Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08455/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 November 2019	**On 2 December 2019**

Before

THE HONOURABLE LORD MATTHEWS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE McWILLIAM

Between

RK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D Solanki, Counsel, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant

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and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The Appellant is a Cypriot from the Turkish controlled area of Cyprus. His date of birth is 21 July 1959.

1. We decided to anonymise the Appellant. There is evidence before us concerning the Appellant's mental health. We have regard to Upper Tribunal Immigration and Asylum Chamber Guidance Note 2013 No 1: Anonymity Orders and specifically Rule 14 (7) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Appellant came to the UK on 4 November 1984 as a visitor. He overstayed. On 20 July 2015 he was convicted at Snaresbrook Crown Court of possession with intent to supply cannabis, possession of heroin and producing another drug criminalised as class B. On 18 January 2016 he was convicted at Harrow Crown Court of conspiracy to supply a class heroin. He was sentenced on 21 April 2016 to a total of five and a half years' imprisonment on all matters. The Appellant has a number of convictions for less serious offences dating from 2006 to 2011.

Following conviction and sentence the Respondent decided to deport the Appellant. The Appellant is a foreign criminal and the Respondent is required to make an order for deportation pursuant to Section 32(5) of the 2007 Act. A deportation order was made against the Appellant on 18 July 2017.

The Appellant appealed on human rights grounds. His appeal was dismissed by Judge of the First-tier Tribunal Housego in a decision promulgated on 12 June 2019, following a hearing on 3 June 2019. The Appellant was granted permission by a Judge of the First-tier Tribunal on 10 July 2019 on ground one. The Appellant renewed the application to the Upper Tribunal in respect of the remaining ground (Ground 2). The matter came before us in order to determine whether the judge made an error of law. In addition, we determined whether permission should be granted in respect of the second ground of appeal.

The decision of the FtT

The judge set out the immigration history of the Appellant at paras. 1 to 5 of the decision. There was no challenge to this. He stated as follows: "On 11 March 2019 the hearing was adjourned because a *'new matter'* was raised on the day; an asylum claim based on asserted torture by Turkish authorities ten years ago". He noted that there had been two adjournments to enable the Appellant to seek legal aid. There had been an adjournment at the request of the Appellant in order to seek a psychiatric assessment. In any event, the matter was adjourned until 3 June 2019. We understand from the judge's record of the immigration history that this was the fifith hearing date.

The judge recorded that on 28 May 2019 an adjournment request was made by the Appellant on the basis that following his claim for asylum in March 2019, he

had not received a date for his asylum screening interview or the substantive interview. It was submitted that his human rights claim should not be heard until the asylum claim had been determined. The application was refused by the FtT on 31 May 2019 on the basis that it was for the Respondent to indicate whether consent was given to consider the new matter in the appeal and if it did not, the new matter would not be considered. The application was renewed orally at the start of the hearing before Judge Housego.

In respect of that application the judge said as follows:

> "37. Counsel made application for adjournment of the hearing on the basis that the appellant had not had his screening interview or substantive interview yet, and that the 2 matters should be linked and heard together. The previous hearing had been adjourned when this point was raised at that hearing.
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> 38. The Home Office Presenting Officer was neutral on the application, leaving it to the Tribunal to decide. He did not consent to the new matter of an asylum claim being part of this appeal.
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> 39. The case law guidance is Nwaigwe (adjournment: fairness) [2014] UKUT 418 (IAC):
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> > *'If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284.'*
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> 40. I was concerned at that continued extension of this appeal. While fully appreciating the necessity for a fair hearing the history of the matter is nevertheless part of the factual matrix.
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> 41. I noted that there had been a written application and a refusal on 31 May 2019, the reason given being that the Secretary of State had to decide whether or not to accept the new matter should be continued, and that if he did not then the Tribunal would be precluded from hearing that new matter in this appeal, which had been outstanding since September 2018.
>
> 42. This is a human rights appeal, to be decided on the balance of probabilities. The asylum claim relates to matter said to have taken place in Turkish controlled Cyprus about 10 years ago when he said that he returned there (it appears at the time when he formed the relationship with the mother of his daughter) and said he was detained and ill- treated by soldiers there. It has no

relevance to the appeal save that it is said to form part of exceptional and compelling circumstances such as should lead to the revocation of the deportation order.

