Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11178/2019
UI-2021-000383

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 14 July 2022	**On 24 August 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

TORAN ALI
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the respondent: No appearance and not legally represented

DECISION AND REASONS

Introduction

1. I shall refer to the parties as they were before the First-tier Tribunal: the Secretary of State is once more "the respondent" and Mr Ali is "the appellant".

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2. This is an appeal by the respondent against the decision of First-tier Tribunal Judge Kinch ("the judge"), promulgated on 22 July 2021 following a hearing on 28 June 2021. By that decision, the judge allowed the appellant's appeal against the respondent's decision, dated 18 June 2019, refusing his human rights claim.

3. The appellant is a citizen of Pakistan born in 1998. He came to the United Kingdom in May 2007 at the age of 9 and has resided in this country ever since. The appellant's father made an asylum claim shortly after the family's arrival. This was refused and the subsequent appeal dismissed in 2010.

4. In April 2015 an application was made for leave to remain on Article 8 private life grounds. This was refused and the appellant lodged an appeal. In April 2016, aged 17, he was arrested for the offences of possession with intent to supply Class A drugs (heroin and crack cocaine) and possession of a Class B drug (cannabis). He was convicted of these offences on 22 November 2016 and, three days later, sentenced to 39 months' detention in a young offender institution. In between the conviction and sentencing, the First-tier Tribunal allowed the appellant's appeal against the refusal of his human rights claim.

5. The 39 month sentence initiated deportation proceedings by the respondent in December 2016.

6. In January 2017, the appellant submitted further representations based on Article 8. Whilst these representations were pending, in October 2018 the appellant was granted leave to remain as a consequence of his appeal having been allowed in November 2016.

7. In June 2019, a deportation order was signed against the appellant. His further representations from 2017 were refused with a right of appeal. The appellant successfully appealed to the First-tier Tribunal in November 2019. However, that decision was set aside by the Upper Tribunal in February 2021 and the appeal remitted to the First-tier Tribunal for a complete re-hearing.

The decision of the First-tier Tribunal

8. The appellant's case on appeal was essentially based on private and family life under Article 8. He had a partner, family members, and lengthy residence in United Kingdom. By contrast, he had no meaningful ties with Pakistan.

9. In a detailed decision, the judge summarised the relevant factual background and the applicable legal framework, including Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"). The analysis and findings run from [29]-[86].

10. In brief summary, the judge concluded as follows:

(a) the appellant's offences were serious, but there were no aggravating features, the offences were committed when the appellant was a minor, and the sentence imposed was below that ordinarily employed: [37];

(b) the respondent had been aware of the appellant's convictions and sentence when she granted him leave to remain in 2018: [38];

(c) (a) and (b) went to reduce the public interest: [37]-[38];

(d) the appellant had not been lawfully resident in United Kingdom for more than half his life: [40];

(e) the appellant was socially and culturally integrated in the United Kingdom: [42]-[48];

(f) there were no very significant obstacles to re-integration into Pakistani society: [49]-[56];

(g) as result of (d)-(f), Exception 1 under section 117C(4) of the 2002 Act was not satisfied;

(h) it would not be unduly harsh for the appellant's partner to relocate to Pakistan: [64]-[69];

(i) it would not be unduly harsh on his partner if they were to be separated: [70]-[72];

(j) as result of (h) and (i), Exception 2 under section 117C(5) of the 2002 Act was not satisfied;

(k) there were very compelling circumstances in the case and therefore section 117C(6) was satisfied and the appeal was allowed on that basis: [73]-[86].

The grounds of appeal and grant of permission

11. The respondent's grounds of appeal all fell under the heading entitled "Failing to give adequate reasons for findings on a material matter/Making a material this direction of law."

