IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000491

First-tier Tribunal No: EA/01411/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 15th of October 2024

Before

UPPER TRIBUNAL JUDGE LODATO

Between

Secretary of State for the Home Department

Appellant

and

Zulquarnain Rafique
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr McVeety, Senior Presenting Officer
For the Respondent: Mr Slatter, counsel

Heard at Field House on 4 October 2024

DECISION AND REASONS

Introduction

1. The Secretary of State for the Home Department, appeals, with permission, against the decision of First-tier Tribunal Judge Cole ('the judge'), dated 29 December 2023, to allow the appellant's appeal on human rights grounds in the context of a decision to deport him.

2. To avoid confusion, I will refer to the respondent in this appeal, Mr Rafique, as the appellant, and the appellant, the Secretary of State, as the respondent as they were before the First-tier Tribunal.

Background

3. The factual and procedural background to the appeal proceedings was not in dispute between the parties and was set out by the judge at [4]-[10] of his decision. In short, he was granted indefinite leave to remain in the UK under the EU Settlement Scheme having previously obtained permanent residence in 2011.

4. On 10 February 2022, the appellant was convicted of attempting to cause a girl under the age of 16 to engage in sexual activity in September 2019. He was sentenced on 18 March 2022 to a period of imprisonment of 12 months suspended for 24 months. He was made the subject of a Sexual Harm Prevention Order ('SHPO') and required to comply with the requirements of the Sex Offender Register for 10 years. On 30 November 2022, the appellant was convicted of 12 counts of breaching the SHPO and one count of failing to comply with his notification requirements. He was sentenced to a total of eight months imprisonment for these matters. In committing these further offences, the appellant breached his suspended sentence which attracted a further consecutive sentence of four months imprisonment. The activation of the suspended sentence was ordered to run consecutively to the substantive offences resulting in a total sentence of 12 months imprisonment.

Appeal to First-tier Tribunal

5. As can be from the decision of the judge, at [3], the appeal before him was initially brought on the ground that the decision to deport the appellant breached his rights under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. However, the respondent did not seek to rely on any of the appellant's offending conduct which pre-dated the UK's final withdrawal from the EU on 31 December 2020. Consent was given for the tribunal to consider the new matter of the appellant's human rights ground of appeal against the decision to remove him from the UK. At [18], the judge confirmed the position adopted by the respondent that the only issue to be resolved was the human rights ground of appeal and whether the decision to deport the appellant breached his Article 8 rights. The appeal proceeded exclusively by applying the domestic (rather than the European) legal framework. The judge recorded, at [23], that the foundation for the respondent's decision to deport the appellant was that he had, by his criminal conduct which post-dated 31 December 2020, caused serious harm. It was further noted, at [44], that the respondent had not suggested that the appellant was a persistent offender.

6. Between [33] and [49], the judge examined the respondent's exercise of discretion to conclude that the appellant's deportation was conducive to the public good through the lens of s.3(5) of the Immigration Act 1971 and the applicable policy guidance. The judge noted errors in how the respondent approached the relevant underlying criminality, at [40]-[42]. The judge found, at [46], that the respondent was wrong to conclude that the appellant had caused serious harm by the offending which post-dated 31 December 2020. While this conclusion was considered to be sufficient to dispose of the appeal, the judge was clear, at [49], that he would fully assess the human rights representations.

7. In addressing his mind to the legal scheme contained within s.117 of the Nationality, Immigration and Asylum Act 2002, the judge returned to the all-important issue of whether the appellant had caused serious harm by his post-2020 offending. The considerations identified in Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 00350 provided the structure for the analysis between [53] and [59]:

The leading case on this issue is Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 00350.

I acknowledge that the Respondent's view of whether the offence has caused serious harm is the starting point and deserves respect. However, the Respondent does not express any view in the decision and Mr Ogbewe's submissions were limited to him stating that the Appellant was convicted of a serious offence, which is not the same as detailing the serious harm caused by the offence.

