Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09396/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th December 2018	**On 23rd January 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR VALDEIR BARBOSA DE ALMEIDA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr J Walsh, instructed by Bindmans LLP

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Brazil born on 22 April 1978. His appeal, against the refusal of his human rights claim and the decision to deport him, was allowed by First-tier Tribunal Judge J K Swaney on 2 October 2018. The Secretary of State appealed.

2. The grounds assert that the judge failed to consider material facts and failed to adequately consider and make findings on very compelling

circumstances over and above those set out in Exceptions 1 and 2 (section 117C of the 2002 Act). The judge wrongly relied on the Appellant's community involvement and rehabilitation which were issues of limited weight. The judge failed to appreciate the public interest in deportation and his findings lacked adequate reasoning.

3. Permission to appeal was granted by First-tier Tribunal Judge Osborne for the following reasons:

> "In an otherwise careful and focused decision it is nonetheless arguable that the judge erred materially in the consideration of very compelling circumstances over and above the circumstances set out in Exceptions 1 and 2. It is further arguable that in that context the findings are inadequately reasoned."

The Appellant's Immigration History

4. The Appellant first entered the United Kingdom as a visitor in 2006 and overstayed. He met his British citizen wife in early 2007. He and his partner went to Brazil and were married on 11 December 2007. The Appellant applied for entry clearance as a spouse in order to return to the UK. He entered on 20 April 2008 with valid leave until April 2010. On 23 March 2010 he applied for further leave to remain as a spouse which was granted. He made an application for indefinite leave to remain on 14 May 2011 which was granted on 12 September 2012. The Appellant was convicted of causing death by dangerous driving on 1 May 2015 following a guilty plea. He was sentenced to five years' imprisonment and was disqualified for driving for five years and until he has passed the extended test.

The Judge's Findings

5. The judge made the following relevant findings:

> "56. In my view significant weight attaches to the public interest in deportation but it is reduced to a degree by his previous good conduct, his remorse and the effort he has made to educate and rehabilitate himself and make a positive contribution to society. In reaching this conclusion I have taken into account the OASys Assessment, the letters from his probation officer, the evidence regarding the education he undertook while he was in prison and since his release and the Appellant's own evidence. I also accept the submission that notwithstanding the person died the nature of the offence means that it is not at the most serious end of the scale.
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> 57. The Appellant speaks English as demonstrated by his oral evidence. I find that it is of a sufficient level to permit his integration into the UK. The Appellant is financially independent. There is no evidence he has been reliant on public funds during his stay in the United Kingdom and I note the evidence of his

employment and self-employment. The Appellant's wife is employed. These are at best neutral factors.

58. The Appellant had a period of overstaying between the expiry of his leave to enter and remain as a visitor and when he returned to Brazil to marry his wife. Although he established his relationship with his wife during the time he was an overstayer I take into account the fact that he left the United Kingdom voluntarily in order to regularise his status within the Immigration Rules and that since then his residence has been lawful. In addition, his relationship with his wife developed after he obtained settlement and when his status was not precarious. I consider I am entitled to place weight on his relationship with his wife and on the private life he has established.

59. I accept the evidence of the Appellant's wife that she has found it difficult to settle abroad in the past. She stated that she is able to meet people but that it is developing closer relationships and the network of friends that she finds difficult. I accept that this together with her age means she is likely to find it more difficult to establish relationships, find work, learn a language there might be the case for someone else in her position.

60. The Appellant is integrated in the community in the United Kingdom. He provided evidence of his employment and self-employment. I take into account the support the Appellant has from his local community. I have considered the witness evidence and other statements of support which demonstrate that notwithstanding the seriousness of his offence he is an important member of his community. This is also true for the Appellant's wife who has initiated a number of community projects. Although the Appellant and his wife may be able to replicate to some degree of this level of community involvement in Brazil it is likely to take some time in particular for the Appellant's wife given the difficulties I have referred to.