43. I decided that the appellant is placed at no disadvantage by continuing. If he failed in this appeal, then if he made out the asylum claim – to the lower standard – he would succeed on that point alone. He had first to overcome the S72 presumption that he was not entitled to claim asylum and paragraph 339D of the Immigration Rules which could likewise prevent him being eligible for humanitarian protection. He would be able to claim under Articles 2 and 3. In this hearing he was not precluded from putting forward the other matters he submitted were very compelling circumstances. It was not unfair to separate the claim into these 2 elements, as if he could not succeed on the balance of probabilities on all the other matters he had only to succeed on the remaining matter (and to a lower standard of proof) in order to be able to succeed. Therefore proceeding did not disadvantage him in either claim.

44. I therefore decided to reject the application for an adjournment. I would not be hearing submissions, or considering any evidence, concerning the appellant's asserted ill-treatment in Cyprus."

The judge recorded the submissions by the Home Office Presenting Officer and the submissions made by Counsel Ms C Robinson on behalf of the Appellant at para. 51. It was argued on the Appellant's behalf that there were very compelling circumstances which outweigh the public interest in deportation. The Appellant relied on the severe disability of his second son. The judge asked Counsel to enumerate what were according to the Appellant the very compelling circumstances. The judge listed the matters on which the Appellant relied in response to the judge's question at paragraph 55 as follows:

"55.1. the appellant the appellant's physical health;
55.2. the appellant's mental health;
55.3. that the appellant had been in the UK since 04 November 1984, a very long time;
55.4. his limited family connections in Cyprus;
55.5. his asserted rehabilitation;
55.6. his relationship with his disabled son and his minor daughter;
55.7. his relationship with his adult son, with whom he lived; and
55.8. that he had been a police informer (for 10 years according to the skeleton argument)."

The judge made findings at paragraphs 57 to 67. The judge found that the Appellant, having worked in the UK in various positions, has transferable skills and that he speaks good English. He has no partner in the UK. He lives with his ex-wife and their older son, who was at the date of the hearing about 30. The judge recorded that he has separated from the mother of his son, who is the Appellant's grandson. The Appellant sees his grandson reasonably often. The judge recorded that the Appellant's younger son, who has severe disabilities, physical and mental, is cared for by his mother and that the Appellant had contributed since his release from prison in April. The judge

found that the Appellant's daughter had limited connection with the Appellant. The judge took into account that neither former partner visited the Appellant in prison and nor did his daughter or younger son.

The Appellant maintained his innocence in respect of his criminality. The judge found at paragraph 64:

> "There is no evidence on which there could be a finding of fact that the Appellant is reformed or rehabilitated. He has been released only a matter of weeks. There is no OASys Report to say so. The courses undertaken in prison do not prove that the Appellant is rehabilitated."

The judge said at paragraph 65 as follows:

> "There is no evidence that the appellant has ever been, as he claims, a long term police informer save the appellant's assertion, and I reject that evidence. In any event being a police informer is not an excuse for criminality. The witness statement of the solicitor supplied said only that the appellant wanted to speak to police and that nothing more was known. There was no letter said to have been given to the sentencing Judge, and none was referred to in sentencing. The insistence of innocence is the antithesis of insight."

The judge at paragraph 66 took into account that the Appellant has diabetes and his evidence was that he awaits leg operations. The judge found that there was no medical evidence of that. The judge concluded that there is no matter that could amount to very significant obstacles to re-integration either singly or in combination with any other factor. In respect of the psychiatric evidence the judge stated as follows:

> "67. The appellant's psychiatric report refers to PTSD. One reason the report was prepared was in support of a bail application. The detention was said to have been damaging to the appellant, who said in evidence he had saved one person from hanging and discovered another who had died in this way. He is no longer detained and there is nothing in the report that might lead to the success of this appeal. The claim does not reach GS (India), EO (Ghana), GM (India), PL (Jamaica), BA (Ghana) & KK (DRC) v SSHD [2015] EWCA Civ 40 levels either physically mentally or both together. Nor, for Article 3 could he meet the requirements of D v UK or N v UK."