12. Paragraph 3 of the grounds stated that:

> "Regard is given to the appellant's age at the date of offending at [37] and the fact that the appellant was of previous good character. It is submitted that these factors do not amount to very compelling circumstances over and above the considerations set out at 399 and 399A of the Immigration Rules…"

13. Paragraph 4 stated:

> "At [74] the [judge] sites the relevant case law in respect to what is meant by very compelling circumstances. However it is submitted that the [judge]

has erred in failing to have adequate regard to the high threshold as established by this case law."

14. Passages from Garzon [2018] EWCA Civ 1225 and Hesham Ali [2016] UKSC 60 were then quoted.

15. Paragraphs 7-9 asserted that the judge had failed to have "adequate regard to the wider public interest, which is not only concerned with the appellant's risk of reoffending."

16. Permission to appeal was refused by the First-tier Tribunal but then granted on renewal. In addition to regarding the grounds as arguable, the Upper Tribunal Judge appeared to raise an additional point, stating that it was arguable that the grant of leave to remain in 2018 was "not rationally capable of supporting the judge's finding [as to the existence of very compelling circumstances]."

The hearing

17. The appellant was in custody. I understand that he was on remand, although I was not provided with any details of why this is the case. He was due to be produced at the Royal Courts of Justice.

18. Prior to the start of the hearing I was informed that the appellant had refused to leave prison and would not therefore be produced. I was not made aware of any specific reason for why he refused to leave. There has been no suggestion that he was, for example, unwell.

19. Mr Tufan urged me to proceed with the hearing in the appellant's absence. I had specific regard to rules 2 and 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I was satisfied that the appellant was aware of the hearing and, in the absence of any explanation for why he had refused to leave prison and the circumstances as a whole, I concluded that it was fair and in the interests of justice to proceed.

20. Mr Tufan relied on the grounds of appeal. He submitted that although the judge had referred to the correct test for the existence of very compelling circumstances, he had not then actually applied the relevant threshold.

21. Mr Tufan accepted that the respondent had not put forward a perversity challenge. He made no application to amend the grounds. For the avoidance of any doubt, even if he had I would have refused that application, given its timing.

22. No additional submissions were made on the wider public interest point raised in the grounds.

23. In respect of the grant of leave to the appellant in 2018, Mr Tufan submitted that this had done no more than give effect to the decision of the First-tier Tribunal, allowing the appeal in 2016.

24. At the end of the hearing I reserved my decision.

Conclusions on error of law

25. Before turning to my analysis of this case I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095, paragraph 19 of which states as follows:

> “19. I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v Secretary of State for the Home Department at [30]:
>
> > "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

26. Following from this, I bear in mind the uncontroversial propositions that the judge’s decision must be read sensibly and holistically and that I am neither requiring every aspect of the evidence to have been addressed, nor that there be reasons for reasons.

27. There is no perversity challenge before me. I make that clear because: (a) certain aspects of the respondent’s grounds appear to come close to an attempt to raise such a challenge by the back door, as it were; and (b) it is incumbent on a party appealing to the Upper Tribunal to state the nature of their challenge in clear terms, identifying the alleged errors and providing the other party with the opportunity to appreciate what they need to address. Procedural rigour is important.

28. The first identifiable point raised in the grounds is at paragraph 3. It is suggested that the judge had regard to the appellant’s age when he offended and the previous good character and then went on to find that

these amounted to very compelling circumstances. That is, in my judgment, a misreading of the decision. First, on a fair reading of what is said at [76], the judge was referring back to his analysis of the Sentencing Remarks at [37]. Those Remarks were relevant. He was not double-counting and indeed the grounds do not assert the contrary. Second, it is clear that the judge did not conclude that the appellant's age and previous good character demonstrated, without more, the existence of very compelling circumstances. They were matters considered by the Sentencing Judge which went into the overall balancing exercise. There is no error here.