61. It is expected that a person convicted of a crime will take steps towards their rehabilitation. I find that the Appellant has made efforts in this regard that are significantly over and above what might normally be expected. I accept that he requested a transfer to a different prison that offered more opportunities for education and rehabilitation. I accept that he was the one who took the initiative in finding out what courses he could take to address his offending and that this continued after his release from prison. I note in particular his completion of a drink drive education course of his own volition. I take into account the Appellant's acceptance of responsibility at a very early stage for which he was given full credit in his sentencing. I accept the Appellant's own evidence which is supported by that of the probation service that he is genuinely remorseful. I note his willingness to participate in restorative justice and the fact that he has not applied for the early return of his driving licence. The Appellant was a trusted prisoner while serving his sentence, having advanced status and a position as an insider. The evidence shows that his conduct was exemplary while he was in prison and that it has continued since his release. His probation

> officer reports that his meetings have reduced from once every three weeks to once every four weeks as this is considered sufficient to manage the risk. His probation officer confirms that he has applied for all conditions of his licence. I also consider the Appellant's desire to make a contribution to charity while in prison is a significant demonstration of his revolt and desire to make amends. I consider these factors carry appreciable weight.
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> 62. Having considered all of these factors together those relevant to the exception to deportation I find that in combination they outweigh the public interest in deportation in the particular circumstances of this case."

Submissions

6. Mr Melvin relied on Thakrar (Cart JR, Art 8, value to community) [2018] UKUT 00336 (IAC) and NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662. He submitted that the judge's conclusion that deportation was disproportionate was perverse and the judge failed to give adequate reasons for coming to that conclusion. It was accepted that the Appellant could not meet the requirements of paragraphs 399 or 398 of the Immigration Rules. There were no circumstances preventing family life from continuing in Brazil and it would not be unduly harsh for the Appellant's wife to remain in the UK without him.

7. The issue in this case was Section 117C(6) and the threshold for offences over four years was a high one as demonstrated by NA (Pakistan). In the present case the Appellant had been sentenced to five years' imprisonment. If it was not unduly harsh for his wife to go to Brazil or remain in the UK, then what were the compelling circumstances which rendered his deportation disproportionate? Mr Melvin submitted that rehabilitation and remorse were insufficient.

8. The judge's reasons for finding that the high threshold test had been met were inadequate and showed that the judge's findings were irrational. The judge had not fully appreciated the public interest and had not considered deterrent and public abhorrence.

9. Mr Melvin relied on the headnote in Thakrar in particular point 3:

> "The fact that a person makes a substantial contribution to the United Kingdom economy cannot, without more, constitute a factor that diminishes the importance to be given to immigration control when determining the Article 8 position of that person or member of his or her family."

10. He submitted that the judge had misdirected herself in failing to appreciate the high threshold to be considered and her conclusions were inadequately reasoned. Rehabilitation, remorse and exemplary conduct in prison did not meet the legal test of very compelling circumstances. There was a material error of law because on the facts of this case any Tribunal

properly directed, after finding that the Immigration Rules cannot be met, could not come to the conclusion that deportation was disproportionate. The test of very compelling circumstances was a high one. The decision should be overturned because it was irrational.

11. Mr Walsh relied on the case of Hesham Ali [2016] UKSC 60 and submitted that the Appellant's case came within the Immigration Rules in that there were very compelling circumstances. He accepted that the Appellant could not benefit from the exceptions in the Immigration Rules or Section 117C, but on the facts of this case, the very compelling circumstances test was met.

12. Mr Walsh submitted that the judge's approach was an appropriate one in that she considered the exceptions and then very compelling circumstances. The facts were assessed in the round in the context of the appeal. All the factors identified by the judge were capable of being relevant factors and the judge did not elevate any one of the factors or attach undue weight to those factors. Remorse, rehabilitation and contribution were relevant factors and the weight given to them was permissible in the circumstances.

13. Thakrar was not a deportation case and the President found, at paragraph 131, that little weight could be attached to the appellant's private life established while she had been in the UK unlawfully. He also found that little weight could be attached to a substantial contribution to society when assessing the weight to be attached to immigration control.

14. However, in this case, the Appellant's character was relevant and the judge accepted the evidence of the Appellant, his partner and a witness from the prison service. The judge properly directed herself in law at paragraph 43. She concluded that it would not be unduly harsh for the Appellant's wife to go to Brazil at paragraph 45 and that it would not be unduly harsh for the Appellant's wife to remain in the UK at paragraph 48. At paragraph 51 she stated that the Appellant could not benefit from the exceptions and properly directed herself on very compelling circumstances over and above those exceptions. At paragraph 52 she attached significant weight to the public interest and then carried out an evaluative exercise.