The judge's conclusions are found at paragraph 68 through to paragraph 78. The judge said as follows at 68: "The appellant's index offence was a very serious drug offence, with a sentence of over 4 years. The appellant must show that he falls with one of the 2 exceptions and that there are very compelling circumstances in addition."

The judge did not accept that the Appellant was rehabilitated. He found at paragraph 70 that there are not very significant obstacles to integration into life in Northern Cyprus where he has family including his mother and a sister with whom he is on good terms. The judge said that he has transferable skills and there was no evidence that he would not receive appropriate treatment in Northern Cyprus for diabetes. The judge found that there was no medical

evidence that he needed operations or that the absence of them would be "sufficiently serious to be relevant to this decision". The judge found that the Appellant speaks Turkish, having lived in Cyprus until he was aged 24.

At paragraph 71 the judge said that that Counsel was specifically asked to identify the very compelling circumstances. However, the judge said, "in truth there are none". The judge went on at paragraph 71 to state as follows:

> "… The only one that might be relevant it is middle son who has severe physical and mental disability. It is his former wife who cares for that adult son, and always has done. He now lives in the same house as that son, and doubtless since he was released on bail in April 2019, 2 months ago, he has contributed. There is no evidence before me that he did so at any time after leaving his former wife, and that was nearly 2 decades ago. His former wife has coped with her disabled son alone, and with council care, for very many years. There is no evidence that during the prolonged period of imprisonment that son has suffered emotionally or physically. There is no emotional dependency because that son did not see his father throughout the period of imprisonment. The appellant has had very limited involvement with the upbringing of his daughter since his relationship with her mother ended in domestic violence, a restraining order followed by imprisonment for breach of that order."

The judge stated as follows :-

> 72. It is not unduly harsh on any of the appellant's offspring for the appellant to be deported to Cyprus, nor any breach of the Secretary of State's duty under S 55 Borders Citizenship and Immigration Act 2009 (which in any event is applicable only for a matter of weeks).
>
> 73. There is no family life between the appellant and his adult son. There is not the *'something more'* required by Kugathas v SSHD [2003] EWCA Civ 31 and Singh & Anor v SSHD [2015] EWCA Civ 630. It is possible this could be established in relation to the younger son, but on the facts it has not been. The daughter is not quite 18, but he has not demonstrated any close relationship with her. He has not been part of her life for a long time. There would be nothing to prevent the appellant's children visiting him there, and the daughter seeing him just as much as she does now, or more.
>
> 74. The appellant has been in the UK for more than half his life. He is a drug dealer on a very large scale and part of a substantial gang. He has a long history of criminal activity related to the supply of illegal drugs to others. He is not culturally and socially integrated into life in the UK because his criminal record is so bad and so long. There are not very significant obstacles to his return. He would need to meet all 3 tests to qualify and he meets only the first. Therefore he does not fall within the relevant provisions of section 117C or paragraph 339A. Even if he did meet them he would not fall within the exceptions. He has no partner in the UK and there is no connection with a child that would fall within Exception 2. Even if he did meet the tests and/or the exceptions he would have to show very compelling circumstances over and

above those matters. There are, for the reasons identified by the Secretary of State, no very compelling circumstances, and those put forward by Counsel do not amount to such circumstances.

…

75. The very great weight of public interest in the deportation of foreign criminal drug dealers outweighs any Article 8 right the appellant may have. He advanced no private life separate from family life, and the only private life of which I have been made aware is extensive criminal activity involved in the supply of Class A and Class B drugs on a large scale over a long time. Such private life has little or no weight, however long it is. I have noted that the appellant had indefinite leave to remain for a considerable period; he has abused that leave by dealing in drugs on a massive scale. The social evil and the misery caused by large scale importation of heroin is enormous and that factor makes the public interest in the deportation of the appellant of very great weight indeed.

