Upper Tribunal
(Immigration and Asylum Chamber **Appeal Number: HU/13880/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 October 2017	**On 8 November 2017**

Before

RT HON LORD BOYD OF DUNCANSBY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

JOTHI PARAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Talacchi, Counsel instructed by Sam Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a foreign criminal against whom a deportation order has been made, appeals from the decision of the First-tier Tribunal (Judge S. Meah sitting at Taylor House on 31 January 2017) dismissing his appeal against the decision of the Secretary of State to refuse his claim that his removal pursuant to the deportation order would constitute a disproportionate interference with the right to respect for his family and private life enshrined in Article 8 ECHR.

The Reasons for the Grant of Permission to Appeal

2. On 5 July 2017, Judge Shimmin granted the appellant permission to appeal for the following reasons:

   (i) it is arguable that the Judge materially erred in the assessment of the weight to be attached to the appellant's presence in the United Kingdom since 1976;

   (ii) it is arguable that the Judge's findings are at odds with the guidance of the Upper Tribunal in **Treebhowan [2017] UKUT 00103 (IAC)**;

   (iii) it is arguable that the Judge erred in his consideration and treatment of the expert's report.

Relevant Background Facts

3. The appellant is a national of Malaysia, whose date of birth is 10 January 1957. He entered the United Kingdom on 3 September 1976 as a student, and was granted 12 months' leave to enter. His leave was extended to 3 September 1978, and he was then granted a further extension of leave to remain from 19 July 1979 to 30 September 1979.

4. On 19 February 1993, the appellant applied for indefinite leave to remain in the UK on compassionate grounds outside the Rules. The application was refused on 2 June 1994, with no right of appeal. In a notice of refusal, the appellant was informed that he should leave the UK without delay. If he failed to leave, he might be prosecuted for an offence under the Immigration Acts, and he would also be liable to deportation.

5. On 9 December 2011, the appellant was convicted at Guildford Crown Court on 20 counts of making indecent photographs or pseudo-photographs of children, and five counts of possessing an indecent photograph or pseudo-photograph of a child. On 2 February 2012 he was sentenced to 13 months' imprisonment. Following his conviction, he was notified on 9 March 2012 of his liability to automatic deportation. On 16 October 2014, the appellant was convicted at South West Surrey Magistrates' Court of the following three offences: (1) breach of a Sexual Offenders Prevention Order, for which he was fined £100, and ordered to pay a victim's surcharge of £20; (2) a Failure to Comply with Notification Requirements, for which he was fined £50; and (3) a further breach of a Sexual Offenders Prevention Order, for which he was fined £100 and given a "deprivation" sanction.

6. On 26 May 2016, the respondent made a deportation order against the appellant under section 32(5) of the UK Borders Act 2007. On the same day, the respondent issued a decision to refuse the appellant's human rights claim, on the ground that Exception 1 in Section 33 of the 2007 Act did not apply.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. At the hearing before Judge Meah, both parties were legally represented. The Judge received oral evidence from the appellant and his British national spouse, Mrs J P.

On the topic of the risk of re-offending, the Judge considered *inter alia* a letter from a psychologist, a report from a psychiatrist, and the pre-sentence report dated 18 January 2012. The Judge found at paragraph [52] that the appellant still posed a risk to children.

Finding on whether removal would have unduly harsh impact on spouse

8. The Judge found at paragraph [55] that Mrs P was a fully qualified Chartered Accountant whose qualification was recognised in Malaysia, and that even if she could not find employment in Malaysia akin to the level she was working at in the UK, "*other alternative employment will be a realistic option, and poignantly, this is by no means a valid reason for her not being to go and live there with the appellant when considered in the context of the relevant law and provisions applicable here*".

Other relevant findings

9. The Judge found at paragraph [73] that, with his skills, and with his educational and employment background, the appellant should be able to transition into life in Malaysia and gain employment there, even if he might experience some initial difficulties when he first arrived.

10. The Judge found at paragraph [74] that the appellant's status in the UK had been precarious for the best part of almost 39 years, while he knowingly remained here illegally as an overstayer after his student leave expired in 1979, and without him taking any proper active measures to resolve this.

11. The Judge found at paragraph [74] that the appellant had been convicted of *"a very serious and abhorrent"* criminal offence.

The Judge's Conclusions

12. The Judge reached the following conclusions:

> 76. Having considered all the relevant evidence presented to me in the round, including the remarks of the Sentencing Judge in the appellant's criminal trial, I find that the appellant's criminal history is a serious matter which outweighs the factors advanced on his behalf in relation to his Article 8 claim, and in particular the presence of his British wife with whom he lives in the UK.
>
> 77. I find that his Article 8 rights are insufficient to outweigh the very strong public interest in favour of his deportation to Malaysia.
>
> 78. Finally, I do not find that there is anything in the appellant's circumstances which can be deemed either exceptional or very compelling to go against the presumption in favour of maintaining the decision to deport him.