15. This approach was that advocated in Hesham Ali: balancing the public interest against all the factors in the Appellant's favour. The judge acknowledged that it was a serious offence, death by dangerous driving, and acknowledged the five year sentence. She took into account the Appellant's guilty plea and his remorse but did not underestimate the significance of the offence. She then balanced it with the Appellant's positive support in the community, the risk of medium harm to the public but low risk of reoffending, and the Appellant's private life and relationship with his wife. Mr Walsh accepted that his family and private life was not enough in itself because the Appellant could not satisfy the exceptions,

but they were relevant factors. The judge also looked at the Appellant's integration and his employment record.

16. At paragraph 61 the judge noted that the Appellant's rehabilitation was over and above what was expected and that he had used his initiative in order to undertake courses in prison and do a drink driving course once he was released. He accepted responsibility for the offence, had shown genuine remorse and had taken part in restorative justice. He had not applied for his driving licence back. He was a trusted prisoner with enhanced status and his conduct within prison was exemplary. This was attested to by his probation officer who had reduced the number of meetings given the reduced risk of reoffending. The Appellant had complied with all the conditions of his licence and contributed to charity. All these factors carried weight in the Appellant's favour.

17. Mr Walsh referred to paragraph 36 of Hesham Ali which stated:

> "Those rules, applicable where offenders have received sentences of between twelve and some four years, provide guidance to officials as to the categories of case where it is accepted by the Secretary of State that deportation would be disproportionate. The fact that a claim under article 8 falls outside rules 399 and 399A does not, however, mean that it is necessarily to be rejected. This is recognised by the concluding words of rule 398, which make it clear that a claim that deportation would be contrary to article 8 will not be rejected merely because rules 399 and 399A do not apply, but that 'it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.' "

18. The judge was therefore obliged to carry out a proportionality exercise which she did at paragraph 62. Mr Walsh relied on paragraph 38 of Hesham Ali which stated:

> "The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at paragraph 26 above, they can include factors bearing on the weight of the public interest and the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of Section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small majority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with Huang [2007] 2 AC 167 para 20), but they can be said to involve 'exceptional circumstances' in that they involve a departure from the general rule."

19. Mr Walsh submitted that the judge's approach was consistent with Hesham Ali. She established the facts and considered the evidence which

was before her, which was significantly greater than that before the Secretary of State. It was for the Tribunal to make its own assessment of proportionality. In this case the judge heard oral evidence from three witnesses and significant weight should be attached to the judge's decision which should stand unless there was a clear error of law.

20. The judge's approach was consistent with paragraph 83 of Hesham Ali which stated:

> "One way of structuring such a judgment would be to follow what has become known as the 'balance sheet' approach. After the judge has found the facts, the judge would set out each of the 'pros' and 'cons' in what has been described as a 'balance sheet' and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders.

21. Mr Walsh submitted that the judge had done that in this case and had given reasons for why there were very compelling circumstances. These need not be extraordinary because the test was one of proportionality.

22. In response to Mr Melvin's submission that the Appellant could not meet the high threshold test, Mr Walsh submitted that this was an unusual case. He could see the force of Mr Melvin's submission, if the Appellant had a long criminal record or was a danger to the community, but this was a single offence and the Appellant's rehabilitation was a relevant factor. Although given limited weight, it did reduce the risk of reoffending. There was no criminal intent in this case. The Appellant had shown remorse and pleaded guilty at the first opportunity. There was a low risk of reoffending. The judge's findings were open to her on the evidence before her and there was no clear error of law because the judge took into account all relevant factors. A different judge may well have come to a different conclusion, but that was not relevant to whether there was an error of law. The judge properly decided proportionality and took into account all necessary features of the case. It would not be possible to just reverse the decision. It was important that the case should be reheard and oral evidence given.

23. Mr Melvin submitted that Hesham Ali was about the Immigration Rules not Section 117C(6) and the Supreme Court were not looking at primary legislation. Mr Melvin had no issue with the judge's self-direction, but her conclusion was not open to her on the evidence before her. Further, she failed to address deterrence and revulsion. Looking at the combination of factors in this case the Appellant's Article 8 rights could not outweigh the public interest in deportation.

Discussion and Conclusion

24. There was no dispute that the Appellant had been sentenced to imprisonment of more than four years and the Exceptions in the

Immigration Rules and Section 117C did not apply. There was no criticism of the judge's approach in assessing whether the Appellant could bring himself within those Exceptions or the judge's conclusion that, even though the Exceptions were not applicable, it would not be unduly harsh for the Appellant and his wife to return to Brazil or for the Appellant's wife to remain in the UK without him. Had the exceptions applied to the Appellant, he would not be able to satisfy them. The result of such a finding is that the weight to be attached to his private life and family life is limited because he was unable to show that his deportation would result in unduly harsh consequences for himself or his wife.

