Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00377/2017

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 11 August 2017	**On 17 August 2017**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

JA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mohzam, instructed by Burton & Burton Solicitors
For the Respondent: Mr Mills, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, JA, was born in May 1982 and is a citizen of Afghanistan. By a decision dated 19 December 2016, the respondent decided to refuse the appellant's asylum and human rights claim and to refuse to revoke a

deportation order made in respect of the appellant under Section 32(5) of the UK Borders Act 2007. On 8 April 2015, the appellant had been sentenced to 15 months' imprisonment for a sexual offence and had been recommended by the trial judge for deportation. The appellant appealed to the First-tier Tribunal (Judge Ghani) which, in a decision promulgated on 2 May 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Judge Froom, who considered the permission application in the First-tier Tribunal, did not grant permission on all grounds. He considered that grounds 1 and 2 were not arguable. These grounds concerned the appellant's asylum and Articles 2/3 ECHR appeals. Permission was granted only in respect of the remaining ground of appeal concerning Article 8 ECHR. Judge Froom wrote:

> The respondent accepted that the appellant has a subsisting relationship with a British spouse. The First-tier Tribunal Judge assessed her circumstances in terms of whether there were very compelling circumstances but he does not address Exception 2 in Section 117C(5) of the 2002 Act [as amended] which poses the question of whether the appellant's deportation would be unduly harsh on her.

3. Judge Ghani considered the appellant's circumstances by reference to paragraph 399(b) of HC 395:

> b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
>
> (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
>
> (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
>
> (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported".

4. He correctly concluded [52] that the appellant's case did not fall for consideration under paragraph 399(b) because the appellant had not formed his relationship with his wife at a time when he had been in the United Kingdom lawfully and whilst his immigration status was not precarious. As Judge Ghani observed, "[the appellant] has never been granted any form of valid leave to remain. He therefore cannot meet the requirements". The appellant complains that the judge failed in addition to consider Section 117C of the 2002 Act (as amended):

> 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.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

5. The appellant's case falls for consideration under 117C(3) because he had been sentenced to imprisonment of less than four years. It is not argued by the appellant that Exception 1 applies to him but it is claimed that Exception 2 should have been applied. The respondent, as noted above, accepts that the appellant has a subsisting relationship with a British spouse.

6. What Judge Ghani did do at [52] is to consider whether or not there were "very compelling circumstances" to indicate that the appellant should not be deported. The current position is summarised by the Court of Appeal in its judgment of *NE–A (Nigeria)* [2017] EWCA Civ 239 at [15]:

> "None of this is problematic for the proper application of Article 8. That a requirement of "very compelling circumstances" in order to outweigh the public interest in the deportation of foreign criminals sentenced to at least four years' imprisonment is compatible with Article 8 was accepted in MF (Nigeria) and in Hesham Ali itself. Of course, the provision to that effect in section 117C(6) must not be applied as if it contained some abstract statutory formula. The context is that of the balancing exercise under Article 8, and the "very compelling circumstances" required are circumstances sufficient to outweigh the strong public interest in the deportation of the foreign criminals concerned. Provided that a tribunal has that context in

> mind, however, a finding that "very compelling circumstances" do not exist in a case to which section 117C(6) applies will produce a final result, compatible with Article 8, that the public interest requires deportation. There is no room for any additional element in the proportionality balancing exercise under Article 8."

7. I note that in *NE-A*, the Court of Appeal was considering an appeal to which Section 117C(6) applied rather than sub-section (5) as in the present case.

8. The question before the Tribunal was summarised by Mr Mills as follows: by considering whether or not there existed "very compelling circumstances" did Judge Ghani consider all the relevant circumstances and make the necessary findings which he would have made had he also considered whether the effect of the appellant's deportation on his British spouse would be unduly harsh? Mr Mohzam submitted that the paragraph of the decision [52] in which Judge Ghani considers the relevant circumstances was intended by him to deal with the appellant's private life only. Mr Mills submitted that the paragraph departs after a few sentences from a consideration of the appellant's private life only to consider the wider issues including his relationship with his wife. I agree with Mr Mills. The paragraph begins with the words "as far as the appellant's private life is concerned ..." but quickly moves on to consideration of the appellant's relationship with his wife and her medical condition. Judge Ghani wrote, "the appellant relies on the medical condition of his wife and maintains that these circumstances are so compelling on the basis of which he should not be deported". Indeed, looking at the evidence and the submissions which had been put before the First-tier Tribunal, it is clear that it was argued that the most significant negative impact of the appellant's deportation upon his wife related to her medical condition and the reliance which she placed upon him for care. Judge Ghani discusses the medical evidence concerning the wife at length at [52]. He noted that the limited evidence showed that the appellant had no obvious abnormality in her hips but that in November 2016 she claimed that she had pains in her face and head. The appellant's wife claimed to have problems sleeping and that she had become depressed as a result. She had suffered a nervous breakdown in 2000 and had been diagnosed with bipolar disorder. However, Judge Ghani noted that, "regrettably, there is no medical report as such to outline the appellant's wife's various ailments and their impact on her day-to-day living". The judge recorded that the wife had indicated that it would be "very difficult" for her to go and live in Afghanistan with the appellant because she could not speak the language and because of these "health issues". Judge Ghani concluded that there was

> "... no evidence to suggest that without the appellant's presence, his spouse will not be able to receive care from the medical professionals and/or her local authority. She also has a sister in the UK. On the evidence before me I find that the appellant has not been able to show that there are very compelling circumstances which should prevent his deportation resulting

from the sentence of 27 months for attempt – adult meet girl under 16 following sexual grooming (*sic*)."

9. As the Court of Appeal stated in *NE–A* at [14], Section 117C "contains more than a statement of policy to which regard must be had as a relevant consideration". The statutory provisions are provisions "to which the Tribunal is bound by law to give effect". To that extent, it is apparent that Judge Ghani erred by failing to include in his analysis a consideration of Section 117C(5). The remaining question is whetherm having identified an error of law, I should exercise my discretion not to set aside the decision. I have concluded that I should exercise that discretion and I will not set aside Judge Ghani's decision notwithstanding his error of law. I shall not do so for the following reasons. First, I find that the judge's analysis in respect of "very compelling circumstances" is sound in law. Secondly, I agree with Mr Mills that there exists, on the facts of this case, little, if any, "gap" between the "very compelling circumstances" analysis and that which would have been required to determine whether the impact on the wife would be unduly harsh. Thirdly, I find that, by carrying out a thorough analysis of the facts, the judge has substantially dealt with those matters which had been advanced by the appellant and his wife as reasons why she would be unable to cope if he were deported. Those reasons were essentially connected with the wife's medical condition; no other reasons were given concerning the wife in the evidence before the Tribunal. The judge has considered the reasons advanced by the appellant and his wife for not separating the couple by deportation and he has rejected them. His rejection is not perverse on the facts; it is soundly reasoned. Had the judge gone on in his decision to consider whether the impact of the appellant's deportation on the wife would be unduly harsh, he would have been going over ground which he had already covered, namely the wife's medical condition. Indeed, I do not consider that the judge would have erred had he added a further paragraph to his decision dealing with "undue harshness" and had simply rejected the appellant's case by reference to paragraph [52] from the analysis which he had already carried out. Any further analysis, given the facts and the case advanced by the appellant, would have been nugatory.

10. For the reasons I have given, I find that the appellant's appeal should be dismissed.

Notice of Decision

11. This appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant 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. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 16 August 2017
Upper Tribunal Judge Clive Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 16 August 2017

Upper Tribunal Judge Clive Lane