<u>The Hearing in the Upper Tribunal</u>

13. At the hearing before us to determine whether an error of law was made out, Mr Talacchi developed the grounds of appeal referred to by the Judge granting permission to appeal. On behalf of the respondent, Mr Melvin adhered to the Rule

24 response settled by a colleague opposing the appeal. He submitted that **Treebhowan** was irrelevant, as it was not a deportation case.

Discussion

14. The appellant meets the definition of a foreign criminal for the purposes of Section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") as he was sentenced to a period of imprisonment of at least 12 months. Section 117C sets out additional public interest considerations in cases involving foreign criminals. These considerations are:

> (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 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; and
>
> (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.

Ground 1

15. Ground 1 is that the Judge materially erred in the assessment of the weight to be attached the appellant's long-standing presence in the UK. It is argued that the Judge's finding at paragraph [53] is at odds with the guidance given by the Upper Tribunal in **Treebhowan [2017] UKUT 0013 (IAC)**; and that he has not engaged lawfully with the *ratio* of **Treebhowan**, which is that a private life developed or established during periods of unlawful or precarious residence might conceivably qualify to be accorded more than little weight, and Sections 117B(4) and (5) of the 2002 Act are to be construed and applied accordingly.

16. We consider that due emphasis must be given to the words "*might conceivably*". It all depends upon the factual matrix. Although not cited to us, we have had regard to **Agyarko [2017] UKSC 11** in which Lord Reed at paragraphs [49]-[53] emphasised a passage in the IDIs that it is people who put down roots in the UK "*in the full*

knowledge that their stay here is unlawful or precarious" who should be given less weight in the Article 8 balance.

17. Lord Reed could envisage circumstances in which "*people might be under reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate".* However, this appellant and his spouse were not under a reasonable misapprehension as to their ability to maintain a family life in the UK, as it was not disputed that their relationship was entered into and maintained in the full knowledge that the appellant was present in the UK unlawfully.

18. We have also had regard to **Ruppiah [2016] EWCA Civ 803**, where Sales LJ held: "*for a case falling within section 117B(5) little weight should be given to private life established in the circumstances specified, but that approach may be overridden where the private life in question has a special and compelling character."*

19. Were it not for the appellant's criminal conviction in 2011, arguably his private life would have acquired a special and compelling character, having regard to his length of residence in the UK, his record of employment, and the ties which he had formed here, most notably with his British national spouse.

20. However, as the appellant is a foreign criminal who is liable to deportation, his private life claim also had to be assessed against section 117C(4) of the 2002 Act with a view to establishing whether Exception 1 applied. Exception 1 clearly did not apply to the appellant. He had not been lawfully resident in the UK for most of his life, and Judge Meah found that there would not be very significant obstacles to the appellant's integration into the country of return, as we have noted at paragraph [9] above.

21. At paragraph [53] of his decision, Judge Meah found that the appellant's long-standing presence in the UK since 1976 was "*of little consequence when considered in the proportionality assessment*". We consider that this finding in a deportation case was clearly open to the Judge for the reasons which he gave, and that it is entirely in line with the relevant statutory provisions and the relevant domestic jurisprudence governing foreign criminals who come within the scope of Section 117C of the 2002 Act. The Judge did not err in law in not attaching greater weight in the proportionality assessment to the appellant's long-standing presence in the UK since 1976.

Ground 2

22. When interviewed by an Immigration Officer on 17 January 1993, the appellant said that his parents were in Malaysia, although he was not in touch with them. He said that he had lost contact with his two brothers, whose whereabouts he did not know, and he thought that his sister was in New Zealand.

23. On 26 September 2016, the appellant was seen by Doctor Balasubramaniam, a Fellow of the Royal College of Psychiatrists, in his Consulting Room in London. The appellant told him that he was an orphan and he had been brought up in an orphanage. He said that he was bullied and sexually abused by staff and older boys while growing up in the orphanage.

24. In his report dated 27 September 2016, Doctor Balasubramaniam diagnosed the appellant as suffering from a depressive disorder. On the topic of treatment (page 6) he said that he had been treated with psychological therapies and it had improved. He had re-started his treatment privately with his therapist. In addition, he was likely to benefit from anti-depressant treatment. He should be able to obtain it from his GP: "*His depression is brought about by the sexual abuse as a child, loss of employment, loss of prestige since his conviction, and the pending deportation order.*"

25. At paragraph [27] of his decision, the Judge noted the appellant's evidence in his witness statement and in answer to questions in cross-examination that he was sexually abused as a child whilst growing up in an orphanage in Malaysia, "*with the inference that this somehow explained his offending behaviour and paedophilic tendencies as an adult and the specific crimes of which he was convicted.*"

26. The Judge went on to give extensive reasons as to why he was not prepared to accept that the appellant had suffered childhood sexual abuse, as he claimed, and that it had in all probability, "*been created to support the appellant's case against deportation*". At paragraph [40], he found that the false claim firmed up his conclusion that the appellant still posed a very serious and extant threat to children in the UK, notwithstanding his efforts to minimise this criminal behaviour through the therapy sessions which he said he was undertaking at present.

