Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12212/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Tuesday 16 July 2019	**On Monday 22 July 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SUZANNE [L M]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Nicholson, Counsel instructed by Osmans solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against a decision of First-tier Tribunal Judge N M Paul promulgated on 15 May 2018 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 11 October 2016 refusing her human rights claim made in the context of an order to deport the Appellant to the US following her conviction of fraud by false accounting for which she was sentenced on 1 February 2016 to three years' imprisonment.

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2. The Appellant came to the UK first as a visitor in 1999 and, following further visits, applied for and was granted leave to remain as the spouse of a British citizen, [MR]. She was granted indefinite leave to remain in that category on 31 July 2002. Following the conviction, the Respondent served the Appellant notice of the deportation decision on 21 April 2016 and on 11 October 2016 refused the human rights claim which she made resisting her deportation.

3. The Judge found that the Appellant could not meet the exceptions to deportation based on her private life. She was not socially and culturally integrated in the UK and, even if she was, there were not very significant obstacles to her integration in the US where she had lived until she was twenty-two years old. The Judge found that it would not be unduly harsh for Mr [R] to accompany her to the US if he chose to do so; alternatively, he could remain in the UK and it would not be unduly harsh for him to do so without the Appellant.

4. Permission to appeal the Decision was refused by First-tier Tribunal Judge Saffer on 11 June 2018 and by Upper Tribunal Judge Rimington on 16 July 2018. The Appellant sought permission to judicially review Judge Rimington's decision. The terms of Judge Rimington's refusal of permission bear setting out, not only because it was her decision which was subsequently subjected to a "Cart" application for judicial review but also because it deals with one of the issues discussed during the hearing before me which therefore enables me to deal with that issue more shortly below. Her decision is as follows:

> "As the judge recorded, the remarks of the sentencing judge illustrated the 'extremely serious offending with minimal mitigating facts apart from a plea of guilty'. The judge noted that the appellant was a *potential* suicide risk but that, as the respondent identified, there were medical facilities in the USA. That is not contrary to AM (Zimbabwe) [2018] EWCA Civ 64. The judge did consider whether the impact on the partner should the appellant be deported, and the judge was entitled to rely on the partner's own evidence that he would if required remove to the USA with his partner. The judge when making this assessment was well aware of the psychiatric background of the appellant. It was open to the judge on the evidence to find that the appellant was not integrated into the UK. **Hesham Ali v SSHD** [2016] UKSC 60 is not proposition for ignoring the Immigration Rules and it was accepted that they have an important role to play in setting out the Secretary of State's position. Nothing in the decision suggests that the judge failed to go on to make reference to compelling circumstances or strong reasons or failed to address the countervailing factors when assessing the proportionality of deportation."

5. Permission was refused by HHJ Allan Gore QC but granted by Lord Justice Leggatt on 22 March 2019. The reasons given were as follows:

> "In my view, the appellant has an arguable case which is not simply a disagreement with the factual determination of the FTT and has not been properly considered by the UT or the High Court. The argument which has a reasonable prospect of success is that the FTT erred in law in failing to take into account in balancing the public interest against the appellant's article 8 claim the medical evidence of the appellant's suicidal tendencies and the risk

> of deterioration in her mental health (including an enhanced risk of suicide) if she is deported. The FTT judge (at para 29) of his decision referred to the emphasis placed by the appellant on this evidence but did not address it at all in his reasons. Amongst other things, he made no finding (contrary to what is suggested in the UT decision) that these risks carried no weight because of the availability of treatment in the US. The fact that this legal argument has not been properly considered by the UT is a compelling reason for the High Court to hear the claim.
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> As to the individual grounds of challenge/appeal:
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> 1. Given the high threshold for the application of article 3 in medical cases, the omission of the FTT judge to address the article 3 claim is not, even arguably, material as there is no realistic possibility that the appeal could have been allowed on this basis.
> 2. Although the appellant's skeleton argument puts the point too high, taking into account the evidence of the likely effect of deportation on the appellant's mental health and consequent impact on the appellant's partner could, at least arguably, have made a difference to a finely balanced decision.
> 3. Grounds 3 and 4 would not by themselves justify interference with the FTT's decision but the points based on *Ali* add to the case that the appeal should be remitted for reconsideration."