The Respondent bears the burden of showing that the offence caused serious harm.

In Wilson it is stated that "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;"

In this case the Judge's Sentencing Remarks state the following:

> *"Whilst I appreciate the basis for which the Crown contend that this is category 2 harm, in reality, on the evidence before me there is no evidence that your activity in entering those websites in fact caused harm to anyone. Of course, there is the risk of future harm should that have gone unchecked, but that is not the situation."*

Therefore, it is clear that the Appellant's offending did not in fact cause any actual harm, let alone serious harm. The case law makes it clear that the mere potential for harm is irrelevant. Also, the fact that a particular type of offence contributes to a serious or widespread problem is not sufficient; there must be some evidence that the actual offence has caused serious harm.

Therefore, I find that it is clear that the Respondent has failed to adduce sufficient evidence to demonstrate that the Appellant's offending has caused serious harm. I find that the evidence overwhelmingly demonstrates that the Appellant has not been convicted of an offence that caused serious harm.

Therefore, the Appellant does not meet the definition of "foreign criminal" in s117D(2) of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration 2014).

8. In detailed findings between [61] and [96], the judge assessed whether the requirements of the private life exception of s.117C were met and undertook a broader proportionality balancing exercise. It was determined that the appellant met all of the requirements of the statutory private life exception and that his removal would amount to very compelling circumstances such that his private interests outweighed the public interest in his removal. In this context, the judge considered the risk of harm posed by the appellant including the sheer number of occasions on which he had breached his SHPO (see [89]-[92]).

Appeal to the Upper Tribunal

9. The respondent sought permission to appeal against Judge Cole's decision on three grounds. Firstly, it was argued that he had misdirected himself in law by looking only at the sentence imposed rather than the underlying seriousness of his offending. It was further argued under this ground that it was "self-evident" that the appellant was a persistent offender and that the judge lost sight of the need to consider the risk of reoffending in the assessment of seriousness. Secondly and thirdly, and as alternatives to ground one, it was contended that the judge had given inadequate reasons in support of his findings that the private life exception was met and that there were very compelling circumstances which outweighed the public interest in his deportation.
10. In a brief decision dated 8 February 2024, permission was granted by First-tier Tribunal Judge Boyes.

11. The matter came before me at an error of law hearing on 4 October 2024. Mr McVeety clarified that the respondent would not seek to pursue grounds two and three if I dismissed the appeal on ground one. I heard oral submissions from Mr Slatter on behalf of the appellant.

Discussion

12. The parties spoke as one in confirming that the decisive issue to be resolved in this appeal against the judge's decision was whether he misdirected himself in law in how he approached the question of whether the appellant had caused serious harm by his post-2020 criminal conduct. To resolve this issue, it is necessary to set out the key statutory provisions and the relevant passages of Wilson which drew together the guidance provided in the leading authorities.

13. Section 3(5) of the 1971 Act provides as follows:

> *(5)A person who is not a British citizen is liable to deportation from the United Kingdom if—*
> *(a)the Secretary of State deems his deportation to be conducive to the public good; or*
> […]

14. Section 117C and 117D of the 2002 Act provide as follows where relevant to ground one:

> ***117C Article 8: additional considerations in cases involving foreign criminals***
> *(1) The deportation of foreign criminals is in the public interest.*
> *(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.*
> *(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.*
> […]
>
> ***117D Interpretation of this Part***
> […]
> *(2) In this Part, "foreign criminal" means a person—*

(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who—
(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender.