29. I regard the point raised in paragraph 4 of the grounds as untenable. At [74], the judge could not have been clearer in his self-direction: "I am mindful that the test for very compelling circumstances is an extremely demanding one." In so saying, he cited Garzon and Hesham Ali. The respondent's case is, in effect, that despite this clear exposition of the applicable threshold, the judge did not go on to do what he has said that he would do. With regard to the points I have made in paragraphs 25 and 26, above, I reject this aspect of the challenge. There is no indication, let alone any clear indication, that the judge failed to in fact apply the "extremely demanding" test which he had referred himself to at the outset of his analysis of the very compelling circumstances issue. There is no error here.

30. The third aspect of the respondent's grounds, relating to the wider public interest, was not elaborated on at the hearing. In any event, there is no error. The judge plainly had regard to the serious nature of the appellant's offences: see, for example, [36]. That passage also contains the clear implication that the nature of the offending (possession and intent to supply drugs) involved issues of deterrence and the public's concern as to the respondent's ability to take action against perpetrators.

31. There is, on the facts of this particular case, a further consideration which the judge was, in my view, entitled to take account of, namely that in the clear knowledge the appellant's offending, conviction and sentence, the respondent nonetheless granted leave to remain in 2018.

32. Mr Tufan submitted that this was simply the implementation of the appeal allowed in 2016; in other words, she had little choice but to grant leave. That argument is misconceived. The authorities show that the respondent is not bound to implement the decision of First-tier Tribunal in all cases. In Ullah [2019] EWCA Civ 550, [2019] Imm AR 1011, the Court of Appeal approved a passage contained in an earlier judgment to the effect that the respondent may decline to implement an allowed appeal where, amongst other considerations, a change in circumstances had occurred after the date of the decision in question (paragraphs 36-39).

33. In the present case there had been an obvious change in the appellant's circumstances: he had been convicted of serious offences (the sentencing occurred a day after the First-tier Tribunal's decision was promulgated). On

the face of it, there was a compelling reason for the respondent not to have granted the appellant leave to remain almost 2 years later. Yet, for whatever reason the grant occurred and no curtailment of that leave followed. It was open to the judge to take this into account as *a* factor in the overall assessment. As he put it at [77]:

> "If the public interest in the appellant's deportation was as significant as the respondent now asserts, one could reasonably have expected the respondent not to have granted him leave to remain in the first place, or to have curtailed it."

34. This factor was relevant to the wider public interest point raised by the respondent now because her own actions appeared to run contrary to deterrence and/or public concern.

35. This particular consideration was, on a sensible reading of the judge's decision, not decisive in any way. It was one of a number which went into the balancing exercise.

36. The foregoing feeds into the issue seemingly raised in the grant of permission. Contrary to the observation of the Upper Tribunal Judge, it was open to the judge to have regard to the grant of leave, albeit one which would not have been capable of entitling the appellant to succeed, without more.

37. In addition, it is, with respect, questionable whether the issue should have been raised at all, in light of the guidance set out in AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC).

38. Even looking beyond the specific points raised in the grounds of appeal, the judge's decision was, in my view, thorough, considered, supported by legally sustainable reasons, and rational. In addition to section 117C, the considerations under section 117B were addressed. The judge specifically stated that he was considering the evidence "as a whole" and "in the round". It is the case that a different judge may have come to a different conclusion, but that is beside the point. There is no proper basis on which I should interfere with the decision.

39. The respondent's appeal to the Upper Tribunal is accordingly dismissed.

40. As mentioned earlier in my decision, the appellant is currently in prison. Depending on the outcome of any criminal proceedings, the respondent may be entitled to look again at the appellant's case, notwithstanding my decision that the judge has not erred in law and that, as matters stand, his decision must be implemented.

Anonymity

41. The First-tier Tribunal made no direction. In the circumstances of this case, there is no basis for a direction to be made at this stage of proceedings.

Notice of Decision

42. **The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.**

43. **The appeal to the Upper Tribunal is dismissed.**

Signed: H Norton-Taylor Date: 18 July 2022

Upper Tribunal Judge Norton-Taylor