Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/10778/2017**

THE IMMIGRATION ACTS

Heard at Field House, London **Decision & Reasons Promulgated**
On 5 December 2019 **On 11 December 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

S H
[Anonymity Direction Made]
Respondent

Representation:
For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondent: Ms J Hassan, Counsel instructed by Warnapala & Co

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal Judge. The appeal involves a protection claim and a vulnerable person. Accordingly, it is appropriate to make an anonymity direction. Unless and until a tribunal or court directs otherwise, the Appellant (as he was before the First-tier Tribunal) 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.

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DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. However, there is also a cross-appeal by [S H]. For ease of reference, therefore, I refer to the parties as they were before the First-tier Tribunal.

2. The Respondent appeals against the decision of First-tier Tribunal Judge G A Black promulgated on 1 July 2019 (“the Decision”). By the Decision, the Judge dismissed the Appellant’s appeal on protection grounds but allowed it on human rights grounds (Article 8 ECHR) on the basis of the Appellant’s private life formed in the UK and his mental health problems. I note at this juncture that the Appellant is a foreign criminal and the Respondent’s refusal of the Appellant’s protection and human rights claims was made in the context of a decision to deport the Appellant to Pakistan, which decision was made on 2 September 2014 and confirmed by a deportation order signed on 29 September 2015.

3. The Appellant is accepted to be a Shia Muslim from Pakistan. However, he left Pakistan at the age of four years and lived in the UAE until he came to the UK on 29 December 2002 as a student. He had previously been issued with a multi-entry visit visa in August 2002 to February 2003 and was previously in the UK as a visitor in September 2002. The Appellant’s student visa was valid to 16 February 2004. His in-time application to extend his leave was initially rejected but then granted on 24 March 2004 to 31 May 2007.

4. On 27 June 2006 the Appellant married [JS]. He divorced her on 26 January 2007. On 24 April 2007, he married [FL] and on 4 May 2007 applied for leave to remain on the basis of this marriage. That application was refused but his appeal against that decision was allowed on 23 November 2007 and on 21 February 2008, he was granted leave to remain as a spouse and, later, on 16 June 2010 was granted indefinite leave to remain (“ILR”). [FL] died of cancer on 3 September 2012.

5. As previously noted, the Appellant was notified of his liability to deportation in September 2014. That arose from a conviction for the index offence of possession of a Class A drug (crack cocaine) and Class B drug with intent to supply. The Appellant was sentenced to twenty-one months’ imprisonment for each of those offences to run concurrently. He was also convicted on that occasion for fraud and driving without insurance for which he was sentenced to six months’ imprisonment for the fraud to run concurrently with the other offences and six penalty points and licence endorsed for the driving offence.

6. Between October 2006 and January 2009, the Appellant received three police cautions for possessing an offensive weapon, common assault and possession of cannabis. In 2009, 2012 and 2013, the Appellant was also convicted of more minor driving and other offences (some relating to his drug addiction) but no custodial sentences were imposed. The Magistrates Courts which dealt with these offences did however impose a drug rehabilitation requirement with which the Appellant failed to comply. Following the index offence, in 2016 and 2017, the Appellant was convicted of further driving offences but was not imprisoned for those offences.

7. The Appellant raised an asylum claim in September 2014 and following interviews, on 29 September 2015, a decision was made to refuse the protection and human rights claims and the Appellant was served with the signed deportation order (which had the effect of bringing to an end his indefinite leave to remain). The claims were initially certified under section 94 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). A judicial review challenge to certification failed.

8. On 20 May 2016, the Appellant made further submissions seeking protection on a different basis; he now claimed that he was at risk based on his sexuality. Following interview, that claim also was rejected on 16 June 2016. On this occasion, the claim was certified under section 96 of the 2002 Act on the basis that it could and should have been made earlier. However, subsequently, both the 29 September 2015 and 16 June 2016 letters were withdrawn and reconsidered leading to the Respondent's decision dated 11 October 2017 which is that under appeal now. It is worthy of note that, in the covering letter to the decision, the Respondent made plain that the deportation order of 29 September 2015 remained in place.