76. The referencing the skeleton argument to *UE (Nigeria)* is misplaced because that is about maintaining firm immigration control, and not about deportation, and because it is not possible to maintain that a large scale drug dealer is *'someone of great value to the community'*. The skeleton argument also overstates the position concerning PTSD, because the appellant said in his oral evidence that he had intervened to prevent one person from hanging and encountered someone else who had hanged himself, and was dead. While doubtless these are highly traumatic, the skeleton argument says that a cellmate cut his wrists and bled to death while the appellant was sleeping, and that it was three attempted hangings that were prevented. The account given by the appellant is not reliable.

77. In dealing with what was put forward as very compelling:

    77.1. *the appellant the appellant's physical health;* This does not reach Article 3 levels. He has diabetes, but there is no evidence that he needs treatment of that any treatment he does need is unavailable in Cyprus.

    77.2. *the appellant's mental health;* he is said to suffer from PTSD, symptoms was said to arise from being detained and is not detained any longer. There is nothing in the medical report which might amount to very compelling circumstances. While there is a reference I the report to suicidal ideation. In the hearing the appellant was absolutely clear about view if returned to Cyprus; he would *'swim back'* and had no intention of remaining in Cyprus if deported there. There is nothing before me to indicate any serious mental health issue if he is deported.

    77.3. *that the appellant had been in the UK since 04 November 1984, a very long time;* this is certainly true, but he has spent most of that time in antisocial activity and the index offence is of much greater weight.

77.4. *his limited family connections in Cyprus;* his mother and sister live in Cyprus. He is in contact with both and on good terms with them. These are not very compelling circumstances.

77.5. *his asserted rehabilitation;* he is not rehabilitated and if it was it would make no difference.

77.6. *his relationship with his disabled son and his minor daughter;* for the reasons given above these are not very compelling circumstances.

77.7. *his relationship with his adult son, with whom he lived;* I have found that there is no family life within the meaning of article 8 above and beyond normal emotional ties, and that applies also to his grandson: and

77.8. *that he had been a police informer.* There is no evidence of this and I make no finding of fact that he was such."

The Law

The Immigration Rules set out how the Secretary of State and her officials will exercise the powers conferred by the 2007 Act.

"398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

On 28 July 2014 the Immigration Act 2014 ("the 2014 Act") came into force. It provided that a new Part 5 should be inserted into the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). That part provides, so far as material:

"PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts -

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard -

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

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.

117D Interpretation of this Part

(1) In this Part -

’Article 8’ means Article 8 of the European Convention on Human Rights;

’qualifying child’ means a person who is under the age of 18 and who -

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

’qualifying partner’ means a partner who -

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

(2) In this Part, ’foreign criminal’ means a person -

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who -

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under -

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time -

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by

virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

Interpretation of the legislation

In NA (Pakistan) [2016] EWCA Civ 662 the Court of Appeal said as follows:

"28. The next question which arises concerns the meaning of 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. The new para. 398 uses the same language as section 117C(6). It refers to 'very compelling circumstances, over and above those described in paragraphs 399 and 399A.'Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C, but they do so in greater detail.

29. In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that 'there are very compelling circumstances, over and above those described in Exceptions 1 and 2'. As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2

of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of Article 8.

31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in *Maslov v Austria* [2009] INLR 47, and hence highly relevant to whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2.'

33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2' as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

The Upper Tribunal considered Section 117(C)(6) in RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 and said as follows at paragraph 22:

> "It is important to keep in mind that the test in section 117C(6) is extremely demanding. The fact that, at this point, a tribunal is required to engage in a wide-ranging proportionality exercise, balancing the weight that appropriately falls to be given to factors on the proposed deportee's side of the balance against the weight of the public interest, does not in any sense permit the tribunal to engage in the sort of exercise that would be appropriate in the case of someone who is not within the ambit of section 117C. Not only must regard be had to the factors set out in section 117B, such as giving little weight to a relationship formed with a qualifying partner that is established when the proposed deportee was in the United Kingdom unlawfully, the public interest in the deportation of a foreign criminal is high; and even higher for a person sentenced to imprisonment of at least four years."