[…]

15. At [31] of Wilson, the Presidential panel cited [39]-[42] of the judgment of McCombe LJ in R (Mahmood) v Upper Tribunal (Immigration and Asylum Chamber) [2020] Q.B. 1113. Paragraphs 39 and 41 are particularly germane:

> *So far as the word 'caused' is concerned, the harm must plainly be causatively linked to the offence. In the case of an offence of violence, injury will be caused to the immediate victim and possibly others. However, what matters is the harm caused by the particular offence. The prevalence of (even minor) offending may cause serious harm to society, but that does not mean that an individual offence considered in isolation has done so.* […]
>
> *Mr Biggs argued on behalf of Mahmood that the harm must be physical or psychological harm to an identifiable individual that is identifiable and quantifiable. We see no good reason for interpreting the provision in this way. The criminal law is designed to prevent harm that may include psychological, emotional or economic harm. Nor is there good reason to suppose a statutory intent to limit the harm to an individual. Some crimes, for example, supplying class A drugs, money laundering, possession of firearms, cybercrimes, perjury and perverting the course of public justice may cause societal harm. In most cases the nature of the harm will be apparent from the nature of the offence itself, the sentencing remarks or from victim statements. However, we agree with Mr Biggs, at least to this extent: harm in this context does not include the potential for harm or an intention to do harm. Where there is a conviction for a serious attempt offence, it is likely that the sentence will be more than 12 months.*

16. In summarising the approach to be taken by the Upper Tribunal considering challenges of this nature, the following observation were made, at [53(1)-(2)] by the panel in Wilson:

> *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.*
>
> *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.*

17. Reiterating the points made in Mahmood, the panel in Wilson said this at [53(j)-(h)]:

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

The mere potential for harm is irrelevant;

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.

18. The central thrust of the respondent's argument on ground one was that the judge did not properly address his mind to the number of breaches of the restrictions imposed on him to protect the public from sexual harm. It was further argued that the nature of the breaches, namely, accessing websites which might attract underage girls only underscored the seriousness of what he might have had in mind when repeatedly flouting the terms of his SHPO.

19. The difficulty with these arguments were that they were directed to entirely different considerations of persistency of the appellant's offending and broad seriousness whereas the judge was concerned with the different question of whether the appellant had caused serious harm. The authorities which the judge plainly had in mind could scarcely be clearer that he was right to focus on the assessment of any harm occasioned by the particular offending. The judge found that there was no evidence to indicate that the appellant had caused any harm whatsoever by repeatedly breaching the SHPO in the way he did. At its highest, the respondent's case is that the appellant was unlawfully placing himself in online spaces where he might well have the opportunity to commit just the kind of offences which led to the SHPO in the first place. It is difficult to see how the judge could have seen this in any way other way than an argument directed to potential harm. The legal scheme required the judge to assess whether the appellant had caused harm, not whether he might do in the future.

20. The persistency argument was equally flawed in that the respondent simply never advanced her case on the footing that the appellant was a persistent offender to bring him within s.117D(2) of the 2002 Act. In those circumstances, it is hardly surprising that the judge did not consider this as an issue for him to determine. The suggestion in the grounds, that this was self-evident on the facts, is exceptionally difficult to reconcile with the reality that it was not so obvious that the respondent's presenting officer took the point at the hearing before the judge.

21. Reminding myself of the guidance in Wilson, the fact-finding decision of a specialist tribunal is deserving of respect and should not be lightly disturbed on appeal. I discern nothing which might amount to a misdirection in law. On the contrary, the judge was plainly correct to assess whether any actual harm had been caused by the offending, as opposed to irrelevant potential harm. Persistency was not relied upon as a basis to suggest that the appellant was a foreign criminal within the statutory legal scheme and it was not unlawful for the judge to only deal with the issues raised before him in accordance with recent guidance (see TC (PS compliance, "issues-based" reasoning) [2023] UKUT 00164 and Lata (FtT: principal controversial issues) [2023] UKUT 00163).

22. Given my conclusion that ground one does not reveal an error of law, and Mr McVeety's concession that the other grounds must therefore fall away as academic, I dismiss the appeal.

Notice of Decision

I find that the decision of Judge Cole did not involve an error of law. I dismiss the appeal brought by the Secretary of State and the original decision stands.

Paul Lodato

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 October 2024