Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06052/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Tuesday 24 April 2018	**On Friday 27 April 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AAL
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Ms J Fisher, Counsel instructed by Sterling Lawyers Ltd

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal on 4 December 2017. Although the reason behind that order does not there appear, I did not hear any submissions about whether it would be appropriate to discharge that order and I therefore continue it.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-tier Tribunal albeit

that the Secretary of State is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-tier Tribunal Judge Cockrill promulgated on 28 February 2018 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 22 March 2017 giving him notice of her intention to deport him to New Zealand.

2. The deportation order is made under section 3(5)(a) Immigration Act 1971 on the basis that the Appellant's deportation is conducive to the public good. The Respondent relies on the Appellant having caused serious harm by his offending. However, the Respondent also refused the Appellant's human rights claim by decision dated 12 April 2017. For the reasons which I have set out below, that is in fact the Respondent's decision under appeal.

3. The Appellant is a national of New Zealand. He came to the UK on 9 June 2015 with a Tier 5 Youth Mobility Migrant Visa valid to 9 June 2017. On 13 February 2017, the Appellant was convicted on five counts of committing an act outraging public decency by behaving in an indecent manner. The offences involved the Appellant taking video footage under women's skirts whilst travelling on the London Underground system. The offences involved ten videos taken on six separate dates on 15 July 2016, 7, 15, 16 and 24 August 2016 and 1 September 2016. The Appellant was arrested on 18 October 2016. There is no evidence that any of those women who were the targets of the filming were aware of it and it cannot be said that they were harmed physically or emotionally by those offences.

4. The Appellant was sentenced to a period of sixteen weeks' imprisonment which was reduced on appeal to eight weeks. He pleaded guilty to the offences and was found to be at low risk of harm to others but a medium risk to women in a limited way. A psychologist's report before the First-tier Tribunal Judge also indicated that the Appellant was later assessed as a low risk.

5. The Appellant made a voluntary departure on 21 April 2017, his human rights claim having been refused and certified under section 94B Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). He now resides in Australia where he works. He says that the making of the deportation order will have an adverse effect on him because he travels on business with his work and may be denied entry to other countries for that reason. He also says that the order will amount to a lifelong ban preventing his return to the UK for work in the future although he does not express any immediate plans to return here.

6. The Judge allowed the appeal finding that the Respondent did not show that the Appellant's offending had caused serious harm. I was told by Ms Fisher that the Respondent expressly conceded at the First-tier Tribunal hearing that she did not rely on the Appellant being a persistent offender. Based on findings made at [45] to [48] of the Decision, the Judge found that the criteria set out at paragraph 398C

of the Immigration Rules ("the Rules") were not made out on the facts. He went on to reach the decision that "[t]he appeal in respect of the making of the Deportation Order (Immigration Act 1971) is allowed".

7. The Respondent appealed on two grounds:-

(a) Although no physical harm took place, the Judge could not know with any certainty that no psychological harm occurred since he could not know whether the victims had become aware of the filming;

(b) The imposition of a custodial sentence permitted the presumption that a serious offence had been committed, the nature of the offending suggested that the Appellant did not respect social values and therefore the offences met the criteria of causing serious harm.

8. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 21 March 2018 in the following terms so far as relevant:-

"…[2] It is arguable that the judge has made a material error of law in finding that the appellant's offences do not constitute serious harm…."

9. The appeal comes before me to determine whether there is a material error of law in the Decision and if so either to re-make the decision or to remit to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

Error of law

10. If the only point for me to consider was whether the Judge erred in relation to his findings on the application of section 3(5)(a) and the application of the Rules in relation to deportation, I would have had no hesitation in finding that there was no error of law in the Decision. Although whether an offence "has caused serious harm" may incorporate not only physical and psychological harm to the victim(s) of the offence and may include harm caused to the wider community, the Judge has taken that aspect into account at [48] of the Decision.

11. However, at the outset of the hearing, I identified a more fundamental error of law than that identified by the Respondent in the grounds or in the grant of permission. This issue goes to the heart of the jurisdiction of the Tribunal Judge to make the Decision.

12. It is implicit in the "Notice of Decision" that the appeal was allowed on the basis that it was not in accordance with the law or the Rules. It is said that the appeal against the deportation order made under the Immigration Act 1971 is allowed. That this is the decision which the Judge thought was under appeal is reinforced by the Judge's comment at [49] of the Decision that it was "unnecessary ..to go into the

detailed analysis of the human rights aspect of the case because I conclude that the test of serious harm is simply not met on the facts of this Appellant's case."

