IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004214

First-tier Tribunal No: HU/05092/2020

THE IMMIGRATION ACTS

Decision and reasons issued:

28th February 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

SS

Anonymity Direction Made

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Joseph instructed by TMC Solicitors Ltd

For the Respondent: Ms S Rushforth, Home Office Presenting Officer

Heard at Field House on 17 January 2024

DECISION AND REASONS

1. The Secretary of State appealed against the decision of First-tier Tribunal Judge C H O'Rourke ('the judge') who allowed, on 25th April 2023, the appellant's human rights appeal. The appellant had been issued with a notice of deportation. The appellant is a citizen of Bahrain born in 1966 and previously had Indefinite Leave to Remain in the United Kingdom but following his two convictions in the

Magistrates Court, he was sentenced on 17th September 2019 and received two six months sentences of imprisonment for breach in relation to his ex wife of a non molestation order and for an offence against his adult daughter under Section 4 of the Protection of Harassment Act 1997.

2. The appellant's appeal was previously allowed by the First-tier Tribunal ('the FtT') in October 2020 but the Secretary of State successfully appealed and on 26th July 2021 the matter was remitted to the FtT by Upper Tribunal Judge Grubb with some findings preserved. The matter was thus subsequently heard by the judge who also allowed the appeal.

3. A non molestation order in relation to the appellant's ex wife was made in 2019 following the breakdown of his marriage and the appellant subsequently was convicted of the offences listed. He was also made the subject of a restraining order effective to 4th September 2022 preventing him from contacting either his ex-wife or his daughter. His appeal against conviction and sentence to the Crown Court was dismissed.

Grounds for permission to appeal

4. The Secretary of State appealed on the basis that the judge had failed to give adequate reasons for findings on a material mater. At [20] the judge found the appellant was not a foreign criminal as defined by Section 117 of the Nationality, Asylum and Immigration Act 2002 ('the 2002 Act'), because his offences did not cause 'serious harm'. The judge relied on a lack of evidence in relation to the effects on the victims of his actions. The judge however, did not consider the actions that led to the non molestation order in the first place. Moreover the effect on the victims is described as 'serious distress and psychological harm' in the Memorandum of Entry in the Court register. The appellant's actions clearly did cause serious harm to his victims and the judge's findings that they did not was entirely without evidential foundation.

5. The judge proceeded to find the appellant had a family life with his son despite the preserved finding by UTJ Grubb that the appellant did not have a ''parental relationship' with his son. This finding, based on the potential for a relationship with the son, was in the face of the fact that the son did not wish to have a relationship with the appellant.

6. At [14] the judge found the appellant was socially and culturally integrated into the UK on the basis of his length of residence and his relationship with his children but even the appellant's representative accepted that there was a strong public interest in the appellant's deportation [18(viii)]. Section 117C did apply and there was no basis

for finding that exception 1 or 2 applied nor that there were very compelling circumstances such that the appellant's Article 8 rights outweighed the public interest.

Submissions

7. At the hearing Ms Rushforth submitted that the judge in his brief reasoning at [20], when commenting on the lack of evidence from the Crown Court, failed to have regard to Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 350(IAC) particularly headnote 3(d) which held as follows:

(d) Whilst the Secretary of State bears the burden of showing that the offence has caused serious harm, she does not need to adduce evidence from the victim at a hearing before the First-tier Tribunal.

The magistrate court documents were sufficient to demonstrate serious harm and the criticism that these documents were merely pro forma was inadequate and not an adequate reflection of the documents. The finding that there was no physical harm did not reflect [3(f)] of the headnote of Wilson. Emotional harm can be considered as serious as well as physical harm. The judge also found no repetition which was inaccurate as he was convicted on several different dates. If the judge had erred in his assessment of Section 117C then his assessment under article 8 was also flawed. The judge put weight on the ability for the appellant to reconnect with his son in the future but at the date of hearing the appellant had no contact with his son. Even if Section 117C did not apply, the appellant could not meet the immigration rules that is Section 117B and the judge had not considered that aspect.