25. It is also not in dispute that the test to be applied in this case is very compelling circumstances over and above those Exceptions. It is not the case that if the Appellant cannot satisfy the exceptions then he will be unable to show very compelling circumstances. All factors must be considered in the round. The 'balance sheet' approach in Hesham Ali is appropriate in this case.

26. The facts in this case are not in dispute. The factors considered by the judge can be summarised as follows:

    (i) The Appellant had positive support from the community;

    (ii) He was at risk of medium harm to the public;

    (iii) The risk of reoffending was low;

    (iv) It would not be unduly harsh for family life to continue in Brazil or for the Appellant's wife to remain in the UK, even though the Appellant's wife would face some difficulties integrating;

    (v) Although, the Appellant met his wife when he was unlawfully present in the UK, he voluntarily left the UK and returned with leave to enter as a spouse. His relationship with his wife developed after he obtained settlement;

    (vi) The Appellant speaks English and is integrated into the UK. He has a good employment record and is financially independent (neutral factors);

    (vii) He has committed a single offence and has taken significant steps, over and above what might normally be expected, to rehabilitate himself;

    (viii) He accepted responsibility for the offence and pleaded guilty at the earliest opportunity;

    (ix) He has shown remorse and taken part in restorative justice;

    (x) His prison record was exemplary, and he has made contributions to charity.

27. The judge quite rightly acknowledged the serious weight to be attached to the public interest. The offence was a serious one, causing death by dangerous driving, and the test was a high one, there had to be very compelling circumstances to outweigh the public interest. However, for the

reasons that follow, I find that she failed to properly apply that test and her conclusion at paragraph 62 was irrational.

28. The Appellant's lawful presence in the UK and the matters relied on by the judge at paragraph 61 are matters which the Appellant would ordinarily do as a law-abiding citizen. The fact that he has taken steps to make amends, rehabilitate himself and is genuinely sorry for his actions are not compelling circumstances over and above the Exceptions in the Immigration Rules or section 117C. I agree with Mr Walsh that they are relevant factors, but looking at all those factors listed in paragraph 61 they are not sufficient to outweigh the significant weight to be attached to the public interest in this case because of the five year sentence and the fact the Appellant has caused death by dangerous driving. It is commendable that the Appellant has, of his own volition, taken significant steps to rehabilitate himself, has engaged in restorative justice and has been an exemplary prisoner, but those circumstances could not be said to amount to very compelling circumstances.

29. In addition, little weight can be attached to the Appellant's private life and relationship with his wife because he could not satisfy the Exceptions. Family and private life could continue in Brazil. Any interference with family and private life was negligible.

30. The factors listed at paragraph 26 above, including the finding that the Appellant and his wife could relocate to Brazil, means that the Appellant's deportation could not be said to be disproportionate. The Appellant is unable to show very compelling circumstances. The low risk of re-offending and exceptional evidence of remorse and rehabilitation are relevant to the protection of the public, but they do not impact on the other public interest elements, namely deterring other foreign criminals and marking social revulsion at the nature of the crime.

31. I find that on the facts of this case the circumstances were not very compelling, the high threshold test was not met and the judge's conclusion that there were compelling circumstances was irrational. The judge erred in law and I set aside the decision to allow the appeal and remake it.

32. On the facts, the Appellant's Article 8 rights do not outweigh the public interest in deportation given the serious nature of his offence, the significant weight to be attached to the public interest and the unchallenged finding that the Appellant's family and private life could continue in Brazil.

33. I am not persuaded by Mr Walsh's submission that the matter needs to be reheard. Save for the passage of time, no change in circumstances was advanced. Any strengthening of the Appellant's private and family life would not be material given the judge's finding that it would not be unduly harsh for the Appellant and his wife to live in Brazil.

34. Accordingly, I set aside the judge's decision of 2 October 2018 and I remake it dismissing the Appellant's appeal.

Notice of decision

The Respondent's appeal is allowed.

The decision of 2 October 2018 is set aside.

The Appellant's appeal is dismissed on Article 8 grounds.

No anonymity direction is made.

J Frances

Signed Date: 11 January 2019

Upper Tribunal Judge Frances