



**Upper Tribunal  
(Immigration and Asylum Chamber)**

**Appeal Number: HU/12164/2018**

**THE IMMIGRATION ACTS**

**Heard at Manchester CJC**

**Decision & Reasons**

**On 18 January 2019**

**Promulgated**

**On 29 January 2019**

**Before**

**UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

**KJ**

**ANONYMITY DIRECTION MADE**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Holmes, Counsel

For the Respondent: Mr Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.*

1. I have maintained the anonymity order granted by the First-tier Tribunal ('FTT') because this decision refers to the circumstances of the appellant's children.

2. The appellant, a citizen of the USA, has appealed against a decision of FTT Judge Birrell, in which she dismissed his appeal against a decision dated 25 May 2018 to refuse his human rights claim.
3. The appellant has been in the UK since 2002 and was granted ILR in 2004. On 15 February 2007 the appellant was sentenced to eight months imprisonment for a breach of a Sexual Harm Prevention Order (SHPO) imposed upon him on 12 May 2016 when he was convicted of possessing indecent photographs of children and sentenced to eight months suspended for two years.

### **Grounds of appeal**

4. Mr Holmes relied upon three grounds of appeal, in relation to which FTT Judge Scott-Baker had granted permission. These can be summarised as follows:

Ground 1 - The FTT failed to resolve whether or not the appellant is a foreign criminal as defined at section 117D(2) of the Nationality, Immigration and Asylum Act 2002 as inserted by section 19 of the Immigration Act 2014 ('the 2002 Act').

Ground 2 - The FTT failed to address the submission that if the appellant was not a foreign criminal, the public interest could not be regarded as set out in section 117C of the 2002 Act.

Ground 3 - The FTT failed to address the impact of separation from the appellant upon his youngest child with autism.

5. Mr Bates relied upon a rule 24 response, which submits that the FTT directed itself appropriately.

### **Legal framework**

6. The introduction of Part 5A into the 2002 Act imposes a statutory duty upon a court or tribunal to pay regard to the considerations listed in section 117B. They include in summary, the public interest in "the maintenance of effective immigration controls" (subsection (1)); the public interest in those seeking to enter being able to speak English (subsection (2)), and be financially independent (subsection (3)); the little weight to be accorded to private life or relationships established when a person was in the country unlawfully (subsection (4)), or when immigration status was precarious (subsection (5)); and -

"(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."

7. However, in cases concerning the deportation of foreign criminals, a heightened burden is placed upon those seeking to avoid removal in the form of additional considerations set out in section 117C. The effect of the additional criteria in section 117C is to add additional weight to the public interest question and thereby to reduce the relative weight that is to be attached to any private or family life that the appellant has acquired. Section 117C states as follows:

- “(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.”

8. Section 117D(2) provides as follows:

- “(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.”

## Discussion

9. The FTT’s decision is very detailed (running to 25 paragraphs) and carefully drafted. Contrary to the appellant’s submissions, the FTT properly directed itself to and made findings on all the relevant evidence before her. That evidence is comprehensively set out in the decision from [33] to [64]. The FTT then analysed that evidence having engaged with the competing submissions and made the following findings entirely open to it:
  - (a) The appellant sought to minimise the personal responsibility he bore for his criminal offending [87, 89 and 92].
  - (b) The offences for which the appellant was sentenced are intrinsically serious because the sentencing Judge described them as such and a significant proportion of the photographs related to the most serious category A images.
  - (c) The offences the appellant was convicted of “*cause serious and wide ranging harm as it perpetrates the exploitation and abuse of children on a global scale*”. The young victims of such crimes often face a lifelong legacy of psychological harm [90].
  - (d) The appellant remains at a medium risk of harm to children but a low risk of reoffending [93].
  - (e) The appellant has a genuine and subsisting relationship with his three children. They spend approximately three days with their father and three days with their mother [98].
  - (f) The youngest child is on the autistic spectrum and any change to the domestic arrangements will be harder for him to cope with than his brothers [99].
  - (g) The appellant’s ex-wife / the children’s mother will be able to cope with caring for the children without the appellant’s presence in the UK, as her life has reached a more settled phase, notwithstanding the appellant’s allegations to the contrary [101]. This includes being able to cope with the demands of the youngest child who is described as having “*behavioural issues*”.

### Ground 1

10. The grounds of appeal fail to acknowledge that the respondent made it clear in the decision letter that the appellant was to be regarded as

a foreign criminal on the basis that he has been convicted of an offence which has caused serious harm. In other words, he met the definition of foreign criminal for the purposes of section 117C, as set out at section 117D(2)(c)(ii). During submissions Mr Holmes accepted that the key issue for the FTT to determine was whether the appellant meets the definition of a foreign criminal as set out in section 117D. He argued that the FTT merely assumed that because the appellant is “liable to deportation” he fell to be considered under section 117C.

11. I entirely accept that the FTT did not directly address the legal definition of a foreign criminal as contained in section 117D, within her decision. Mr Holmes accepted that the FTT did not have the benefit of a skeleton argument on behalf of the appellant.
12. The FTT’s failure to refer to the section 117D definition is not a material error of law. Had the FTT judge directed herself to this section, her factual findings are such that she inevitably would have found the appellant to be a foreign criminal. At [90] the FTT made an unequivocal finding that the appellant’s offending has caused serious harm. The appellant clearly met the definition of a foreign criminal in section 117D because it was not in dispute that a) he is not a British citizen; (b) he has been convicted in the United Kingdom of an offence; and the FTT made a clear finding that (c) he had been convicted of an offence that has caused serious harm.
13. The appellant clearly met the definition of a foreign criminal and the FTT was therefore correct to consider whether in accordance with section 117C(5) the effect of the appellant's deportation on the children, would be unduly harsh.

#### *Ground 2*

14. Mr Holmes accepted that ground 2 was predicated upon ground 1 being accepted and made no additional submissions on it. As ground 1 does not give rise to any material error of law, it is unnecessary to deal with ground 2.

#### *Ground 3*

15. The FTT was well-aware that the impact upon the youngest child (‘F’) was likely to be more severe than the other two children. The FTT judge expressly reminded herself of this. I invited Mr Holmes to take me to the evidence in support of the effect upon F being particularly grave. He relied upon the evidence summarised in ground 3. The child’s mother described the impact of the appellant’s imprisonment upon F as immediate sadness, anger and withdrawal. His grandmother emphasised that he does not cope well with change and this is supported by the CAMHS assessment. There was no requirement on the part of the FTT judge to refer to every item of

evidence in relation to F. When the decision is read as a whole, the FTT was clearly aware of the evidence that F did not cope with well change. The FTT was entitled to find that notwithstanding that evidence and the behavioural issues likely to arise, F's mother would be able to cope with F and any behavioural issues that might arise as consequence of his separation from his father, with the support of family and friends. It cannot be said that evidence regarding F's autism was left out of account by the FTT.

## **Decision**

16. The FTT's decision did not involve the making of a material error of law and I do not set it aside.

Signed:

Ms M. Plimmer  
Judge of the Upper Tribunal

Date:  
21 January 2019