8. Mr Joseph submitted this was a mere disagreement with the decision. The judge summarised the case law accurately and referred to the Memorandum from the Magistrates Court. The judge quoted extensively from Judge Grubb's decision and directed himself legally appropriately. At [20] the judge gave adequate reasoning. Mr Joseph accepted there were no case papers from the Crown Court as the appellant had sought to challenge the conviction and sentence but had withdrawn his appeal. The judge had not sought to minimise the Memorandum, from the Magistrates Court. Mr Joseph accepted that the appellant was convicted under section 4 of the Protection from Harassment Act 1997 which required repetition in order to constitute an offence because under that Act the appellant needed to put the victim in fear of violence on at least two occasions but that did not amount to serious harm without more. He accepted that the offence against the daughter was the more serious offence.

9. In relation to Article 8, the judge had taken into account the potential for the relationship with the appellant's son to be resumed because the family court had commented that his relationship could change but at the time it was impractical because a restraining order was in place vis a vis the mother. The appellant had attempted to address his behaviour by attending a course.

Conclusions

10. In relation to the definition of 'foreign criminal' under Section 117C of the 2002 Act, the headnote of **Wilson** states as follows:

'(A) section 117D(2)(b)(ii): "caused serious harm"

The current case law on "caused serious harm" for the purposes of the expression "foreign criminal" in Part 5A of the 2002 Act can be summarised as follows:

(1) Whether P's offence is "an offence that has caused serious harm" within section 117D(2)(c)(ii) is a matter for the judge to decide, in all the circumstances, whenever Part 5A falls to be applied.

(2) Provided that the judge has considered all relevant factors bearing on that question; has not had regard to irrelevant factors; and has not reached a perverse decision, there will be no error of law in the judge's conclusion, which, accordingly, cannot be disturbed on appeal.

(3) In determining what factors are relevant or irrelevant, the following should be borne in mind:

(a) The Secretary of State's view of whether the offence has caused serious harm is a starting point;

(b) The sentencing remarks should be carefully considered, as they will often contain valuable information; not least what may be said about the offence having caused "serious harm", as categorised in the Sentencing Council Guidelines;

(c) A victim statement adduced in the criminal proceedings will be relevant;

(d) Whilst the Secretary of State bears the burden of showing that the offence has caused serious harm, she does not need to adduce evidence from the victim at a hearing before the First-tier Tribunal;

(e) The appellant's own evidence to the First-tier Tribunal on the issue of seriousness will usually need to be treated with caution;

(f) Serious harm can involve physical, emotional or economic harm and does not need to be limited to an individual;

(g) The mere potential for harm is irrelevant;

(h) The fact that a particular type of offence contributes to a serious/widespread problem is not sufficient; there must be some evidence that the actual offence has caused serious harm.

11. The judge held at [20] as follows:

'20.The Application of s.117C. I find that s.117C is not engaged in this appeal, as the Appellant does not meet the definition in s.117D(2) as to being a 'foreign criminal', because the offences he has committed did not, I find, cause 'serious harm'. I reach that finding for the following reasons:

(i) There is very little evidence, apart from the brief synopses in the Magistrates' Court record, of the detail of the offences, or their effects upon the victims. As indicated in Wilson, the burden of proof is on the Respondent to show 'serious harm' and there was potential further evidence that could have been adduced, such as the Crown Court appeal judgment, or any statements of the victims provided to the Magistrates' Court. While the Court record does refer to 'serious distress and psychological harm' being caused to both victims, this entire section of the record has a 'pro-forma' feel to its wording (strengthened by the reference to 'persistent nature of offending' in relation to the first offence, when it was clearly not and an irrelevant reference to a 'breach of the non-molestation order' in relation to the offence against the daughter, when there was no such order in respect of her), rather than providing any real insight into the effect upon both women. The offence against his ex-wife was (while still serious) seemingly almost solely related to his breach of the order, rather than any direct effect on her caused by his banging on the door and shouting. There was no question, despite threats, of any actual physical harm to either woman.

(ii) Clearly, had the Magistrates considered that the offences merited
longer sentences, then the matter would have been referred to the
Crown Court.

(iii) There was no repetition of the offences.