6. Following that grant of permission, permission to appeal was granted by the Vice President of the Tribunal on 29 May 2019. The Respondent filed a Rule 24 response on 20 June 2019 seeking to uphold the Decision

7. I am therefore required to consider whether the Decision contains a material error of law and if I conclude that it does, either to re-make the decision or remit the appeal to the First-tier Tribunal for redetermination.

DISCUSSION AND CONCLUSIONS

8. Understandably, given the terms of the permission grant, Mr Nicholson did not seek to argue that the deportation of the Appellant would breach Article 3 ECHR. I therefore begin my consideration with ground two since that is the principal ground on which permission was granted.

Ground Two

9. The Appellant's grounds of appeal before the Court of Appeal plead her case on ground two as a failure "to consider the consequence of the Claimant's committing suicide in his consideration of subsection 117C (5) of the Nationality, Immigration and Asylum Act 2002". That is the provision which required the Judge to consider whether the effect of deportation would have an unduly harsh effect on Mr [R].

10. The way in which this aspect of the case is argued is expanded upon at [14] to [15] of Mr Nicholson's very helpful document replying to the Respondent's Rule 24 statement as follows:

> "[14] …The risk of the Appellant's taking her own life is clearly relevant to the question of whether the effect of her deportation (which is the trigger identified in the relevant report for both the existence of the risk and of the likelihood of such an eventuality) is unduly harsh upon her partner.
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> [15] But the First Tier Tribunal took *no account* of the effect of this. The question of whether it is unduly harsh for the Appellant's partner to be confronted with the likelihood of the Appellant's taking her own life is not reasonably to be regarded as the same as the question of whether it is unduly harsh to expect him to leave the UK with her, or to remain in the UK without her, if only because he is effectively contemplating the rest of his life *without* her and with no prospect of any further contact with her if she takes her own life as a consequence of her deportation. Needless to say his own experience of being bereaved in these circumstances would be capable on its own of demonstrating the undue harshness of the effect of the Appellant's deportation."

11. The difficulty of the case being run in that way is, as I observed during the hearing, because the Judge has dealt with the question of undue harshness on the basis that Mr [R] will return to the US with the Appellant. That appears from the following paragraphs of the Decision:

> "[11]….If she did return, it would be very difficult for her partner to find work – if he was able to get a visa to enter the country….
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> …
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> [13] [The Appellant's] partner gave evidence and explained that he had been working in IT for 20 years, and was on the verge of being upgraded to a new level of IT/a higher status with the prospect of doubling his salary to about £70-80,000. He also emphasised that it would be catastrophic were the appellant be forced to return to the USA. He had not made any firm enquiries as to his employment prospects there, but accepted that his IT skills he might be able to find work. He said he had many friends who had moved to the United States of America for work.
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> …
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> [32] Mr [R] was an appealing and honest witness, whose love and affection for the appellant was manifest. But, as he himself said, and his father said as well, he would (if required) move to the USA to be with his partner. He himself accepted that friends of his had moved to the United States and that he also accepted that, with his IT background, he had the potential to find employment in the USA. The real essence of his case was that it would be disproportionately disruptive to his family life.
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> …
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> [35] It is my view, having heard the evidence and indeed it being accepted as such, that she would be returning to America with her partner that he would provide the necessary support for her to re-integrate into society…"

12. I anticipate that it was on the basis of those paragraphs that UTJ Rimington said as she did in her refusal of permission to appeal. There has been no challenge to those findings. Mr Nicholson suggested that these findings were not that Mr [R] would accompany the Appellant at the time of her deportation but that he might join her later if he could obtain a visa. He submitted that this was not certain as it would depend on whether the US authorities would grant him a visa. I of course accept that but there was no evidence before Judge Paul that they would not do so. The highest it is put is in the written statements that the Appellant did "not even know whether he would be able to seek admission to the US considering [her] financial and mental health" ([12] of the Appellant's statement at [AB/35]) and "it is not guaranteed that America will allow me to move there to support [L] …" ([11] of Mr [R]'s statement at [AB/38]). It was for the Appellant to provide evidence if she relied on the inability to obtain a visa as being a factor which prevented Mr [R] from returning to the US with her. It ought not to be difficult to obtain information of this nature which I anticipate is readily and publicly available.