The Upper Tribunal further considered very compelling circumstances in MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 and concluded that when determining Section 117C(6) of the 2002 Act a court or Tribunal must take into account, together with any other relevant public interest considerations, the seriousness of the particular offence of which the foreign criminal was convicted; not merely whether the foreign criminal was or was not sentenced to imprisonment of more than four years. Nothing in KO (Nigeria) v Secretary of State for the Home Department demands a contrary conclusion. It also concluded that there was nothing in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 that requires a court or Tribunal to assume that the principle of public deterrence, as an element of the public interest, in determining a deportation appeal by reference to Section 117C (6).

In PF (Nigeria) [2019] EWCA Civ 1139 Lord Justice Hickinbottom said the following about the statutory provision and the Immigration Rules concerning deportation:

> "36. The statutory provisions in sections 117A-117D are, unlike the Immigration Rules (see Ali at [17]), law rather than mere policy. However, both section 117C and the relevant Immigration Rules set out policy, in the sense that they provide a general assessment of the proportionality exercise that has to be performed under article 8(2) where there is a public interest in deporting a foreign criminal but countervailing article 8 factors. The force of the assessment in section 117C is, of course, the greater because it directly reflects the will of Parliament. The statutory provisions thus provide a 'particularly strong statement of public policy' (NA (Pakistan) at [22]), such that 'great weight' should generally be given to it and cases in which that public interest will be outweighed, other than those specified in the statutory provisions and Rules themselves, 'are likely to be a very small minority (particular in non-settled cases)' (Ali at [38]), i.e. will be rare (NA (Pakistan) at [33]).
>
> 37. But the required, heavily structured analysis does not eradicate all judgment on the part of the decision-maker and, in its turn, the court or tribunal on any challenge to that decision-maker's decision. It is self-evident that relative human rights (such as the right to respect for family and private life under article 8) can only

ultimately be considered on the facts of the particular case. The structured approach towards the article 8(2) proportionality balancing exercise required by the 2002 Act and the Immigration Rules does not in itself determine the outcome of the assessment required to be made in an individual case.

38. Therefore, whether an exception in paragraph 399 or 399A applies is dependent upon questions that require case-specific evaluation, such as whether in all of the circumstances it would not be reasonable for a child to leave the United Kingdom or whether in all of the circumstances there are insurmountable obstacles to family life outside the United Kingdom.

39. More importantly for the purposes of this appeal, where an offender has been sentenced to at least four years' imprisonment, or otherwise falls outside the paragraph 399 and 399A exceptions, by section 117C(6) and paragraph 398 of the Rules, the decision-maker, court or tribunal entrusted with the task must still consider and make an assessment of whether there are 'very compelling circumstances' that justify a departure from the general rule that such offenders should be deported in the public interest. That requires the decision-maker to take into account, not only that general assessment (and give it the weight appropriate to such an assessment made by Parliament), but also the facts and circumstances of the particular case which are not – indeed, cannot – be taken into account in any general assessment."

Section 85 at NIAA 2002 reads as follows:

"**85 Matters to be considered**

(1) An appeal under section 82(1) against a decision shall be treated by **[**[F1]the Tribunal**]** as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

(2) If an appellant under section 82(1) makes a statement under section 120, **[**[F1]the Tribunal**]** shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section **[**[F2]84**]** against the decision appealed against.

(3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.

(4) On an appeal under section 82(1) [F3]... against a decision **[**[F4]the Tribunal**]** may consider [F5]... any matter which **[**[F6]it**]** thinks relevant to the substance of the decision, including [F7]... a matter arising after the date of the decision.