(iv) Applying Wilson, 'the mere potential for harm is irrelevant'

12. This was the essence of the reasoning given by the judge.

13. The judge properly directed himself in relation to Wilson and there was no indication that the judge failed to consider the Secretary of State's view that the offences had caused serious harm. The judge identified that it was the respondent that needed to show the appellant had caused serious harm, there was very little evidence and he referred to the Memoranda of Convictions in the Magistrates' courts. He noted that there were no sentencing remarks. As the judge factored in there was what appeared to be a 'pro forma' record of offences in the Memoranda of Convictions for which the appellant received six months sentences to run consecutively.

14. Mr Joseph acknowledged that for the second offence this involved repetition and was the more serious offence but there was almost identical reasoning in both records. The judge clearly noted at [15] Mr Joseph's previous submissions, that the first offence was *'purely due to his breaching of that [non molestation] order'*, when finding this '*seemingly almost solely related to his breach of the order.'* The judge did note the door banging and shouting and threats.

15. In relation to the second offence, as the judge reasoned, the Memorandum of the Magistrates Court and the description of the offence contained only limited information. Crucially as the judge recorded and Mr Joseph pointed out, no victim statements had been provided.

16. Albeit psychological the *detail* of the second offence was not recorded. As the judge identified at 20[(i)) in relation to 'serious harm':

> *'there was very little evidence apart from the brief synopses in the Magistrates' Court record of the detail of the offences or their effects on the victims'.*
>
> *As indicated in Wilson the burden on proof is on the respondent to show 'serious harm'.*

17. Again the judge noted that no information from the Crown Court had been provided and although I acknowledge Ms Rushforth's submission that it was for the appellant to provide this information, as the judge repeated there were no statements of the victims supplied by the

Magistrate's' Court. That evidently was important in the judge's reasoning.

18. As the judge also noted the finding of the Magistrates Court 'pro forma' approach by the judge was bolstered by the reference to the 'persistent nature' in relation to the first offence (breach of a non-molestation order) when, as the judge noted, 'it was clearly not'. Although there was a reference to a non molestation order against the daughter, there was no such order in relation to the daughter as the judge observed.

19. Although the judge referred to their being no actual physical harm to either woman, I consider this to be inelegant phrasing on the judge's part and an addition to his findings on psychological harm. The judge did note the record of 'serious distress and psychological harm' being caused to both victims' on the face of the record and was thus clearly aware that the offences related to psychological harm but was adding, merely by way of addendum and fuller description, that there was no physical harm. As the judge also identified had the Magistrates consider the offences merited longer sentences, that is more serious harm had been inflicted the matter could have been referred to the Crown Courts.

20. The judge had already made his findings in relation to the actual offences by the time of his finding as to potential and although this reference at (20(iii) is unhelpful in relation to the mere 'potential for harm', bearing in mind there clearly had been some harm and the judge recorded the offence against the ex wife as serious in relation to the breach of the non molestation order, that was insufficient in the judge's eyes to constitute serious harm itself and he was entitled so to find.

21. It is clear that the Memoranda are official records of the offences and the detail of the offences given but the assessment of serious harm, taking into account all relevant factors is a finding of fact by the judge and having directed himself properly legally, I consider adequate reasoning was given for finding that the appellant had not caused 'serious harm' or that the offences were serious

22. As such the judge's finding in relation to Section 117C stands.

Article 8

23. Turning to Article 8, permission to appeal was specifically granted on this ground of Article 8 as follows:

> *'1. It is arguable that the evidence before the First-tier Tribunal did not, on any legitimate view, support the*

conclusion that the appellant has a family life in the UK that engages Article 8 ECHR. It was therefore arguably not open to the judge to find, in para. 22, that the appellants' "family life will suffer interference, sufficient to engage Article 8."

2. All grounds are arguable.'

24. The judge noted at [6 (iii) (j)] the findings preserved by UTJ Grubb in his previous decision such that

'(1) if s 117 (Part VA of the 2002 Act) applies to the appeal Exception 1 in Section 117C (4) is not met, but the finding that the appellant is socially and culturally integrated in the UK ' is preserved;

(2) Again if s 117 applies to the appeal, Exception 2 is not met for the reason found by the previous Tribunal.'

