Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002487
PA/01031/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 October 2022	**On 1 December 2022**

Before

THE HON. MRS JUSTICE LANG
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

AMJID KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Byrne, Counsel, instructed by NK Law Solicitors
For the Respondent: Mr T. Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal ("FTT") Judge Alis, promulgated on 13 May 2022, who dismissed his appeal against the Respondent's refusal of his human rights claim in regard to a deportation order served by the Respondent on 8 March 2021, following his convictions for multiple sex offences and a sentence of 14 years imprisonment.

2. Permission to appeal was granted by FTT Judge Grimes on all grounds.

Immigration history

3. The Appellant is a national of Pakistan who was born on 11 June 1976. He entered the UK on 28 January 2006 with entry clearance as a spouse. On 28 November 2008, he was granted indefinite leave to remain as the spouse of a settled person.

4. The Appellant's wife is a British citizen of Pakistani origin. They have three children: two girls (born 15 August 2011 and 3 March 2013) and a boy (born 30 July 2014). The children are all British citizens. The Appellant's elderly widowed mother, brother and sister are also resident in the UK.

5. On 22 December 2014, at Manchester Crown Court, he was convicted, after a trial, of the following offences: (1) rape of a female; (2) two counts of rape of a male; (3) three counts of sexual assault without penetration; and (4) exposure. On 27 April 2015, he was sentenced to a term of 14 years imprisonment.

6. In a Notice of Decision dated 5 March 2021 the Respondent decided to made a deportation order pursuant to section 32(5) of the UK Borders Act 2007 ("UKBA 2007"), refusing the Appellant's claim that removal from the UK would be unlawful under section 6 of the Human Rights Act 1998. The Appellant's claim for asylum and humanitarian protection was also refused. The Respondent confirmed that the statutory presumption under section 72(2) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") applied to him, as he had been convicted of particularly serious crimes and constituted a danger to the community, and so he was ineligible for asylum or humanitarian protection.

7. In a supplementary letter dated 18 January 2022, the Respondent refused the further claim for asylum and humanitarian protection.

FTT's findings

8. Judge Alis upheld the certification under section 72 NIAA 2002, and held that the Appellant could not put forward a claim for asylum or humanitarian protection.

9. The Judge described the Appellant's claim that deportation to Pakistan would breach Article 3 ECHR as falling into two categories, namely, risk posed due to alleged political activities and risk posed to him through his convictions.

10. After assessing the evidence, the Judge found that he would not face a real risk of serious harm for political reasons or face arrest from the Pakistan authorities in respect of the First Information Report ("FIR") which he claimed had been issued.

11. The Judge did not accept the Appellant's claim that he would be at risk in Pakistan because of his convictions because of the lack of any evidence in support (paragraph 77).

12. The Judge then went on to consider whether the deportation order was in breach of Article 8 ECHR.

13. The Judge set out the sentencing remarks and considered the OASys reports in detail. He concluded that they raised serious concerns about the risk posed by the Appellant, particularly because of his reluctance to accept responsibility for what happened. After hearing the Appellant and his wife give evidence, he was not satisfied that he had "learnt his lesson" as he claimed. The Judge found that the Appellant continued to pose a risk of committing similar offences.

14. The Judge found that it would not be unduly harsh for the Appellant to leave the UK as he had spent the majority of his life in Pakistan. There were no very significant obstacles to his return to Pakistan, despite the fact that his family was in the UK.

15. In considering whether there were "very compelling circumstances" why the public interest did not require deportation in this case, the Judge referred to all the evidence and submissions, and considered the Appellant's relationships with his wife, children, mother and brother, and gave full weight to the best interests of the children as a primary consideration. However, he concluded that there were no very compelling circumstances over and above the "unduly harsh" test.

16. The Judge undertook a proportionality assessment and concluded that the decision to deport the Appellant was proportionate.

Grounds of appeal

17. The Appellant's grounds of appeal may be summarised as follows:

    a. **Ground 1**. The Judge erred in law in applying the Immigration Rules ("IR") paragraphs 398 to 399 in his analysis under Article 8 ECHR, instead of limiting himself to the approach set out in section 117C NIAA 2002, in accordance with the guidance given by the Upper Tribunal in Binaku (s.11 TCEA; s.117C NIAA; para 399D) [2021] UKUT 00034 (IAC).

    b. **Ground 2**. The Judge erred in law in failing to resolve a dispute between the parties by making no finding on the possibility of the Appellant's convictions becoming known in future and the likely consequences.

    c. **Ground 3**. The Judge erred in law in concluding that the Appellant's removal from the UK would not cause a disproportionate interference with the Appellant's family and private life.

Ground 1

Submissions

18. The Appellant submitted that the Judge erred in directing himself, at paragraph 82, that "the Appellant's article 8 rights are to be assessed within the complete code provided for under paragraphs A398 to 399 of the Immigration Rules and section 117C of the 2002 Act" and in then proceeding to apply the IR to this case. This was clearly contrary to the guidance given in Binaku.

19. The Respondent submitted that Ground 1 was misconceived. The Judge set out the statutory framework of section 117C NIAA 2002 at paragraph 88. Between paragraphs 100 and 102, he conducted a structured analysis of the relevant factors and concluded that the "very compelling circumstances" test set out in section 117C NIAA 2002 was not met. The Judge's conclusion was properly reasoned and legally sound.