9. I begin with the Appellant's cross-appeal. The initial application for permission to appeal to the First-tier Tribunal was out of time. Permission to appeal was refused by First-tier Tribunal Judge Povey on 14 August 2019 in the following terms (so far as relevant):

> "... 2. The deadline for applying for permission to appeal was 15 July 2019. The Appellant's application was received on 5 August 2019, three weeks out of time. No explanation was given for the delay. The Appellant continues to be legally represented.
>
> 3. In addition, the application for permission disclosed no arguable errors of law in the Judge's determination. It was alleged that the Judge had erred in her assessment of the Appellant's evidence as to his sexuality. The Judge was entitled to have regard to the Appellant's failure to raise his sexuality earlier, was entitled to reject the Appellant's explanation for the delay (at [18]) and afforded the delay appropriate weight. She provided adequate reasons for her findings, which were open to her on the evidence and it was not necessary for her to set out

> the Appellant's oral evidence with any greater detail within her determination.
>
> 4. The Appellant's delay is compounded by the fact that the Respondent's appeal is to be heard by the Upper Tribunal on 21 August 2019.
>
> 5. For all those reasons, it is not in the interests of justice to extend time and the application for permission to appeal is refused."

10. The Appellant renewed his application to the Upper Tribunal. By a decision dated 22 October 2019, Upper Tribunal Judge Kopieczek did not refuse permission on the basis of the lateness of the application to the First-tier Tribunal. He did however refuse permission on the merits in the following terms:

> "... Nevertheless the grounds have no arguable merit. First-tier Tribunal Judge G.A. Black ("the FtJ") undertook a comprehensive assessment of the appellant's claim to be at risk on return to Pakistan on account of his sexuality.
>
> The grounds mischaracterise the FtJ's conclusions in terms of the suggestion that she treated the appellant's evidence of 'reverting back' (per the grounds) to being bisexual (from being gay) as adverse to his credibility. The FtJ properly understood that the appellant's claim was that in detention he decided that he was gay, but then reverted to his previous account that he was bisexual. At para 17 she set out the appellant's evidence as to his reasons for deciding in detention that he was gay. She did not find this aspect of the claim to be credible. She gave other reasons for concluding that his claim to be bisexual was not credible.
>
> There was no 'undue focus' on the lateness of the appellant's reliance on his sexuality as a reason for his fear of return. It was but one factor that the FtJ took into account. She was entitled to attribute the weight that she did to that issue.
>
> The FtJ did not find that the appellant's being in relationships with women contradicted his claim to be bisexual. She pointed out at para 19 that the evidence was that up until 2016 the evidence was that he was married and had relationships with women, and did not make any reference to having had any relationships with men. That again, in any event, was but one aspect of the FtJ's adverse credibility findings.
>
> There was sufficient reference in the FtJ's decision to the significant features of the appellant's evidence, his account having been referred to in various places in the course of the FtJ's findings. There is no arguable legal error in the FtJ not having separately set out a summary of the appellant's oral evidence."

11. Ms Hassan confirmed that the Appellant has not challenged the Decision dismissing the protection appeal further. She did not pursue any challenge before me. I do not therefore need to say anything further about that.

12. The Respondent challenged the Decision and the conclusion that the appeal should be allowed on human rights grounds. She did so on the basis that the Judge had failed to have regard to certain of the evidence about the Appellant's circumstances in Pakistan and had failed to consider the Appellant's human rights claim through the lens of the Immigration Rules ("the Rules") and the provisions of Section 117C of the 2002 Act ("Section 117C") which apply in deportation cases.

13. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 19 July 2019 in the following terms so far as relevant:

> "… 3. It is arguable that the Judge may have materially erred in her assessment of the risk to the Appellant through a deterioration of his mental health if returned to Pakistan given the jurisprudence, as it is arguable that inadequate reasons have been given for the findings of a lack of personal and medical support to ameliorate the consequences of a mental health relapse. All grounds may be argued."

14. The matter comes before me to determine whether the Decision contains a material error of law and, if it does, to re-make the decision or remit the appeal to the First-tier Tribunal to do so.

15. For completeness, I note that, under cover of a letter dated 27 November 2019, the Appellant applies pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce up-to-date evidence in relation to his mental health. That cannot be relevant to whether there is any error in the Decision but may become relevant if it becomes necessary to re-make the decision.

<u>DISCUSSION AND CONCLUSIONS</u>

16. Mr Tarlow adopted the Respondent's pleaded grounds. Those are in effect a challenge based on a failure to give adequate reasons and a failure to have due regard to the public interest.