25. The judge acknowledged that if Section 117C was not engaged then authorities pre-dating the introduction of that section in 2014 should be considered and which indicated that due weight must be given to the strength of the public interest in the deportation of offenders, Hesham Ali (Iraq) v SSHD [2016] UKSC. That was a proper direction. Such factors such as the seriousness of the offending and future risk were relevant and further, rehabilitation could be a factor in assessing the weight given to the public interests.

26. In relation to private life, it was also noted that the appellant was considered 'socially and culturally integrated in the UK' at least for the purposes of Section 117C(4)(c), albeit Section 117C was not engaged.

27. In relation to family life, although the previous First-tier Tribunal did not find that the appellant had a genuine and subsisting parental relationship, that finding was not binding on the judge (as is clear from the preserved findings of Judge Grubb) and the judge made his own assessment of the relationship. I note, there was no discussion at the previous FtT that the appellant did not have family life with his son for the purposes of Article 8 and I note that the refusal letter from the Secretary of State proceeded on the basis that he did.

28. That is different from a genuine and subsisting parental relationship and does not appear to be a matter raised by way of challenge until the grounds of appeal. The judge recorded at [10] to [15] undisputed facts such that the appellant had lived in the UK for 32 years and he is the father of two British citizen children. At [15] the judge recorded that the appellant wished to have contact with his son and he applied

to the family court for such contact in November 2021. Although it was ordered that he have no further contact with his son and there be no further application permitted before 1st January 2025 without the permission of the court, there was an exception such that if he were able to evidence successful regular and consistent attendance at an accredited Behavioural Management course he would be permitted to make a further application by no later than 31st December 2022.

29. Although tenuous as far as a parental relationship, it is clear that the appellant has a biological relationship with a minor son and has initiated court proceedings in order to pursue his contact with his son. The judge proceeded on the basis that the appellant had family life when this was now specifically disputed by the respondent.

30. However in the European Court of Human Rights, Ahmut V Netherlands (Application no. 21702/93) at [60] it was held as follows

> ***'A. Whether the bond between the applicants amounted to "family life"***
>
> *As the Court has frequently held, it follows from the concept of family on which Article 8 (art. 8) is based that a child born of a marital union is ipso iure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life" (see, as a recent authority, the Gül v. Switzerland judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, pp. 173-74, para. 32), which subsequent events cannot break save in exceptional circumstances.*
>
> *It was not suggested that any such exceptional circumstances were present in this case. The existence of "family life" between the applicants is therefore established.'*

31. Although it was asserted in submissions before the judge that there was no family life with the son, in the light of the refusal letter which I reference above and the absence of an exceptional circumstances put forward by the respondent, I find that the judge's omission in considering whether there was family life was not a material error of law. It is clear that the appellant was formerly engaged in court proceedings and could renew the application by 1st January 2025.

32. The judge proceeded to make a balanced assessment in relation to the proportionality assessment having directed himself appropriately at [27]:

'I consider that the balance falls in favour of the Appellant in this case. In particular, the isolated nature of the offences, the relatively low sentences and the low risk of re-offending, when considered against the overall worthwhile and lengthy life he has accrued in UK, as well as, at least, the potential of restoring or maintaining his family life, outweigh the public interest in his deportation. The Appellant should, of course, be under no illusion that if, however, he fails, through his own fault, to restore family life, or commits further offences, then, in any future such exercise the public interest is very likely to outweigh his. Accordingly, therefore, I find that interference with the Appellant's family life would be disproportionate.'

33. Although Ms Rushforth submitted that the judge, in the event Section 117C did not apply, failed to address Section 117B, that is not evident from reading the decision. For example at [26(iii)(c)] the judge found the appellant to be *'socially and culturally integrated in the UK, where he has now spent more than half his life and speaks English*.' The reference to his language clearly references Section 117B.

34. Overall the judge made balanced findings of fact and **Volpi v Volpi** [2022] EWCA Civ 464 confirms at 2(i) that '*An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong'*.

35. The judge may have been generous in his findings but was not plainly wrong and did adequately reason his decision.

Notice of decision

I find no material errors of law. The decision of the First-tier Tribunal stands and the appellant's appeal remains allowed.

Helen Rimington
Judge of the Upper Tribunal Rimington

Immigration and Asylum Chamber

Signed
23rd February 2024