Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09982/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 October 2017	**On 21 December 2017**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE PLIMMER

Between

ALI [K]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Collins, instructed by Kilic & Kilic Solicitors.
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant is a national of Turkey, now aged 39. He came to the United Kingdom in May 1995 and claimed asylum. His application was refused but he was granted exceptional leave to remain from 1 April 1999 to 1 April 2003. He was granted indefinite leave to remain on 19 April 2003. His application for British citizenship failed, apparently for lack of reply to queries from the Home Office.

2. On 28 October 2004, the appellant was arrested in relation to an attempted burglary, and during the course of the subsequent enquiries talked to the police in what was said to be confused manner about having

killed his mother. Further investigations were made, and the decapitated body of his mother was discovered at the flat that he had shared with her. The history was that she had suffered a severe stroke over a year previously, and he had been her 24-hour care carer. We do not need to go further into the details of the offence, but although charged with murder, his plea of guilty to manslaughter on the ground of diminished responsibility was accepted. Reports were obtained and on 6 April 2005, at the Central Criminal Court, he was made subject to a hospital order under s 37 and a restriction order under s. 41 of the Mental Health Act 1983. Those orders remain in force.

3. Over ten years later, the Secretary of State appears to have decided that the appellant should be deported. The reasons for the decision to deport are in a letter from the Home Office dated 20 August 2015. There were submissions in response made by the appellant's solicitors, which the respondent treated as a Human Rights claim. She was unpersuaded by them and the decision to deport the appellant was made on 21 October 2015.

4. The appellant appealed. The appeal was heard by Judge Cary in the First-tier Tribunal. He heard oral evidence from the appellant's sister and read statements from other members of the appellant's family. There was written medical evidence, notably reports from Dr Ali Ajaz, who had been the appellant's responsible clinician since February 2015 and had written reports dated 15 September 2015 and 27 May 2016, the latter date being about a fortnight before the hearing. The judge set out the relevant law as it is to be found in the Nationality, Immigration & Asylum Act 2002 (as amended) and the Statement of Changes in Immigration Rules, HC 395 (as amended), applied it as he understood it to the facts, most of which were not in dispute, and dismissed the appeal.

5. Permission to appeal was granted on the basis that it was arguable that the judge did not fully engage with the medical reports, did not properly consider the assessed impact on the appellant, including reduction in family support, if he were to be deported, and failed to take into account the fact that the appellant remains detained. There is a response under rule 24 on behalf of the Secretary of State, pointing out that the judge agreed that it would not be reasonable to leave the public vulnerable to potential harm that might arise from the appellant's offending, that the judge had found that the appellant had not shown that medical care would not be available in Turkey, where he has one sister, and his family members in the United Kingdom would no doubt support him financially. The Secretary of State's position in summary is that the appeal simply seeks to reargue the appellant's case.

6. It is convenient to set out at this point the relevant law applicable to a person such as the appellant who raises an appeal against deportation on human rights grounds. We first consider Part VA of the Nationality, Immigration & Asylum Act 2002. Section 117A(2) requires the Tribunal to have regard –

"(a) in all cases, to the consideration listed in section 117B, and
(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C."

7. There is no doubt that the appellant is for these purposes a foreign criminal who has been sentenced to a period of imprisonment of at least four years: that is the effect of s 117D(2) and (4)(c) and (d) on the face of the wording of those paragraphs and as interpreted by the Court of Appeal in SSHD v KE (Nigeria) [2017] EWCA Civ 1382.

8. Sections 117B and 117C are as follows:

"**117B Article 8: public interest considerations applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.

(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

9. Paragraphs A398 and following of the Immigration Rules make similar but not identical provision. It is, in particular, not by any means clear that on the wording of those rules the appellant, given the methods of disposal of his case, falls within the category of persons sentenced to a term of imprisonment of at least four years. But in Chege [2015] UKUT 00165 (IAC) this Tribunal decided that the provision needs to be read together in such a way that the Immigration Rules could be seen to be implementing the statutory provisions. The Secretary of State, in the decision letter, assessed the appellant's offence as having caused serious harm, which was clearly sufficient to bring the appellant within the same category in any event: see para 398(b) and (c) and para 399. Chege also provides guidance on the meaning of the word compelling in the phrase "very compelling circumstances".

10. As the rule 24 response points out, the judge's reasoning was based at least in part on his agreement with the respondent that if he remained in the United Kingdom the appellant posed a risk to the public. It is, we have to say, by no means clear on what basis the judge reached that view. The clinician's judgment was that the removal of the appellant from the United Kingdom would be a significant stress factor that might interfere with his treatment and his rehabilitation, but thought that whilst in the United Kingdom his family support would greatly reduce the risk of any relapse. It is clear that the appellant has suffered only one significant phase of acute illness, during which the offence was committed. That is now a long time ago and although the results at the time were serious and tragic, it is not easy to see that there is any real risk of reoccurrence. Further, in this case (and distinguishing it from the run of other cases in which the Tribunal needs to make an assessment of this sought), there is a restriction order under s 41 of the Mental Health Act in force, which is specifically intended for the protection of the public until it is clear that he does not pose a danger. This is a factor which, we think, ought to be taken into account in assessing the risk. On the other hand, it is clear that although the appellant's offence has been (undeniably correctly) assessed

as causing serious harm, that of itself cannot be a pointer to a future risk. We also think it is right to take into account the fact that the Secretary of State did not regard it as necessary for the protection of the public to make any decision as to the appellant's deportation in the ten years following his conviction, and there is no evidence that the risk has escalated within that time.

