Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11027/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 September 2019	**On 27 January 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K D N T
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Ms J Victor-Mazeli, Counsel instructed by Morgan Hall Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Respondent (also "the Claimant"). Breach of this order can be punished as a contempt of court. I make this order because it continues an order made when the appeal was first heard in the First-tier Tribunal and renewed at every stage since. I assume that there is concern that the details of domestic violence should not be in the public domain to protect the Claimant's sister and mother.

2. This is an appeal brought by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the Respondent, hereinafter "the Claimant", against a decision of the Secretary of State on 18 April 2016 refusing him leave to remain on private and family life grounds and refusing to revoke a deportation order.

3. I note that this is the second time that his appeal has been allowed by the First-tier Tribunal on human rights grounds. An earlier decision made in May 2017 was found to be wrong in law and set aside and the decision before me was the result of rehearing the Claimant's appeal.

4. By way of introduction, the Claimant is eligible for deportation because he has been sentenced to five years' detention at a Young Offenders' Institution for assault occasioning grievous bodily harm with intent and the associated offence of having a knife in a public place. Given the strict statutory tests that apply in such cases any informed reader will, at least initially, find the decision surprising. The reasons for allowing his appeal, again in extreme summary, are that he has lived in the United Kingdom since March 1997 when he was about 18 months old, that he would face great difficulties establishing himself in his country of nationality and that he committed the offence when he was suffering from post-traumatic stress disorder arising from his being a victim of domestic violence. The tribunal found that these things taken together constitute the "very compelling circumstances, over and above those described in Exceptions 1 and 2" that are required by section 117C(6) of the Nationality, Immigration and Asylum Act 2002 before the appeal of a foreign criminal who has been sentenced to at least 4 years in custody can be allowed lawfully on human rights grounds.

5. Although not expressed in these terms the grounds must boil down to a rationality challenge. It is said that the Judge has either not explained or was not entitled to make the findings that he did.

6. Importantly, I also remind myself that it is not my task to decide if this person should be deported but if the Secretary of State has shown that the decision to allow the appeal made in the First-tier Tribunal was unlawful.

7. I begin by looking very carefully at the First-tier Tribunal's decision.

8. The Claimant arrived in the United Kingdom with his mother on 29 March 1997. His mother applied for and was refused asylum but the Claimant was given discretionary leave to remain and on 13 August 2009 he was given Indefinite Leave to Remain.

9. Apart from the matters already indicated the Claimant has a criminal record. It is set out in some detail in the First-tier Tribunal's Decision and Reasons. He first came to the attention of the courts in September 2011 when a referral order was made because of crimes of violence including two offences of robbery. There were other court appearances. The most severe punishment before the index offence was imposed in February

2014 when he was made the subject of a suspended sentence of detention at a young offenders' institution for sixteen weeks for two matters of battery.

10. In July 2014 he was sentenced to an order to undertake unpaid work. On 4 January 2015 he committed the offence leading to the deportation order.

11. In summary the Claimant was armed with a knife and supported a friend who appeared to be settling a score with the victim. The Claimant pleaded guilty. The sentencing remarks of the learned Recorder in the Crown Court give some inkling of the difficulties in this case. The Recorder said:

> "You have a poor criminal history, offences of robbery in 2011, affray in 2013 and battery in 2014, but I do take into account that this is your first time in custody. I have read a letter from your mother. I have read a letter from your young sister and I have read the letter from you and one cannot be but moved by all of those letters and that you too, as well as your co-defendant, have had to live through very difficult times and life has not been easy for you. I understand that and accept that, but I must take into account that this is of course a very serious offence."

12. The First-tier Tribunal Judge accepted evidence that the Claimant's mother had married a British citizen but the family home was not happy. The Claimant and his mother were victims of domestic violence and there were times when the mother and children, that is the Claimant and his half-sister, left the family home.

13. The Claimant's stepfather was an alcoholic and that played its part in causing the misery that the family endured.

14. The Claimant explained how he had grown up in an environment where violence was normal. The Claimant then explained that during his time at Feltham Young Offenders' Institution his attitudes had been challenged and redirected by a victims' awareness course and an anger management course and the assistance of the mental health team and the chaplaincy.

15. It was the Claimant's case that, when his appeal was last heard by the First-tier Tribunal, he was 23 years old and had spent almost all of his life in the United Kingdom and had no ties with Colombia. He had never visited Colombia. He could not read or write Spanish. He had no understanding of Colombian culture which he assumed would be different from the culture in Essex where he grew up. He had nowhere to go in Colombia, no family and no means of support. He noted too that he had been told unemployment was very high in Colombia. Since his release from custody in July 2017 he had been working with removal firms and helping to support his mother and sister.