Conclusions

20. In Binaku, the Upper Tribunal (Lane J. and UT Judge Norton-Taylor) held as follows at [97]:

> "(a) By virtue of section 117A(1) of the 2002 Act, a tribunal is bound to apply the provisions of primary legislation, as set out in sections 117B and 117C, when determining an appeal concerning Article 8.
>
> (b) In cases concerning the deportation of foreign criminals (as defined), it is clear from section 117A(2)(b) of the 2002 Act that the core legislative provisions are those set out in section 117C. It is now well-established that these provisions provide a structured approach to the application of Article 8 which will produce in all cases a final result compatible with protected rights.
>
> (c) It is the structured approach set out in section 117C of the 2002 Act which governs the task to be undertaken by the tribunal, not the provisions of the Rules.
>
> (d) A foreign criminal who has re-entered the United Kingdom in breach of an extant deportation order is subject to the same deportation regime as those who have yet to be removed or who have been removed and are seeking a revocation of a deportation order from abroad. The phrases "cases concerning the deportation of foreign criminals" in section 117A(2) and "a decision to deport a foreign criminal" in section 117C(7) are to be interpreted accordingly.
>
> (e) Paragraph 399D of the Rules has no relevance to the application of the statutory criteria set out in section 117C(4), (5) and (6);

(f) It follows that the structured approach to be undertaken by a tribunal considering an Article 8 appeal in the context of deportation begins and ends with Part 5A of the 2002 Act."

21. The Tribunal said, at [78]:

> "By contrast, the relevant Rules are not legislation, but a statement of the practice to be followed by the respondent's officials when assessing a claim by an individual seeking to resist deportation and a reflection of her view as to where the public interest lies. On this basis, Leggatt LJ (as he then was) concluded at paragraph 21 of CI (Nigeria) that:
>
> > "In these circumstances it seems to me that it is generally unnecessary for a tribunal or court in a case in which a decision to deport a "foreign criminal" is challenged on article 8 grounds to refer to paragraphs 398-399A of the Immigration Rules, as they have no additional part to play in the analysis."_

22. In this case, the Judge expressly directed himself in regard to section 117C NIAA 2002 at paragraphs 82, 86, 87, 88, 98, 104, and he referred to the statutory tests at paragraphs 106 and 107. He set out the provisions of section 117C at paragraph 88. He then applied those provisions in a structured way to the evidence and issues in the appeal.

23. The Judge also applied IR paragraphs 399 and 399A, alongside section 117C NIAA 2002. As he observed at paragraph 86, the provisions of IR paragraph 399 and 399A are mirrored in section 117C; they are not contradictory. Section 117A-D was enacted to reflect the importance that Parliament attached to the public interest in deportation. Although we recognise that, following the guidance in Binaku, tribunals should apply the statutory test, and it is no longer necessary to refer to the test in the IR as well, we do not consider that the Judge's approach led to any error of law.

Ground 2

Submissions

24. The Appellant submitted that, at the hearing, he claimed he would be at risk of persecutory ill treatment in Pakistan on account of his notoriety as a sex offender. One of his victims was a young man which would lead to him being persecuted as a perceived homosexual. Although the Judge referred to this submission and considered whether his convictions were public knowledge in Pakistan, he made no finding on the possibility that his convictions would become known in future and the likely consequences. He failed to resolve a dispute between the parties on this point.

25. The Respondent submitted that the Appellant's case throughout was that his convictions were already known in Pakistan, not that they might become known in future. The Judge dealt with the case as it had been

argued. It was for the Appellant to show that he would be at risk and there was no evidence that this was in fact the case.

Conclusions

26. The Respondent's Notice of Decision, dated 5 March 2021 referred at paragraphs 28-30 to the Appellant's claim that he had received hate mail from Pakistan due to the details of his criminal offending becoming known via social media, and concluded "[i]t is considered that your claimed fear of return to Pakistan for such a reason is wholly uncorroborated and is unsubstantiated by credible evidence."

27. The Judge set out the Appellant's evidence on this issue at paragraph 23, his brother's evidence at paragraph 37, and submissions at paragraph 56. The Judge identified risks posed to him due to his conviction at paragraph 69. His conclusion, at paragraph 77, was as follows:

> "Finally, the Appellant raised his convictions as a reason for not being returned. There is no evidence before me that anyone in Pakistan is aware of his convictions. The Appellant had not adduced any documentary evidence that he had been threatened and whilst anyone, including the UK authorities, would view these matters seriously there is no tangible evidence that he would be mistreated by anyone upon return."

28. In our judgment, the Judge responded to the Appellant's case as it was primarily presented, namely, that he was at risk because his convictions were already known in Pakistan and hate mail had been sent. The Judge rejected the evidence given by the Appellant and his brother. In our view, the Judge was entitled to conclude that there was no evidence that his convictions were already known about in Pakistan, nor that he had been threatened. In so far as it was submitted that his convictions would become known in future because he was a "notorious sex offender" (paragraph 56), the Judge concluded that "there was no tangible evidence that he would be mistreated by anyone upon return". In our view, there was no unresolved dispute between the parties.

Ground 3

Submissions

29. The Appellant submitted that his removal from the UK would cause a disproportionate interference with his private life and his family life.

30. The Respondent submitted that this was a mere disagreement with the Judge's findings. The Appellant's family circumstances were properly considered by the Judge and it was clearly open to the Judge to find that the public interest in removal was not outweighed by the family life in this case.

Conclusions

31. In our judgment, the Judge undertook a lawful proportionality assessment, and carefully weighed the Article 8 rights of the Appellant and his family members in the balance, giving full weight to the impact of the separation, and the best interests of the children as a primary consideration: see paragraphs 100 to 107.

32. The Judge was entitled to conclude on the evidence before him that the decision to deport him in the public interest was proportionate.

33. Therefore, for the reasons set out above, the appeal is dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed: B.A. Lang Date: 27 October 2022

The Hon. Mrs Justice Lang sitting as an Upper Tribunal Judge.