13. That though is not the end of the matter. I do not accept Mr Tufan's submission that, for this reason, the medical evidence did not need to be considered when the Article 8 claim was being assessed. It is capable of being relevant not just to whether it would be unduly harsh or whether there are very significant obstacles to the Appellant's integration in the US but also to a wider Article 8 assessment when considering whether the consequences of deportation would be unjustifiably harsh for the Appellant and for Mr [R]. That entailed the Judge considering what is likely to happen on deportation, particularly when considering the risk of suicide.

14. The medical evidence consists of two reports from Dr Ruta Skrinskiene, psychiatrist ([AB/87-107]), and Dr Stephen Kellett, clinical psychologist ([AB/112-127]), the pre-sentence report ([AB/62-66]) and a more recent report of Susan Pagella, psychotherapist ([AB/128-143]).

15. The Judge summarised that evidence at [7] and [8] of the Decision. There is however no reference to the risk of suicide as set out, in particular, in Ms Pagella's report. I accept Mr Tufan's point that there would be treatment available for the Appellant's mental health problems on return to the US (see [25] of the Decision). However, that does not answer the point made by Mr Nicholson which I accept that suicide risk and to some extent mental health issues are very different from physical health issues, particularly where, as here, the trigger is said to be the deportation itself. The Judge needed to say what he made of the evidence and what would be likely to occur before, during and after deportation in relation to the suicide risk and to the Appellant's mental health. Whilst there is reference to the Appellant's ability to reintegrate at [35] of the Decision and to other compelling factors at [37] of the Decision, the assessments there made completely ignore the medical evidence about the Appellant's mental health and suicide risk.

16. For those reasons, I accept that there is an error of law made out by ground two. I do not accept Mr Tufan's submission that the error is not material. Whilst the evidence might not ultimately lead to any different outcome depending on the assessment made of the medical opinions, and the factual findings reached as to what will happen if the Appellant is deported, I certainly cannot say that the outcome is very likely to be the same.

Grounds three and four

17. As Lord Justice Leggatt indicated when granting permission, taken alone, these two grounds are not arguably material. Strictly, having found an error of law on ground two, it is not necessary for me to deal with these grounds. I deal with them however as they are relevant to whether and to what extent I should preserve any findings and as to next steps.

18. Ground three is that the Judge "misdirected himself as to the applicable law (in respect of the appeal's being governed by the Immigration Rules)". Mr Nicholson submitted that the way in which the Judge applied the law was contrary to the Supreme Court's judgment in Ali v Secretary of State for the Home Department [2016] UKSC 60 ("Ali") at [18] where the Court said that "[t]he Secretary of State has a wide residual power under the 1971 Act to grant leave to enter or remain in the UK even where leave would not be given under the Rules…The manner in which that power should be exercised is not, by its very nature, governed by the Rules. There is a duty to exercise the power where a failure to do so is incompatible with Convention rights, by virtue of section 6 of the Human Rights act 1998".

19. That passage however is dealing with the Respondent's duty and not the Tribunal's duty. Paragraphs [39] to [47] of the judgment undermine the Appellant's case particularly the reference to the need for the Court/Tribunal to "attach considerable weight" to the Respondent's policy as to where the proportionality balance lies ([46]). It must also be remembered that Ali pre-dates the coming into force of Section 117C of the 2002 Act. The Tribunal is therefore required to have regard to the exceptions set out in that section which are, to all intents and purposes, the same as the relevant Rules.