13. Mr Duffy confirmed that the appeal is one under the provisions in section 82 of the 2002 Act following amendment by the Immigration Act 2014. As such, the only decision which could be under challenge in this case is the decision to refuse the Appellant's human rights claim. That could only be appealed on the basis that "the decision" (ie the decision to refuse the human rights claim) is unlawful under section 6 Human Rights Act 1998. Ms Fisher did not dissent from that proposition.

14. In this regard, although in discussions at the hearing, I was initially minded to accept that I could consider the notice of intention to deport as being "the decision" which is said to be unlawful in human rights terms, on reflection and further consideration of the appeal provisions, I do not think that this is a sustainable interpretation. Section 82(1) of the 2002 Act sets out the decisions which may be appealed which include only (in this context) that the Respondent has decided to refuse a human rights claim and at section 84 that the decision breaches the Human Rights Act. That can only mean the decision to which section 82 refers and therefore the decision to refuse the human rights claim. That is therefore the only decision under appeal. Any challenge to the lawfulness of the making of the deportation order itself would now have to proceed by way of a judicial review challenge.

15. Furthermore, "human rights claim" is defined by section 113 of the 2002 Act as meaning "a claim made by a person to remove him from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom". Although the Appellant has already left, he has done so following certification under section 94B of the 2002 Act and to that extent I can still consider whether the Appellant's removal is disproportionate. However, as I observed at the hearing, it is difficult to see how the Appellant could complain about removal from the United Kingdom (as distinct from his deportation) because he only had limited leave the basis of which has now expired. He is not seeking to re-enter. Although he has been required to leave the UK, the Appellant would struggle to say that he could not be removed consistently with his Article 8 rights. His complaint is that he is being kept out of the UK by the deportation order (or probably more accurately at this point in time that the existence of that order will prevent him travelling to other countries).

16. It follows from the foregoing, that the Judge has erred by starting and ending his consideration of the issues with the lawfulness of the deportation order. He has not gone on to consider what is the effect of his finding that the Appellant does not meet the criteria for deportation. He has not considered the only issue which was for him

to determine namely whether the decision to remove the Appellant or require him to leave breaches his human rights.

17. Although the Respondent did not appeal on this ground, the error is a "Robinson" obvious one. Although I accept also that the error was not identified in the grant of permission to appeal, if there is an error in the exercise of the Tribunal's jurisdiction, that goes to the heart of the validity of the Decision. For that reason, the Decision cannot stand. The error of law is material because the Tribunal has exceeded its jurisdiction in the making of the Decision for the reasons underpinning the Decision. I therefore set the Decision aside.

Re-making of the decision

18. The starting point for consideration of the Article 8 claim is the making of the deportation order. The Appellant does not satisfy the criteria for automatic deportation due to the length of his sentence. The power to make the deportation order is therefore exercised under section 3(5)(a) Immigration Act 1971. That is on the basis that "the Secretary of State deems his deportation to be conducive to the public good". That is a wide provision and has to be read also in the context of the Rules which apply to the practice of applying the legislative power and relevant policies of the Secretary of State.

19. The relevant starting point in the Rules is paragraph 398(c) which provides that:-

> "(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

20. Ms Fisher submitted that the Judge's findings at [45] to [48] concerning whether the offending has caused serious harm are without error and should be adopted. She also pointed out that the Respondent conceded at the First-tier Tribunal hearing that she does not rely on an assertion that the Appellant is a persistent offender.

21. Mr Duffy unsurprisingly submitted that the Judge's findings were in error for the reasons set out in the grounds of appeal. He pointed out that section 3(5)(a) Immigration Act 1971 represents the Secretary of State's view that the Appellant's deportation is conducive to the public good which should be given weight. He pointed out that in a "non-conducive" deportation case, the offence is always likely to be at the lower end of the scale because the sentence is likely to be below twelve months as otherwise the automatic deportation provisions would normally apply.