27. In Ground 2, it is pleaded that the Judge devoted a substantial part of his findings (paragraphs 26-40 of his decision) to assessing an argument that was not actually pursued by the appellant. Accordingly, the Judge had unlawfully taken into account an irrelevant matter; and his error was material to the outcome, as he had treated the "false" claim as significantly damaging the appellant's overall credibility, including the credibility of his account of the Malaysian authorities refusing to acknowledge that he was a Malaysian citizen who was entitled to enter Malaysia.

28. We consider that it was open to the Judge to find that the claim of sexual abuse in an orphanage during childhood was not credible, for the reasons which he gave. We do not consider that the finding was irrelevant to the issues which the Judge had to decide.

29. Firstly, the finding was relevant to the question of whether the appellant was credible in his claim that he had fully cooperated with the Malaysian authorities in providing accurate information about his life in Malaysia before he came here as a student.

30. Secondly, the finding was relevant to the question of whether the information which he had provided to the psychiatrist was truthful. If it was untrue, as the Judge found, it provided an evidential platform for the finding at paragraph [51] that critical parts

of the report were essentially a regurgitation of what the appellant told the author, and hence *"highly subjective"*, as distinct from the critical parts being based on truthful and reliable information.

31. We also consider that it was open to the Judge to treat the false claim as firming up his conclusion that the appellant still posed a significant risk to children, rather than accepting the opinion of the psychiatrist that he now posed only a very low risk because he had completed two years of psychological treatment *"with good effect"* (the sixth factor) and he had a *"high motivation to change his old behaviour"* (the seventh factor). For we note that the causal link between his criminal offending and alleged past trauma was explicitly made by Elisabeth Batty, Senior Counselling Psychologist, in her letter of 27 January 2017. Ms Batty had undertaken therapy sessions with the appellant for two years since April 2013. She said: *"He has been able to reflect more on the connection of his past abusive and traumatic history and his previous conviction to try to understand what led him to collect the images."* If the appellant had invented an account of being abused as a child in an orphanage in order to explain the motivation for his criminal offending, as the Judge found, this supported the Judge's finding at paragraphs [34]-[40] that *"due weight"* should be given to the assessment in the pre-sentence report that the appellant posed a high risk of harm to children, because, among other reasons, *"Mr Param had limited insight into the motivation for his criminal offending or the impact of it"*.

Ground 3

32. Ground 3 is that, at paragraphs [51]-[52], the Judge unlawfully failed to consider the list of *"good prognostic factors"* which the psychiatrist had given in his report as being likely to reduce the appellant's potential risk to children in the future.

33. Mr Talacchi developed the argument in his oral submissions. He submitted that the Judge's assessment of the psychiatrist's conclusions was unbalanced. The Judge had seized upon the one negative factor identified by the psychiatrist, which was that in one of the papers it had been quoted that the incidence of sexual offending behaviour was 12 times higher in people who collect sexual images of children compared to the general population. The Judge had failed to go on to refer to the good prognostic factors that reduced the risk.

34. We note that five of the seven *"good prognostic factors"* identified by the psychiatrist also applied before the appellant committed the index criminal offences which triggered his liability to automatic deportation. Nevertheless, these five factors did not prevent the appellant from offending. So we do not consider that the Judge erred in law in not commenting on them specifically.

35. On analysis, the sixth and seventh factors previously discussed were the factors which principally underpinned the conclusion of the psychiatrist that the appellant now presented a very low risk to children. We find that the Judge gave adequate reasons in the course of his decision as to why, by direct or oblique reference to these factors, he did not agree with this assessment.

36. At paragraph [51], the Judge acknowledged that the psychiatric report was supportive of the appellant's case against deportation. It was open to the Judge not to give the report decisive weight for the reasons which he gave, which included the following: (a) that the report was prepared following a one-off meeting; (b) that the earlier 2015 report from the psychologist had not been disclosed; and (c) that the appellant had not told the truth about suffering sexual abuse as a child.

37. At paragraph [52], the Judge went on to say that, in any event, even if he were to accept the report and its conclusions at face value, he still did not find its contents were sufficient, when viewed in light of all the other evidence placed before him, to rebut the strong presumption in favour of deportation. This was clearly a sustainable finding, having regard to the fact that future risk is only one facet of the public interest in the deportation of foreign criminals. The other facets are deterrence and the building of public confidence in the system for dealing with foreign criminals who have committed serious crimes.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

We make no anonymity direction.

Signed Date 5 November 2017

Judge Monson

Deputy Upper Tribunal Judge