20. The reference to Ali arises because, when setting out the legal framework, the Judge made reference only to the Rules and Section 117D (which I accept should read Section 117C) and then referred to the case of Secretary of State for the Home Department v AJ (Zimbabwe) and another [2016] EWCA Civ 1012 ("AJ (Zimbabwe)"). Mr Nicholson said that AJ (Zimbabwe) is inconsistent with what is said in Ali. AJ (Zimbabwe) itself is a case which makes no mention of Section 117C. In any event, it has not been overturned nor even disapproved and continues to be relied upon by the Courts (see, for example, Secretary of State for the Home Department v AB (Jamaica) and another [2019] EWCA Civ 661). In any event, it is clear from what follows [18] of the Decision that the Judge has adopted the correct approach, namely considering whether either of the

exceptions are met and, if they are not, whether there are very compelling circumstances over and above the exceptions which enable the case to succeed. There is therefore no error of law established in this regard.

21. Ground four is even weaker. It relies on the Judge having "misdirected himself with regard to the weight to be attached to 'society's revulsion'". The reference there is to [36] of the Decision where the Judge acknowledges that "[p]art of the public interest in deportation, as being part of the public interest exercise, is to deter criminals from committing such crimes and it is also an expression of society's revulsion of such serious crimes".

22. Mr Nicholson relies on what is said by Lord Wilson at [70] of the judgment in Ali that "[s]ociety's undoubted revulsion at certain crimes is, on reflection, too emotive a concept to figure in this analysis". However, he goes on to say that he "maintain[s] that I was entitled to refer to the importance of public confidence in our determination of these issues. I believe that we should be sensitive to the public concern in the UK about the facility for a foreign criminal's rights under article 8 to preclude his deportation." Whilst Judge Paul expressed himself in accordance with the former articulation of the public interest, there is nothing to suggest that he gave any great weight to this aspect and he was in any event entitled to have regard to society's views of crimes such as were committed by the Appellant. There is no material error disclosed by ground four.

23. In light of my conclusions, I have carefully considered whether any of the findings made by Judge Paul ought to be preserved. I have though come to the conclusion that they should not. As I indicated at [13] above, the Appellant's mental health issues and risk of suicide are potentially relevant to all facets of her Article 8 case – her ability to integrate in the US, whether and to what extent Mr [R] can support her on return and if so what is the impact on her health issues, depending on the answer to those questions, whether the effect of her deportation would be unduly harsh for him, and finally whether the health issues and risk of suicide when coupled with the other Article 8 factors are sufficient to tip the balance as sufficiently compelling circumstances to outweigh the public interest. The assessment of the Article 8 case will therefore require to be reconsidered afresh in its entirety. It is not simply a matter of considering and making findings on the medical evidence.

24. For that reason, I am also persuaded that this is an appropriate case to remit to the First-tier Tribunal. Mr Nicholson referred in support of his request to that effect on the case of MM (unfairness; E&R) Sudan [2014] UKUT 00105 (IAC). He said that there was a procedural unfairness in the previous hearing. Ultimately, the same might be said of any error of law in a First-tier Tribunal decision.

25. I have regard to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal and the guidance there given as regards remittals. This case is more akin to that of an appellant having been deprived of the opportunity to have a central part of their case

considered rather than there being any procedural unfairness, but it remains appropriate for the appeal to be remitted.

26. I record also that Mr Nicholson indicated that the Appellant will wish to serve and file an updated medical report for the next hearing (although has made no application to adduce further evidence before this Tribunal). I also reiterate the point I made above and during the hearing that, if the Appellant wishes to argue that it would be unduly harsh or even simply unrealistic to expect Mr [R] to accompany her to the US because of visa issues, it is for her to put forward evidence about those difficulties.

CONCLUSION

27. For the above reasons, there is an error of law disclosed by the Appellant's ground two. For the reasons given above, I set aside the Decision and I do not preserve any findings.

DECISION

I am satisfied that the First-tier Tribunal Decision of Judge N M Paul promulgated on 15 May 2018 contains a material error of law. I therefore set aside the Decision. I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Paul.

Signed Dated: 16 July 2019

Upper Tribunal Judge Smith