IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13878/2018

THE IMMIGRATION ACTS

Heard at Manchester remotely by Skype for Business On 11 February 2021	**Decision & Reasons Promulgated On 1 March 2021**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALI TAIZHDIN OSMAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Ms Hooper

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born on 13 January 1995 and is a male citizen of Iraq. He appealed to the First-tier Tribunal (Judge Sethi) against a decision of the Secretary of State dated 11 June 2018 refusing his claim to remain on human rights grounds following the making of a deportation order. The First-tier Tribunal, in a decision promulgated on 22 July 2019, allowed the

appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The appellant was sentenced at Canterbury Crown Court on 14 March 2018 to 10 months' imprisonment upon conviction of dangerous driving/driving with excess alcohol. That conviction led to the making of a deportation order under a section 5(1) of the Immigration Act 1971. The appellant lives in the United Kingdom with his Treaty Rights-exercising EEA (Polish) partner and their child (aged 5 years). The child is not a Qualifying Child for the purposes of the 2002 Act and paragraph 399 of HC 395 (as amended). In a careful and thorough decision, Judge Sethi concluded that the appellant is not a foreign criminal for the purposes of Section 117D (2) of the 2002 Act. The appellant's prison sentence was for less than 12 months, he is not a persistent offender and the judge found that he had not been convicted of 'an offence that has caused serious harm' (Section 117D (2) (c) (ii)). It is on this latter finding that this appeal turns. The Secretary of State submits that dangerous driving under the influence of alcohol constitutes a 'serious harm to the community in general' although the judge noted that it did not feature with drugs and sex offences and offenses of violence in the Secretary of State's policy statement of May 2019. The respondent also submits also that the fact the appellant received a sentence of 10 months indicated the seriousness of the crime and should be given the 'significant weight' which the judge had failed to give it.

3. At the Upper Tribunal initial hearing, Ms Hooper, who appeared for the appellant, submitted that the judge had not erred in law. His decision had been consistent with the guidance which the Court of Appeal had provided in *Mahmood* [2020] EWCA Civ 717, a judgment postdating the judge's decision. At [42] the Court of Appeal held:

> The adjective 'serious' qualifies the extent of the harm; but provides no precise criteria. It is implicit that an evaluative judgment has to be made in the light of the facts and circumstances of the offending. There can be no general and all-embracing test of seriousness. In some cases, it will be a straightforward evaluation and will not need specific evidence of the extent of the harm; but in every case, it will be for the tribunal to evaluate the extent of the harm on the basis of the evidence that is available and drawing common sense conclusions.

Further, it is now clear that the question whether particular offending constitutes serious harm is a matter the First-tier Tribunal:

> … the views of the Secretary of State are a starting point and the reasoning of a decision letter may be compelling; but ultimately the issues that arise under s.117D(2)(c)(ii) will be a matter for the FtT. Provided the tribunal has taken into account all relevant factors, has not taken into account immaterial factors and has reached a conclusion which is not perverse, its conclusion will not give rise to an actionable error of law.[56]

4. I agree with Ms Hooper's submission that the judge has reached a decision which was not perverse (Mr McVeety, who appeared at the initial hearing for the Secretary of State acknowledged that it was possible on the same facts for a Tribunal to find that the offending did not constitute serious harm), that the judge has taken account of all relevant factors and has not had regard to immaterial factors. Not every judge would have reached the same conclusion on the facts but that is not the point. I disagree with the Secretary of State's assertion that drink driving *per se* must constitute serious harm as defined in the statute. Had Parliament wished to state that certain specific offences always and irrespective of the factual context constitute serious harm then it would no doubt have listed these in the Act.

5. Mr McVeety sought to expand upon the grounds of appeal in his oral submissions. He submitted that the judge had erred in law by finding (i) that there was no clear evidence of serious harm arising from the appellant's offending and that; (ii) the sentencing judge's reference to 'significant damage' concerned not the two women (one heavily pregnant) who were in the car into which the appellant had crashed but the car itself (described in the sentencing remarks as a 'write off'). At [7], Judge Sethi quotes a large section of the sentencing judge's remarks. The sentencing judge states that, '[the two women], from what I have heard, both significantly affected by the collision' which 'caused significant damage and **injury**…' [my emphasis]. Mr McVeety submitted that the judge had made an error of fact by failing to have regard to this 'significant injury'. He also submitted that Judge Sethi had ignored the sentencing judge's remark that the appellant had tied to blame others for his offending.

6. Mr McVeety's submissions lie beyond what is argued in the written grounds but Ms Hooper did not object to the argument being advanced. I find that, whilst the judge may have made an assumption that the women involved in the accident were not injured 'significantly' so to that extent misread the sentencing judge's comments, I cannot see that proceeding on the basis that serious injury had occurred would have made any difference to the outcome of the appeal. As Mr McVeety acknowledged there is virtually no evidence at all in this case regarding any injuries which the victims may have suffered. Even if the judge had had focused upon the comment that 'significant damage and injury' had occurred, that comment constitutes the sum total of the evidence of injury. I do not accept that the judge's entire careful and thorough analysis of all the relevant circumstances has been vitiated by his failure to emphasise that single phrase. At [40], the judge found that 'it can reasonably be expected that [the pregnant woman] would have been taken to hospital…' That finding itself was a speculation on the part of the judge given the paucity of actual evidence of any injury; we do not in fact know whether the women were taken to hospital at all. The judge was certainly not required to speculate even further as to what 'significant injury' either of the women might have sustained. The judge has considered all 'relevant factors' as *Mahmood* states he should have done. He has done all he could

with the evidence meagre available and has delivered a sound decision supported by cogent reasoning.

7. Ms Hooper submitted that, even if the judge had erred as the Secretary of State argues, any error is immaterial. She submitted that, as the appellant does not have a relationship with a Qualifying Child, this appeal was always destined to be determined on Article 8 ECHR grounds outside the Rules. She submitted that such an assessment is exactly what the judge has carried out, reaching clear findings on family life and the best interests of the child with which the Secretary of State does not appear to disagree. The judge would have followed the same route and reached the same outcome even if he had concluded that the appellant, having been convicted of an offence which had caused serious harm, was a 'foreign criminal'. Mr McVeety submitted that a finding that the appellant was a foreign offender could have changed the result as the judge would have been obliged to consider the appellant under the provisions of section 117C of the 2002 Act.

8. I agree with Ms Hopper's submission. Had the appellant been considered as a foreign criminal, then, as he had not been sentenced to more than 4 years' imprisonment, the question as to whether it would be unduly harsh for the appellant's child to accompany him to Iraq or to be left in the United Kingdom without the appellant would have had to be addressed. The judge correctly reminds himself several times at [57-59] that the child is not a Qualifying Child. His Article 8 ECHR assessment is, in my view, legally sound and, I am satisfied that, had the judge approached that assessment on the basis that the appellant is a foreign criminal, the conclusion would have been the same.

9. For the reasons I have given, the Secretary of State's appeal is dismissed.

Notice of Decision

The Secretary of State's appeal is dismissed.

Signed Date 12 February 2021

Upper Tribunal Judge Lane