22. Mr Duffy also referred to the case of Chege ("is a persistent offender") [2016] UKUT 187 (IAC). Ms Fisher objected to this submission based on the Respondent's concession. It is recorded at [12] of the Decision that the Secretary of State does not argue that the Appellant is a persistent offender. The Respondent in her refusal of the human rights claim relies only on the Appellant having caused serious harm. The Respondent's grounds do not suggest that the Judge misunderstood her case in relation to the grounds for deportation. Accordingly, I proceed on the basis that the only issue is whether the Appellant's offending caused serious harm.

23. As the decision maker observes in the Respondent's refusal of the human rights claim, paragraph 398 is the relevant section of the Rules which set out the practice to be followed by officials considering deportation action against an individual. Whilst I recognise therefore the force of Mr Duffy's argument that the context of the deportation in this case is the Secretary of State's view that deportation of the Appellant is conducive to the public good, as Ms Fisher pointed out, that has to be considered in the context of the Respondent's policy and practice which sets out when such action is appropriate. It also has to be considered based on the wording of the relevant rule (as set out above).

24. The Respondent's guidance concerning the deportation of non-EEA foreign nationals appears in Immigration Directorate Instructions, Version 3.1 dated April 2015 and, so far as relevant to this appeal states as follows [(3.1) and (3.2)] :-

> "3.1 Introduction
> Section 3(5) of the Immigration Act 1971 allows the Secretary of State to deport individuals where their presence in the UK is not conducive to the public good. This gives the Secretary of State discretion to act in a way that reflects the public interest. Evidence of serious or persistent criminality must be proved to the immigration (balance of probabilities) rather than criminal (beyond reasonable doubt) standard.
> .....
> 3.2 How to consider if deportation is appropriate
> A non-EEA foreign national will normally be considered for deportation pursuant to the Immigration Act 1971 if they do not meet the criteria for deportation under the UK Borders Act 2007…but they have been involved in criminal activity in the UK…and meet one of the criteria below:
>
> .....
>
> - The non EEA foreign national has been sentenced to less than 12 months' imprisonment, but the Secretary of State considers that the offending has caused serious harm either in the UK or another country;

25. Cross-reference is made in that guidance to further policy guidance entitled "Criminality: Article 8 ECHR cases" (version 6.0 dated 22 February 2017) which makes the following relevant points at page [7]:-

> "Serious harm

> It is at the discretion of the Secretary of State whether she considers an offence to have caused serious harm.
> An offence that has caused 'serious harm' means an offence that has caused serious physical or psychological harm to a victim or victims, or that has contributed to a widespread problem that causes serious harm to a community or to society in general.
> The foreign national does not have to have been convicted in relation to serious harm which followed from their offence. For example, they may fit within this provision if they are convicted of a lesser offence because it cannot be proved beyond reasonable doubt that they were guilty of a separate offence in relation to the serious harm which resulted from their actions.
> Where a person has been convicted of one or more violent, drugs or sex offences, they will usually be considered to have been convicted of an offence that has caused serious harm."_

26. There is no indication that any of the Appellant's victims were aware that their privacy was being invaded by his actions or indeed that they were victims at all. It cannot be said that the Appellant caused them either physical or psychological harm by his actions.

27. Whilst what the Appellant's behaviour was, as the Judge said at [45], "lewd and indecent", it does not, in my estimation, fall into the category of offending which can be said to have caused serious harm on any wider definition. The Respondent's policy refers in this regard to the offending having contributed to a widespread problem causing serious harm to the community or to society. There is no evidential basis for such a view. The question whether the offending "has caused serious harm" involves both that the conduct "cause harm" and that the harm is "serious". Public affront to a course of offending as being contrary to societal norms does not denote that the offending has caused harm. Furthermore, the issue is not whether the offending "might cause harm" or that it "could reasonably be expected to cause harm". There is no reference whether in the rule or the policy guidance to the offending causing public revulsion or requiring deterrence as reason for finding that it "has caused serious harm" The question is only whether it has caused such harm.

28. For those reasons and based also on the findings of the Judge at [45] to [48] of the Decision (which I adopt as disclosing no error of law), the criteria in paragraph 398(c) are not met in the circumstances of this case. That rule does not therefore apply. It follows that the Appellant is not someone to whom deportation powers apply. It follows that I do not need to go on to consider whether the Appellant is someone whose private and family life is disproportionately affected by the decision to deport him (applying paragraphs 399 and 399A).

29. That though is not the end of the matter. The issue for me is whether the Appellant's removal or the requirement for him to leave is a breach of his human rights.