16. He also said that he was saving money as his partner was pregnant by him. He did not associate with his old friends.

17. He was addressing mental health issues partly by taking prescribed medication.

18. He was asked about the prospects of his partner relocating with him to Colombia. It was his case that she could not do that. She is a British citizen employed in the United Kingdom and he had not even discussed the possibility of removing because he did not want to worry her when she was pregnant and suffering from bouts of depression.

19. He confirmed that he could not read or write Spanish though he did say that he could "sometimes grasp the gist". He said he had tried to learn Spanish but when he visited Spain he realised that his efforts had not been successful.

20. The First-tier Tribunal Judge's summary of the evidence at paragraph 40 of the Decision and Reasons might be thought significant and I set it out below:

> "The [Claimant] informed [the Presenting Officer] that his mother entered into the relationship with J.C. when he was aged 3 or 4 and they were married when he was aged 6. The marriage continued until he was aged around 13 or 14. He recounted that J.C. was violent towards him from the age of 7, but it got worse over time. The [Claimant] recounted a cyclical history of his mother running away with him and his sister, but his stepfather worming his way back into their lives. He further recounted residing at a number of properties away from the family home including a hostel."

21. The First-tier Tribunal Judge then summarised the evidence of the Claimant's mother. She confirmed parts of her son's evidence but said rather more about the violence in the home. Her partner had been sent to prison for breaching a non-molestation order. He was alcoholic and the Claimant had been subject to verbal and physical abuse over a long period and had seen his stepfather engage in violent outbursts and bad temper when he broke things in the house.

22. The Claimant's sister, S C N, attended the hearings to support the Claimant. She was then aged 13 years. The Judge decided not to hear oral evidence but noted that she confirmed the history of violence in the home.

23. The Claimant's partner, J.L.C., did not attend. She explained her absence on one occasion by reference to needing to work and on another occasion by the state of her pregnancy although provided no medical evidence that she was unfit to attend. Nevertheless she provided a signed statement that confirmed the relationships and that described the Claimant in appreciative terms.

24. The Judge then noted a report from a psychiatrist, Mr Roy Shuttleworth, and the report from the Probation Service in the form of an OASys assessment. This pointed to a perceived change in behaviour during his

time in custody and his taking a responsible attitude towards his probation officer following his release.

25. The Judge looked carefully at the Secretary of State's decision and reasons that, as is usual, were set out in the form of a letter. He reminded himself that the proposition that deportation of a foreign criminal is in the public good is established by statute and emphasised in the Court of Appeal. The letter pointed out that a person sentenced to five years' imprisonment (the significant thing is more than four years) disqualified him from the protections available to people enjoying family life with a partner or child under the Rules. The Judge also set out the relevant parts of Part 5A of the Nationality, Immigration and Asylum Act 2002. The Judge then directed himself that he had to consider two issues that overlapped. He had to ask himself how much weight should be given to the public interest in deportation and whether any interference in the private and family lives of the people involved was disproportionate. He reminded himself expressly of the need to deter foreign criminals from committing crimes, of the need to express society's revulsion (perhaps no longer an entirely apt phrase) and the risk of reoffending. He also reminded himself that it was wrong to regard the risk of reoffending as the most important consideration.

26. He then directed himself expressly with the question "Are there very compelling circumstances outweighing the public interest?"

27. The Judge then reminded himself of leading cases and particularly the observations in **Hesham Ali** [2016] UKSC 20, that in a case of a person who was sent to prison for at least four years "the countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders".

28. He also reminded himself of the expectation of Lord Reed that such cases would be "likely to be a very small minority".

29. The Claimant did not have a child in the United Kingdom when the decision was made and the Judge was not satisfied that there was a "qualifying partner" within the meaning of Section 117D of the 2002 Act. The Judge found the evidence too weak.

30. For the avoidance of doubt the Judge also found that deportation would not be "unduly harsh" within the meaning of Section 117C(5) of the 2002 Act or paragraph 399(b)(ii) of HC 395.

31. The Judge did find that "Exception 1 applies". It was accepted that the Claimant had been lawfully resident in the United Kingdom for most of his life. The Judge found that he was socially and culturally integrated into the United Kingdom. Notwithstanding his criminal behaviour the Judge found, uncontroversially, that the Claimant had been educated in the United Kingdom as well as living there for most of his life. He had taken employment and continued to live in East London. He had been employed

since the summer of 2017 and had a close relationship even though it did not amount to a partnership.

32. The Judge accepted that the Claimant had not been in Colombia for over twenty years. He had not attended school there and had no connections there. The Judge found that there had been some exaggeration of his inability to speak Spanish but found that he "enjoys nothing more than a very basic understanding of the Spanish language".