17. I begin by setting out the relevant paragraphs of the Decision as follows:

> "21. I now turn to the issues raised on human rights grounds. I conclude that the evidence failed to meet the high level or threshold required for Article 3 or Article 8 on medical grounds and I rely on "N". I find that there are compelling circumstances outside the rules such that Article 8 private life is engaged by reason [of] length of residence and involvement with mental health services. The evidence shows that since 2013 the appellant has presented with mental illness and been variously diagnosed with depression, unspecified psychotic delusions, bi polar disorder and mental and behavioural disorders because of drug misuse and substance abuse. The records also show that on occasions it has been concluded that he was malingering. He has been prescribed with anti-depressant medication and anti-

psychotic medication. He is presently prescribed Olanzapine and Depakote.

22. I rely on the independent expert report which provides an overview of the appellant's conditions, treatment and diagnosis in 2018. It was concluded that he suffered from a chronic, recurrent and long term mental illness. He had not suffered from any major breakdown but had presented for help at times of crisis. He had presented with suicidal ideation and there was evidence of suicide attempt and self-harm. In addition the appellant's condition was complicated by his drug misuse and malingering. At the time of the report the appellant was receiving primary care and had been offered but refused treatment for drug misuse. He was found to have a number of mental health risk factors as set out in paragraph 49 of the report.

23. I find that the appellant would suffer a crisis in his mental health that would require intervention of medical professionals and admission to hospital. I am satisfied that he would be able to access medication in Pakistan, but on the evidence before me I find that he would be rapidly propelled into crisis on return to Pakistan such that he would not be able to access the required medication. I find that the prospect of the move itself would be sufficient to create a serious crisis and deterioration in his mental ill health including possible attempted suicide. I find that the appellant would have no one to go to for support in Pakistan for immediate help and there are few psychiatric hospitals providing treatment.

24. I find that he has no family and no meaningful connections with Pakistan and as a vulnerable person he would need emotional, social and practical support together with reliable and accessible treatment for his mental health. In addition I take into account that the appellant lived in the UK lawfully for a significant period of time (16 years) and has not lived in Pakistan since he was aged 4 years old. I am satisfied that he has established a strong private life in the UK by reason of his long lawful residence and former family relationships together with his engagement with the mental health services since 2012, which impacts on his personal integrity. His removal to Pakistan would amount to a serious interference in his private life.

25. Clearly there is a strong public interest in deportation for drug offending which is harmful in society and for those addicted to drugs. Unfortunately I had little by way of information about the index offence and the sentencing remarks lacked any detail as to the amount or value of the drugs, the appellant's role in the supply and the organisation of the supply. The Judge found that the appellant was involved in commercial supply and did not believe that it was for personal use. The severity of the offence was marked by the immediate custodial offence as opposed to a very lengthy sentence. The appellant has previous convictions but has not offended since 2017. He has only had one custodial sentence. I am unable to find that he has addressed his drug habit given that a recent conviction was for driving whilst under the influence of drugs. His medical report dated March 2019

> confirmed that he was abstinent, but I have no more recent evidence. I find that he has taken some steps to rehabilitate and to tackle his drug abuse but there was no evidence to show that this has been sustained. He has made some progress to the extent that he is receiving secondary care and regularly attends for treatment and is compliant with his medication.
>
> 26. I conclude that the appellant has demonstrated a high level of vulnerability because of his mental ill health and associated crises which is long term and continuing. Together with his long lawful residence in the UK these factors amount to very compelling circumstances such that the public interest is outweighed and the decision to deport him is not proportionate. In reaching my conclusion I have also taken into account that the appellant may well suffer discrimination on return by reason of his religion and his mental ill health as evidenced in the relevant CPINs. It is my conclusion that there would be very significant obstacles to the appellant's integration in Pakistan (Kamara v SSHD [2016] EWCA civ 813) and taken cumulatively with the other factors, I allow the appeal under Article 8 outside of the Rules."

18. Ms Hassan began by observing that the Respondent had not challenged the Judge's underlying findings at [21] to [26] of the Decision. That is not entirely correct since at [10] and [11] of the grounds the Respondent says that the Judge has erred by failing to give adequate reasons for the finding that the Appellant would have no-one to turn to in Pakistan as the Respondent points to numerous references in her decision letter about family members in the village of origin. Ms Hassan accepted that the Appellant does have some distant family in his village of origin. However, as she also pointed out, the Appellant has not lived in Pakistan since the age of four years; he is now in his thirties. His immediate family are in the UAE. That finding is not challenged. The Judge had regard to the Appellant's time out of Pakistan and that his immediate family were not living in that country (see [24] of the Decision). That underpins her conclusion that the Appellant has "no meaningful connections" with his country of origin. The time which the Appellant has spent out of Pakistan is also relevant to whether there would be "very significant obstacles" to the Appellant's integration in Pakistan. Since he left there as a child, as Ms Hassan pointed out, he would be unfamiliar with the way of life in that country. I accept the Appellant's submissions in response to those criticisms. The Judge was entitled to make those findings on the evidence.