[[F8](5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a 'new matter' if -

(a) it constitutes a ground of appeal of a kind listed in section 84, and

(b) the Secretary of State has not previously considered the matter in the context of -

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the appellant under section 120.**]**

The Upper Tribunal in the case of Quaidoo (new matter: procedure/process) [2018] UKUT 87 said as follows:

> "*1. If, at a hearing, the Tribunal is satisfied that a matter which an appellant wishes to raise is a new matter, which by reason of section 85(5) of the Nationality, Immigration and Asylum Act 2002, the Tribunal may not consider unless the Secretary of State has given consent, and, in pursuance of the Secretary of State's Guidance, her representative applies for an adjournment for further time to consider whether to give such consent, then it will generally be appropriate to grant such an adjournment, rather than proceed without consideration of the new matter*
>
> *2. If an appellant considers that the decision of the respondent not to consent to the consideration of a new matter is unlawful, either by reference to the respondent's guidance or otherwise, the appropriate remedy is a challenge by way of judicial review.*"

The case of Mahmud (S. 85 NIAA 2002 –'new matters') [2017] UKUT 488 (IAC) sets out guidance as to how the issue of a new matter must be dealt with. The first requirement is that the First-tier Tribunal must determine whether an issue is a new matter. There were a number of documents before us. There was the Appellant's skeleton argument of 17 October 2019. There was the Secretary of State's skeleton argument of 19 September 2019. There were the original grounds of appeal and a statement from Counsel Ms Robinson of 24 June 2019 and her notes of the hearing before Judge Housego. In addition, there was a Statement of Evidence from the Appellant relating to his protection claim.

Grounds of appeal

The first ground of appeal is that the judge's approach to the assessment of very compelling circumstances was flawed with reference to para. 28 of the decision where the judge stated as follows:

> "Paragraph 399A only applies to paragraph 398(b) and (c) and not to (a). It is within (a) that the Appellant falls as he has been sentenced to a term of imprisonment exceeding four years. This means that even if he has established there are very significant obstacles to return to Cyprus a deportation order would still be required by the Immigration Rules."

At para. 30 the judge stated:

> "Having been sentenced to a term of imprisonment of over four years, in order to succeed, the Appellant must show not only that he meets Exception 1 or 2 (as set out above), but that over and above that there are very compelling circumstances. It is not enough to show that there are very significant obstacles to his re-integration to Nigeria."

Furthermore, para. 68 is relied upon where the First-tier Tribunal held: "The Appellant's index offence was a very serious drug offence with a sentence of over four years. The Appellant must show that he falls with (sic) one of the two exceptions and that there are very compelling circumstances in addition."

The second ground of appeal, on which Judge Fisher refused permission, is that the judge's decision not to adjourn the hearing was procedurally unfair. The grounds assert that the Appellant was not able to advance evidence about his protection claim. The claim arises from his work as a police informer in the UK and previous ill-treatment in TRNC renders the decision flawed because the judge failed to take into account material evidence. The judge was not able to undertake a holistic and comprehensive assessment of Article 8. It is further asserted the judge failed to record all of the Appellant's evidence on the issue of risk. It is for the purpose of this argument that Ms Robinson has submitted a witness statement and her notes of what was said at the hearing.

We granted permission on this ground. We accept on the face of the grounds that it is arguable that the judge's decision to refuse to adjourn the hearing and to consider evidence relating to the Appellant's protection claim was procedurally unfair. We heard full submissions from both representatives in relation to the purported errors and materiality.

Conclusions

We will deal first of all with ground 2. We conclude that this ground is wholly misconceived. The Appellant, having made an application on protection grounds very late in the day in March 2019, wished to rely on this as part of his case before Judge Housego. It was not challenged by the parties that the protection claim was properly identified as a new matter as far back as 11 March 2019. It was not challenged at the hearing before us that Judge Housego's record of the Secretary of State refusing to consent at para. 38 is correct. At no time did the Appellant make an application to adjourn in order to challenge the decision of the Respondent to refuse consent by way of judicial review. Instead, an application was made very late in the day, for an adjournment of the appeal pending a decision on his asylum case.