33. Importantly the Judge accepted that he had no "true familial connections in Colombia". He found truthful the Claimant mother's evidence about losing contact with the family and there being no connection with the Colombian community in the United Kingdom. The Judge found that there would be "very significant obstacles" to the Claimant's integration into Colombia. This, of course, is not sufficient to allow the appeal. The Judge was aware of that and asked himself if there were "very compelling circumstances".

34. The Judge also made clear that he understood that the statutory obligation before allowing an appeal was that there were "very compelling circumstances 'over and above' those necessary to establish Exception 1 or Exception 2.

35. The Judge did not accept that the Claimant's relationship with his sister or his mother amounted to "family life" for an Article 8 balancing exercise.

36. The Judge considered the expert evidence of Mr Shuttleworth. He accepted that the Claimant suffered from Attention Deficit Hyperactivity Disorder and Post Traumatic Stress Disorder and that he was presently taking medication to help with his PTSD and that the ADHD was diminishing with age.

37. The Judge found that the conditions were undiagnosed and untreated when the Claimant committed the offence that led to his prolonged detention.

38. There was a dispute between the parties about the nature and onset of domestic violence. The Judge decided, for reasons that were fully explained, that the household:

> "…was one where JC was a controlling alcoholic, struggling with employment and financial pressure, who sought to exercise dominance and would use physical violence, such as hitting MNT's head against a wall, or the threat of violence, such as SCN's recollection of his regularly pointing a knife at her mother or brother, to exercise his dominance or exhibit his anger. I particularly note SCN's evidence as to having to regularly resort with her brother to hiding in the toilet from their father."

39. The Judge made similar findings on the same theme.

40. He went on to find that the Claimant now had greater insight into his own exhibitions of anger and had learnt to control his temper better. The Judge accepted his evidence that the opportunities created by prison to reflect on his behaviour and change his lifestyle had been seized. The Judge found at paragraph 126 that the Claimant's apparent reform was due to a combination of factors including the offender behaviour programmes in custody and a general maturity and also the impact that medication had on his PTSD. The Judge said:

> "Some weight can therefore be given to the underlying nature of his rehabilitation, though it is not determinative of my assessment."

41. The Judge then reminded himself of the observations of Richards LJ on **Maslov v Austria (Application No. 1638/03) [2009] INLR 47** in **JO (Uganda) v SSHD [2010] EWCA Civ 10** where he said:

> "Where the person to be deported is a young adult who has not yet founded a family life of his own, the subset of criteria identified in paragraph 71 of the Maslov judgment will be the relevant ones. Further, paras 72-75 of that judgment underline the importance of age in the analysis, including the age at which the offending occurred and the age at which the person came to the host country. This is pulled together in paragraph 75: for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion; and this is all the more so where the person concerned committed the relevant offences as a juvenile."

42. This Claimant was aged 19 years and 3 months when he committed the offences that led to his sentence.

43. The First-tier Tribunal Judge noted that the decision in **Maslov** did not overrule Part 5A of the 2002 Act.

44. Perhaps the crucial paragraph of the Decision and Reasons is 132 where the Judge said:

> "I observe the high threshold that the [Claimant] has to meet, and that 'compelling' means circumstances which have a powerful, irresistible and convincing effect. When conducting my proportionality assessment, I have very firmly in mind the fear the victim suffered during the attack. I am very alive to the anguish he experienced in such moments. I also have clearly in mind both the need to deter foreign criminals from committing serious crime using knives and that deportation is an expression of society's revulsion of serious crimes and building public confidence in the treatment of foreign criminals who have committed such crimes. However, I give weight to Mr Shuttleworth's assessment at [35] of his report that the [Claimant] *'had been very traumatised from an early age by his stepfather's aggressive behaviour'*. I note that the [Claimant] was a young child when such behaviour was directed towards him and it continued during his formative years. Such experiences led to Mr Shuttleworth providing a 'firm' diagnosis of PTSD and opining that *'some of his aggressive behaviour in recent times may be attributable to his PTSD and as a*

> *consequence he should have far more control over his mood state when he has had effective treatment for PTSD'*. I also place some weight on the evidence of the [Claimant's] rehabilitation being strong consequent to my observations above."

45. The Judge found that very compelling circumstances over and above were made out and he allowed the appeal.

46. Against this background I look carefully at the Secretary of State's grounds. The sole ground, which is particularised, is that the Judge has failed to give adequate reasons for findings on a material matter.

47. Paragraph 4 merely recites the obvious, that the Claimant's sentence was over four years (in fact five years) and the exceptions under the Rules cannot apply.

48. Paragraph 5 contends that the Judge erred because he considered the Claimant's private life under paragraph 399A but, according to the Secretary of State, paragraph 399A cannot apply because paragraph 398(b) and paragraph 398(c) are not satisfied.

