



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/14274/2017**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Birmingham Civil Justice Centre
On 21 June 2019** **Decision & Promulgated
On 25 June 2019** **Reasons**

Before

UPPER TRIBUNAL JUDGE LANE

Between

MOHAMMED SULEMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Blackwood

For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 10 October 1971 and is a male citizen of Pakistan. The First-tier Tribunal, in a decision promulgated on 10 May 2018, dismissed his appeal on human rights grounds against a decision of the Secretary of State dated 19 May 2017. For reasons which I will set out below, the Secretary of State now accepts that the judge carried out her analysis on an incorrect basis and that her decision should be set aside.
2. I was assisted at the initial hearing by Mr Blackwood, who appeared at short notice for the appellant by way of direct access. He had prepared a bundle of documents and a skeleton argument which only reached the

Upper Tribunal and the Secretary of State on the evening before the initial hearing. In the circumstances, I gave time to Mr Mills to consider the arguments raised in the skeleton argument. Before the hearing was briefly adjourned, Mr Blackwood applied to amend the grounds of appeal. There was a discussion in court regarding the nature of this to Blackwood's amendment following which I gave permission for the grounds to be amended I took the view that the proposed amendment addressed an issue which arguably undermined the entirety of the First-tier Tribunal's decision. I wish to record at this point the considerable assistance provided to the Tribunal by both Mr Mills and Mr Blackwood. I am grateful to them for their cogent and skilful submissions.

3. Following the brief adjournment, Mr Mills provided a chronology as follows. On 11 April 2017 at Nottingham Crown Court, the appellant was convicted of two counts of sexual assault on a female. He was sentenced on the first count to 30 weeks imprisonment and on the second to 22 weeks making an aggregate sentence of 52 weeks in total. On 19 May 2017, the Secretary of State issued to the appellant a decision to deport him pursuant to the UK Borders Act 2007 and the Immigration Act 1971. The second paragraph of the decision letter reads as follows:

Paragraph 396 of the Immigration Rules (as amended) provides that there is a presumption that the public interest requires deportation of a person who is liable to deportation. Therefore, the Secretary of State had decided to make a deportation order against you under Section 5(1) of the Immigration Act 1971

4. Mr Mills told me that deciding to make a deportation order immediately after conviction was contrary to the normal process adopted by the Secretary of State. Generally, an individual is served with a liability to deportation notice, giving him/her an opportunity to make representations, before any decision to deport is made. He told me that Home Office records indicated that a senior caseworker had noted the error in August 2017. However, no action appears to have been taken and further problems arose when a second decision was made on 25 October 2017 to refuse the appellant's human rights claim following representations made by the appellant. That letter contained the following paragraph:

Your deportation is conducive to the public good and in the public interest because you have been convicted an offence for which you have been sentenced to a period of imprisonment of less than four years but at least 12 months. Therefore, in accordance with paragraph 398 of the Immigration Rules, the public interest requires your deportation unless an exception to deportation applies. The exceptions are set out paragraphs 399 and 399A of the Immigration Rules.

5. However, the appellant is not a foreign criminal as defined in section 117D of the 2002 Act:

(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.

(3)...

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) ...

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c)...

(d)....

[my emphasis]

6. The appellant had only been sentenced to a period of imprisonment of 12 months by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time. The October 2017 letter assumed wrongly that the appellant had received a sentence of 12 months. There is nothing in the letter to indicate that the Secretary of State considered that the appellant was a persistent offender (although the second offence was serious, he has any only committed two offences whilst in the United Kingdom) or that the appellant's offending had caused serious harm. Mr Mills submitted that the appellant second offence could fall within the serious harm category but he acknowledged nothing in the letter indicated that the Secretary of State considered that it did.
7. The consequence of the appellant not falling within the definition of foreign criminal is that he also fell outside the provisions of paragraph A398(a) and (b) of the Immigration Rules. The consequence of the Secretary of State not having informed the appellant that he considered him to be a persistent offender or that his offence had caused serious harm was that the appellant fell outside the scope of paragraphs 398 and 399 also. Unfortunately, none of these matters were brought to the attention of the First-tier Tribunal judge. Consequently, the judge made the false assumption that the paragraphs did apply with the result that her analysis proceeded on a false legal basis.
8. Mr Blackwood accepted that the no longer exists right to appeal on the basis that a decision is not in accordance with the law (see *Charles (human rights appeal: scope)* [2018] UKUT 89 (IAC)). However, in a human rights appeal, the question of whether or not an appellant meets the requirements of particular immigration rules may go to the question of proportionality as may the legal soundness of a Secretary of State's

decision. Both representatives agreed that the First-tier Tribunal's decision was fundamentally flawed and should be set aside. Mr Blackwood submitted that I should remake the decision, allowing the appeal. I declined to do so. Given that the decision is fundamentally flawed, the proper course of action is for the appeal to be returned to the First-tier Tribunal for the Tribunal to remake the decision at or following a hearing. Mr Mills indicated that the Secretary of State will, prior to the next hearing, seek to deal with the deficiencies in the decision under appeal, whether by withdrawing the decision or, more likely, issuing a supplemental decision. That is a matter for him. If he does so and the appellant objects, then that is an issue which will have to be raised before the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 10 May 2018 is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal (not Judge Gurung-Thapa) for the Tribunal to remake the decision at or following a hearing.

Signed

Date 21 June 2019

Upper Tribunal Judge Lane