



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/17982/2019

THE IMMIGRATION ACTS

**At: Civil Justice Centre (Remote Decision & Reasons Promulgated
Hearing)**

Heard On: 10th September 2020

On 14th September 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**FAU
(anonymity direction made)**

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Chirico, Counsel instructed by Riverway Law

**For the Respondent: Mr Diwnycz, Senior Home Office Presenting
Officer**

DECISION AND REASONS

1. The Appellant is a national of Zimbabwe who faces 'automatic' deportation from the United Kingdom, a country in which he has lived since 2002, because he is a foreign criminal. In 2016 he was convicted by a jury of sexual activity with a person with a mental disorder. The circumstances of the offence were that the victim was a young woman with significant learning disabilities whom the Appellant, her care worker, caused to believe that they were in a genuine loving relationship. The evidence was that this young woman, so vulnerable that she needed constant protection,

performed oral sex on the Appellant in a public park. The psychological damage she sustained as a result of the Appellant's behaviour caused her to set fire to herself. The trial judge found that the Appellant had planned the offence and groomed his victim; the offending constituted a serious breach of trust. He sentenced him to 6 years imprisonment.

2. Under the terms of the statutory scheme it is conducive to the public good that the Appellant be deported: s32(4) Borders Act 2007. The length of his sentence is such that he cannot hope to resist deportation on the ground that either of the 'exceptions' to the automatic deportation provisions contained at s117C of Nationality, Immigration and Asylum Act 2002 apply. The only way that the Appellant can successfully resist deportation is by demonstrating that there are "very compelling circumstances over and above" those exceptions, or their equivalence.
3. The Appellant's appeal was heard and dismissed by First-tier Tribunal Judge MA Khan in a decision dated the 20th January 2020. In this appeal against that decision the simple ground advanced by Counsel Mr Chirico, and in granting permission considered arguable by Mr Justice Lane, was that the Judge wholly failed to apply that one relevant test in his disposal of the appeal.
4. In her Rule 24 response the Secretary of State (through the offices of Senior Presenting Officer Mr Tufan) described this decision as having "structural failings". When pressed Mr Diwnycz, who appeared for the Respondent before me, accepted that one of these failings was the fact that the Judge makes no findings on the central matter in issue. What the Judge did was to consider whether the 'exceptions' in s117C applied to the Appellant, and (uncontroversially) finding that they did not, proceeded directly to dismissing the appeal. Whilst it is true to say that a sentence of this length, and a crime of this nature, weighs very heavily in favour of deportation, parliament has made clear that the 'automatic' deportation provisions are in fact no such thing: all the legislation does is create a *presumption* of deportation. It is still incumbent upon decision makers to consider whether that presumption is rebutted, in this instance by asking itself whether there are very compelling circumstances. That has not been done in this case.
5. The decision of the First-tier Tribunal must be set aside, and remitted for hearing *de novo* by a judge other than Judge MA Khan.

Anonymity Order

6. The Appellant is a criminal who would not ordinarily benefit from an order protecting his identity. The final decision in the appeal will however involve consideration of evidence about his minor daughter. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I am concerned that identification of the

Appellant could lead to identification of his daughter. I therefore consider it appropriate to make an order in the following terms:

“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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decision and Directions

7. The decision of the First-tier Tribunal is flawed for material error of law and it is set aside.
8. The decision in the appeal is to be remade in the First-tier Tribunal following a fresh hearing before a Judge other than Judge MA Khan.
9. There is an order for anonymity.

Upper Tribunal Judge Bruce
10th September 2020