30. It does not appear to be suggested that the Appellant can meet the Rules based on his private life or family life. It is not suggested that

he has a partner or child in the UK. He lived in the UK for just under two years before he left. His status was as a temporary worker. There is no indication that he would have qualified for any further leave on this or any other basis. The route under which he was admitted provides for only two years leave on entry. There is no provision for extensions of leave on the same basis. Although there is mention in the evidence to the possibility of finding a sponsor to allow him to continue to work in the UK, there is no evidence before me that the Appellant had a sponsor lined up for such purposes. It is not suggested that there are any "very significant obstacles" to his integration in his home country. It appears that he now lives and works in Australia but that is not said to be because he cannot return to New Zealand.

31. The Appellant's Article 8 claim therefore falls to be considered outside the Rules.

32. The difficulty with the Appellant's evidence in this regard is that it is largely directed at the decision to deport him rather than the refusal of his human rights claim per se. As such, the most which can be taken from his own evidence about the impact on his human rights is that, as the subject of a deportation order, he will not be able to travel to other countries or return to the UK. To some extent, his concerns in that regard may be more illusory than real given that, at least in the short term, he will have to declare his criminal record in any visa application. His suggestion in the evidence that such a "ban" is lifelong is also exaggerated since it is open to him to seek to revoke the deportation order (and in light of my above conclusions, it is open to him to make such an application on the basis that the original deportation order was not lawfully made).

33. The problem with the Appellant's evidence though is that I am not here concerned with the future effect of the deportation order but with whether the decision to remove or require the Appellant to leave is a breach of his human rights. Any impact on the Appellant's human rights in relation to a future application to re-enter arising from the effect of the deportation order is a matter which would have to be considered if and when an application is made for entry clearance/leave to enter. Put another way, any challenge to the lawfulness of the deportation order or of a refusal to revoke the order would now be a matter which could only be raised in a judicial review challenge.

34. I have little or no evidence about the nature and extent of the Appellant's private life in the UK nor the consequence of his removal/departure on that private life. On the evidence I have, it is difficult to see how the Appellant's Article 8 rights are even engaged or, assuming they are, that there has been a sufficiently serious interference with those rights to require justification by the Respondent. The Appellant lived in the UK for a very short period on a

temporary basis as a worker. His right to work was due to come to an end shortly after the date when he voluntarily departed.

35. Even if I accept, based on that period of residence, that the Appellant is bound to have formed some private life with which his removal interferes to a sufficient extent, I would need to consider the proportionality of the Respondent's decision to require the Appellant to leave. I take into account my finding that the Appellant is not a person who can lawfully be deported (at least not on the basis on which the Respondent relies). That does not though mean that his criminal offending is not a relevant factor which favours the public interest in removal. I therefore factor into account not only that the Appellant is no longer a person with any basis to remain in the UK under the Rules but also that he has been convicted of a criminal offence. Although I have found that the criteria for deportation was not met on the basis relied upon by the Respondent, the Appellant was nonetheless convicted of five counts of outraging public decency. The offences led to a sentence of imprisonment and cannot be said to be so minor as to be ones which should be ignored in the proportionality balance.

36. I accept that section 117C of the 2002 Act has no part to play in this appeal as I have found that the criteria for deportation are not met. However, Section 117B provides that maintenance of effective immigration control is in the public interest. The fact that the Appellant cannot meet the Rules based on either family or private life and that his private life is deserving of little weight because his period of residence was on a precarious (temporary) basis militates in favour of removal. The fact that he has recently committed offences which cannot be said to be very minor and which resulted in a term of imprisonment is an additional factor favouring the public interest in removal.

37. Particularly in circumstances where there is little or no evidence as to the private life which the Appellant has formed in the UK or which shows any interference or any sufficiently serious interference with that private life, the decision refusing the Appellant's human rights claim and requiring him to leave the UK is proportionate.

38. For those reasons, the Appellant's appeal against the decision to refuse his human rights claim is dismissed.

DECISION

1. **The First-tier Tribunal Decision involves the making of a material error on a point of law. I therefore set aside the First-tier Tribunal Decision of Judge Cockrill promulgated on 28 February 2018.**
2. **I re-make the decision. I dismiss the Appellant's appeal.**

Signed

Upper Tribunal Judge Smith

Dated: [25] April 2018