11. For these reasons it seems to us that the judge's approach to the relevance of future risk, and his emphasis on it, was wrong in principle.

12. So far as concerns the medical evidence, we cannot see any proper basis for criticising the judge's conclusion that it had not been established that appropriate medical support would be unavailable to the appellant if he were returned to Turkey, assisted if necessary by remittances from his family based in the United Kingdom. But the availability of strictly medical support (including medication) is not the only matter that the responsible clinician deals with. In passages that the judge set out in his determination, Dr Ajaz emphasised the importance of the family support he receives in the United Kingdom. As we have indicated, the evidence from the family was before the judge largely in writing; the Presenting Officer had indicated that he would not have any questions in cross-examination, so the deponents were not called. There is no good reason to doubt the level of support set out in the evidence before the judge, and referred to by the doctor.

13. Looking first at the factors set out in section 117B, the judge found that the appellant speaks English and that he has a rental income from a house that he owns, although it is unlikely that he is able to derive any useful income from work. His presence in the United Kingdom has not been precarious, because he has indefinite leave to remain. He has built up a wide network of relationships with his family. The judge describes this as "some degree of emotional dependency", but it seems to us that, particularly in view of the doctor's report, the relationship goes further than that: the appellant's own mental health, and the interest that his family members have shown in him and his rehabilitation, takes the relationship, in our judgment, well beyond the ordinary relationship of adult members of the same family.

14. It is accepted that neither exception 1 nor exception 2 in s 117C applies. We need say no more about exception 2. So far as concerns exception 1, the appellant's lawful residence in the United Kingdom had at the date of the respondent's decision been sixteen years with leave and a further four years as a person who had claimed asylum promptly and was awaiting a decision. That period of twenty years in total was more than half of his life; the two years since the decision help to tip this point in the appellant's direction.

15. There cannot, we think, be any doubt that the appellant is socially and culturally integrated into the United Kingdom. Certainly the judge made no findings to the contrary effect. The Secretary of State's position in the

decision letter is that as the appellant had been detained in a mental hospital since April 2005, he could not have integrated into the "wider society", but that is not the test, and in any event it fails to take account of the ten years the appellant spent in the United Kingdom before his detention.

16. Whether there would be any significant obstacles to the appellant's integration in Turkey is a matter of some difficulty. Turkey is the country of his nationality, and so far as we know he speaks Turkish. He has family in Turkey in the form of one sister, and we accept that his medical needs would be met. Whether true integration would be possible after the disruption he would suffer by the cessation of his long-standing course of treatment in this country and the removal of the family support he has here is problematic: the medical support suggests that lasting damage might well be caused by his removal.

17. Sub-section (6) of s 117C refers to "very compelling circumstances, over and above those described in exceptions 1 and 2". The phrase "over and above" is not the same as "in addition to", nor should it be read as though it were. If it were read in that way, the Act would wholly prevent a human rights claim succeeding if a person who came within these provisions did not exactly meet the requirements in the one of the exceptions. Nevertheless, in deciding whether circumstances are "over and above" those described in the exceptions, the extent to which the person does meet the requirements of the exceptions must be of some relevance. In this case our conclusion is that the appellant very nearly meets the requirements of s 117C(4)(a), does meet those of (b), and may well meet those of (c).

18. We have felt able to leave our conclusions in that rather vague way, because this is by any standards a wholly exceptional case. In our view, the position is that despite the seriousness of the consequences of the appellant's offence, there is no real risk for the future whilst the restriction order remains in force; and, as we understand the evidence, there is no current proposal to withdraw it save to enable the appellant's removal from the United Kingdom. On the other hand, his treatment and rehabilitation benefit enormously from the interest his family shows in him and the continuity of treatment in the United Kingdom. Those appear to us to be very compelling circumstances of the sort that would be "over and above" almost anything that might be specified as a routine exception to the principle that the public interest requires the deportation of foreign criminals.

19. At the hearing we indicated to Mr Tarlow, who appeared for the Secretary of State, that for those reasons we proposed, subject to anything he might want to say, to allow the appeal. He told us that he had no submission to make in response.

20. The judge erred in law in failing to take fully into account the medical evidence and in treating the evidence of future risk in a manner that was

not properly open to him. We set aside his determination. We substitute a determination allowing the appellant's appeal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 19 December 2017