Ms Solanki submitted that it is normal for cases to be linked and heard together by the FtT. This may be so when there are two appealable decisions and two notices of appeal. This was not the case here. The Appellant had made a claim for protection late in the day. We understand that these proceedings commenced in September 2018. The claim on protection grounds was made in March 2019. The application has not been determined by the Secretary of State. The Appellant had not even been interviewed. It would not be

surprising if the application was not determined for up to a year. There was no guarantee that this application would generate an appealable decision.

The issue before us is whether the judge's decision was procedurally unfair in so far as he was unable to advance his case. We find that the Appellant had the opportunity to advance his case by way of the new matter procedure outlined in the cases of Mahmud and latterly Quaidoo. We find it surprising that the Appellant, who was legally represented, did not challenge the decision of the Respondent to refuse consent and ask for an adjournment in order to do so. We find it more surprising that the Appellant, having seemingly accepted that the protection claim was a new matter, did not seek the Respondent's decision whether to consent or to refuse to consent prior to the hearing on 3 June. This should have been done if the Appellant wanted the FtT to consider the new matter. There was no jurisdiction for the FtT to consider the new matter in the absence of consent. There was no pending appeal to link with the matter before the judge. Any adjournment granted on the basis of the reasons advanced by the Appellant, would have been wholly speculative and not in accordance with the overriding objective of the FtT. There was no procedural unfairness.

Whilst we accept the submissions in relation to what a judge should take into account when considering Article 8 and the case of GM (Sri Lanka) [2019] EWCA Civ 614, this was not the issue before us. The Tribunal did not have jurisdiction to determine the matters now relied on by the Appellant which formed the basis of the protection claim.

In respect of ground 1, we concluded that the judge did not approach the question as to whether there are "very compelling circumstances" by adopting the correct test. As the case law makes clear it is possible not to meet the exceptions at Section 117C(4) or Section 117C(5) and for there to be "very compelling circumstances".

Whilst the judge erred in the application of the test under Section 117C(6), we asked the parties to address us in relation to materiality. Initially, Ms Solanki addressed us in relation to the medical evidence, drawing our attention to page 73 of the Appellant's bundle, which is a psychiatric assessment conducted by Dr Burman Roy, a consultant psychiatrist. We interjected at this point because we were being addressed on a matter that was not raised in the grounds of appeal, namely the findings of the judge relating to the Appellant's mental health. Ms Solanki conceded this and withdrew her challenge. She then drew our attention to para 77.6 to assert that the relationship the Appellant has with his children was capable of amounting to very compelling circumstances when considered with the evidence as a whole. However, we drew her attention to para 71 of the judge's decision and we communicated that it was difficult to see how the judge's unchallenged findings about the Appellant's relationship with his children could amount to very compelling circumstances in isolation or cumulatively with other factors. The judge properly considered the medical evidence. It is unarguable that the finding of the judge that the medical evidence as regards the Appellant's physical health did not reach Article 3 levels (see para. 77.1) was determinative of the outcome is wholly unarguable.

The judge properly considered the medical evidence when assessing proportionality.

All issues were engaged with by the judge, who made findings on each matter relied upon against which there has been no meaningful challenge in the grounds. In our view, taking into account all matters which the Appellant relied on as amounting to very compelling circumstances and considering these collectively, they were not capable of meeting the high hurdle. On the basis of the lawful and sustainable findings made by the judge the only reasonable conclusion is that the Appellant has failed to establish very compelling circumstances.

We noted that despite the judge having no jurisdiction to hear the new matter and the nature of the application before us, the judge made a finding at paragraph 65 that there is no evidence that the Appellant has ever been a long-term police informer and he rejected that evidence. There is no meaningful challenge to this conclusion on jurisdiction grounds or otherwise.

For all of the above reasons, we find that there is no procedural irregularity. Whilst the judge applied the wrong test, there is no material error of law. He took into account all material matters and made findings on the evidence that are grounded in the evidence and adequately reasoned. There were no properly identified circumstances that could amount to very compelling.

Notice of Decision

There is no material error of law. The decision to dismiss the Appellant's appeal under Article 8 is maintained.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Joanna McWilliam Date 27 November 2019

Upper Tribunal Judge McWilliam