19. The Respondent's remaining grounds concern the Judge's approach to the Article 8 issue and criticise her for failing to have regard to the Rules/ Section 117C and the public interest more generally.

20. As I observed and I understood Ms Hassan to accept, it is highly unusual to see a Judge's decision in a deportation case fail to make any mention of Section 117C or the exceptions which apply to an

"under four years" case such as this. There is not even a self-direction as to Section 117C. Nonetheless, that failure does not automatically mean that there is a material error of law in the Decision provided that the Judge has approached the issue in a way which is broadly consistent with the statutory framework.

21. As Ms Hassan submitted, in this case the Appellant could not meet either of the two exceptions. It is not suggested that he has family in the UK; he has no partner or child here. The exception to be found in Section 117C (5) could not apply. In relation to Section 117C (4), although the Appellant has been here for sixteen years, largely lawfully, he could not satisfy the requirement to have lived here lawfully for most of his life, due to his age. Although I accept that there is no finding by the Judge concerning social and cultural integration, that issue is likely to have been finely balanced between the Appellant's reliance on medical support and his drugs misuse. The Judge has made a finding at [26] of the Decision that there are "very significant obstacles" to integration in Pakistan. Whilst undoubtedly it would have been preferable if the Judge had made that finding at the start and not the end of the section in order to show that she was mindful of the statutory framework, the Judge's references to that test as well as to the length of lawful residence indicates that she was well aware of the factors which are relevant to the private life exception.

22. As Ms Hassan submitted, and I accept, the Judge has proceeded directly therefore to considering whether there are "compelling circumstances outside the rules" (see [21] of the Decision). Whilst I appreciate that, once again, it may have been preferable if the Judge had made some express reference to the statutory test (which is whether there are "very compelling circumstances over and above" the exceptions), it is clear from that paragraph read with what follows that the Judge had regard to the sorts of factors which are likely to tip the balance in this case.

23. The Respondent contends that the Judge has failed to have regard to the strong public interest in the deportation of foreign criminals. I am unable to accept that submission. The Judge recognises the strong public interest expressly at [25] of the Decision. The level and extent of offending was clearly relevant when balancing the interference with the Appellant's private life against the public interest. The Judge had regard to relevant risk factors also at [25] of the Decision. Nonetheless, she was entitled on the evidence also to have regard to the progress made by the Appellant and lack of recent offending.

24. As Ms Hassan pointed out, the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 advocated precisely the sort of balance sheet approach which the Judge has utilised in this case (see [83] of the judgment in the speech of Lord Thomas).

25. I asked Ms Hassan to identify the factors which led the Judge to reach the finding that the interference with the Appellant's private life outweighs the public interest. She said that those were the length and lawfulness of the Appellant's residence in the UK together with his engagement with medical help and support for his drugs and mental health problems ([24]). In relation to the position in Pakistan, although treatment would be available and therefore the health problems did not reach the high threshold to succeed on that account alone, the Judge found on the evidence that the Appellant would not be able to access treatment due to his mental health problems and lack of necessary support in Pakistan ([23]). Furthermore, as a Shia Muslim, the Appellant would face discrimination for that reason and also because of his mental health problems ([26]). As Ms Hassan submitted and I accept, the Judge was bound to consider the case holistically. The conclusion is based on a combination of all the relevant factors.

26. Although the Judge's findings do not follow the approach which I would expect to be adopted when assessing Article 8 in a deportation case, when read as a whole, paragraphs [21] to [26] of the Decision do provide reasons which are adequate to justify the Judge's conclusion that deportation of the Appellant would be disproportionate.

27. For those reasons, I am satisfied that the Decision does not contain a material error of law.

CONCLUSION

28. The Respondent has failed to make out her case that the Decision contains a material error of law. Accordingly, I uphold the Decision with the consequence that the appeal remains allowed on human rights grounds (Article 8 ECHR) but dismissed on protection grounds.

DECISION

I am satisfied that the decision of First-tier Tribunal Judge G A Black promulgated on 1 July 2019 does not disclose an error of law. I uphold that decision with the consequence that the appeal of [SH] is allowed on human rights grounds (Article 8 ECHR) but remains dismissed on protection grounds.

Signed: Dated: 9 December 2019
Upper Tribunal Judge Smith