49. The Secretary of State is right in the sense that paragraph 399A is only to be considered where paragraph 398(b) or 398(c) apply and they do not apply here because paragraph 398(a) applies because this is a person who has been sent to a period of imprisonment of at least four years. If the Judge had allowed the appeal because 399A applied he would have been wrong but he was careful not to do that. He was careful to look for exceptions "over and above" and his findings on 399A do not undermine his findings on the "over and above" argument. The Judge's reference to 399A without some further comment or clarification is a little surprising but it is not a *material* error of law. Indeed paragraph 6 of the grounds notes, correctly, that the Judge went on to consider if there were "very compelling circumstances over and above those described in the Rules such as to outweigh the public interest".

50. Paragraph 7 complains that the starting point should have been that the Claimant could integrate unless he can clearly show that he could not. The Judge is said to have "erroneously diluted the required threshold". He has not. He had noted that the Claimant can hardly speak the language and has no knowledge whatsoever of the country or contacts there. His finding that there were very significant obstacles in the way of integration was clearly open to the Judge and I repeat that is not the reason the appeal was allowed. The Judge looked for more.

51. Paragraph 8 complains that the Judge erred in concluding that the Claimant having witnessed his father's violence and then having been the victim of domestic violence at the hands of his father amounted to very compelling circumstances. That is not what the Judge decided. The very compelling circumstances was the damage done to the Claimant by reason of the violence both seen and experienced. That is different and it was taken cumulatively with other facts.

52. Paragraph 9 complains that the Judge should not have concluded that this is one of those "rare cases" identified by Lord Reed in **Hesham Ali**. The draftsman then makes the observation that it is "indeed surprising how common 'those very rare' cases are". That additional comment is not a proper ground of appeal but an unnecessary and unhelpful observation. Indeed the whole point is immaterial. The Judge clearly decided that this is one of those rare cases. The issue was whether or not he was entitled to do that.

53. I turn now to paragraph 10. This is an assertion that the facts relied on cannot amount to reasons that satisfy the relevant test and, although pleaded with reference to authority the authority does not illuminate the issue in dispute but emphasises the importance of not being persuaded too easily.

54. Grounds 11 and 12 deal with deterrence and social revulsion. These points were fully acknowledged by the Judge and he has made a decision about them. Point 13 reworks the same point. It complains that the Judge did not give adequate weight to the public interest. The most superficial reading of the decision makes it plain that the Judge had in mind the public interest. He resolved the case in the way that he did.

55. Before me Mr Lindsay adopted the grounds of appeal and made oral submissions consistent with them. His essential point was that the facts just do not justify the decision. He also pointed out that the prospects of rehabilitation were possibly not as good as the Judge seemed to think because the risk of reoffending was assessed as medium at the time of discharge from prison.

56. Ms Victor-Mazeli's submissions, predictably and wholly appropriately, were that the material directions were sound and the Judge had reached a decision that was open to him. The Judge had not allowed the appeal because there were very significant obstacles to integration into Colombia but there were such obstacles and that was something the Judge was entitled to bear in mind. There was nothing wrong in that part of the decision. The evidence showed that the Claimant has no links to that country and no more than a smattering of the language although he had demonstrated a willingness to learn but with only partial success.

57. She did make the point that the offending was attributable in part to illness and that had been addressed and illness, although not the cause of the criminal behaviour, was something for which the Claimant should not be blamed and which illuminates the decision as a whole.

58. Although I have endeavoured to go through this case with some care and look in detail at the Judge's decisions certain things are apparent from even a quick reading. The Judge very much had in mind the public interest in deportation and the difficulties that a person has created for himself when he commits criminal offences that attract a sentence of four years' imprisonment or more. The Judge was clearly aware that he could

not allow the appeal unless satisfied that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". The Judge found there were such circumstances and the important one was that he found the criminal offending was caused in part by the appalling ill-treatment he had experienced in the family home.

59. These are certainly, in my experience, unusual circumstances but I recognise that does not, of itself, make them "very compelling".

60. It is not the place of this Tribunal to comment on the length of sentence but it is, I find, open to me to note that there is no reason to think that the sentencing Judge was aware of the post-traumatic stress disorder although it is quite plain that the Judge was well aware of the problems the appellant had faced and found that they did make a difference although the sentence was still one of five years.

61. Having reflected on this and having considered the grounds and Mr Lindsay's submissions I am not persuaded that the Judge misdirected himself or that the directions were not followed or that the decision was perverse. He has explained his decision.

62. He was entitled to reach the decision that he did and therefore I dismiss the Secretary of State's appeal.

Notice of Decision

63. The Secretary of State's appeal is dismissed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 27 January 2020