IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02180/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 July 2014	**On 6 November 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

F S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Harding, Counsel, instructed by Irving & Co Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of the First-tier Tribunal (First-tier Tribunal Judge Hanley and Dr P L Ravenscroft) in which they dismissed his appeal against the decision by the respondent made on 5 July 2013 to refuse to revoke a deportation order signed against him.

2. The appellant is a citizen of Iran who arrived in the United Kingdom on 1 June 2000 and claimed asylum on arrival. His application was refused on 1 July 2004 and on 16 June 2006 the respondent made a decision to deport the appellant pursuant to Section 3(5)(a) of the Immigration Act 1971, the appellant having been convicted on 25 separate occasions between 16 September 2002 and 30 May 2006 in the Magistrates' Court. The convictions were predominantly for shoplifting but also include possession of class A drugs. His appeal against that decision was dismissed. Following that, a deportation order was signed on 23 August 2007 but he was not removed.

3. On 7 April 2008 a fresh claim for asylum was submitted and in the meanwhile his offending behaviour continued resulting in a further seven convictions, the most recent being on 7 May 2013 for battery.

4. The fresh claim for asylum was based on two strands:-

   (a) documents in support of the original claim showing that he had been summonsed to a Revolutionary Court in Shiraz; and,

   (b) claiming that he had converted to Christianity.

5. The respondent refused the claim for asylum for the reasons set out in the refusal letter dated 5 July 2013. As the appellant no longer seeks to rely on a claim for asylum, there is no need to refer to this in any detail suffice to say that the respondent did not accept his claims.

6. It is the appellant's case that his deportation to Iran would be contrary to the United Kingdom's obligations pursuant to Article 8 of the Human Rights Convention given that he is now in a stable relationship with Miss A who, as a result of a long-standing mental illness including bipolar affective disorder, is a vulnerable adult who could not relocate to Iran; and, were they to be separated, is likely to suffer a relapse such that she is likely again to be detained under Section 3 of the Mental Health Act as she has on six occasions previously.

7. The Tribunal heard evidence from the appellant and Miss A; they also had before them a substantial bundle of material including material relating to Miss A's condition. The Tribunal found:-

   (i) the appellant is not a person of interest to the Iranian authorities and is not at risk arising from any events he claims to have taken place in Iran prior to his life in the United Kingdom [74];

   (ii) the appellant was not a convert to Christianity; any conversion was not genuine [75], noting that there was no evidence from his Anglican Church he claimed to attend finding it wholly lacking in credibility that if he were a genuine man from an Anglican congregation as claimed, regularly attending his local church over a significant period of time there had been no evidence from that church [78];

(iii) the appellant and Miss A are in a relationship and live together but that they had not lived together as long as claimed [85] given the lack of documentary evidence to that effect;

(iv) Miss A was a somewhat defensive witness [87];

(v) that Miss A had accepted that she had been well before she met the appellant and had been well for the last four years or so [88];

(vi) that they were not satisfied that the relationship with Miss A was a compassionate circumstance warranting revocation of the deportation order noting that she had been stable for at least a year or two before she even met the appellant and as the relationship had been commenced in the full knowledge the appellant's immigration status was precarious;

(vii) that the appellant was a persistent petty criminal and they were not persuaded that he had been rehabilitated.

8. The appellant sought permission to appeal to the Upper Tribunal on the grounds that:-

(i) the Tribunal had failed to give any reasons in support of the finding that the appellant was not rehabilitated, the Tribunal giving no reasons for disregarding the appellant's own oral and written evidence and there being no analysis of the seriousness of his reoffending;

(ii) the finding as to the length of cohabitation was flawed and that it was not sufficiently reasoned, the Tribunal failing to give weight to the oral and written evidence of all three witnesses;

(iii) the Tribunal's assessment of compassionate circumstances was incomplete in that they failed to have proper regard to the evidence from Miss A, her mother, the consultant psychiatrist and the outreach team leader in assessing the likely effect of the appellant's deportation on Miss A's health and failed also, in their approach to Miss A's evidence, to take into account that she is a vulnerable witness as defined in Section 59 of the Safeguarding Vulnerable Groups Act.

9. On 22 May 2014 I granted permission to appeal stating:

> "It is arguable that in assessing the compassionate circumstances with respect to the appellant's partner, the First-tier Tribunal failed to take into account the medical evidence indicating that she may have a significant relapse were the appellant to be deported."

10. I heard submissions from both representatives. I deal with each of the grounds in turn:-

Ground 1

11. It is not in dispute that the appellant has been convicted on over 30 occasions between September 2002 and May 2013. It is also accepted

that he has suffered from drug addiction. The last conviction was less than a year before the date of hearing and in this context and given also the unchallenged adverse credibility findings with respect to his claiming to have converted to Christianity, the panel were entitled to conclude that he had not rehabilitated. That was a finding of fact it was open to them to reach on the evidence before them and they were entitled to conclude that he had not completed the rehabilitation programme and whilst their reasoning is succinct, it is in the context of this case adequate and sustainable.

Ground 2

12. I accept that, as Mr Whitwell submitted, the Tribunal did at paragraphs 33(f) and (g) set out the nature of the medical evidence with respect to Miss A, noting the evidence of both Kathy Owen, the team leader, and Dr Jason Read, that there was a concern on the part of both that if the appellant were deported to Iran then Miss A's mental health could be unstable and that she might suffer a relapse. The Tribunal said [89]:-

> "We take into account [Miss]A's medical condition and recently submitted medical letters but we note that on her own evidence and according to the medical professionals that she was stable for at least a year or two before she even met the appellant. The relationship has been commenced in the full knowledge that the appellant's immigration status was precarious."

13. It is evident from this that the panel concluded that Miss A was not likely to suffer a relapse. In contrast, the letter from her treating psychiatrist Dr Read, states:-

> "I am concerned if her partner were removed to Iran this would contribute to a relapse in her mental health problems. This is evidenced by previous episodes in the past, having been precipitated by relationship difficulties."

14. Miss Owen, the assertive outreach team leader states "It is likely that if Miss A's partner is removed to Iran this will cause her mental health to become unstable."

15. There is insufficient evidence that the Tribunal engaged with the reports when concluding that she was unlikely to relapse. The reference to her having been stable for four years and before she met the appellant is a fact referred to and known to both professionals and thus the rejection of their expert opinion is insufficiently reasoned.

16. Further, there is no indication in the decision that they had considered whether, in the alternative, if Miss A were to suffer a relapse, what would flow from that and the degree of harm which she would suffer.

17. Whilst I note Mr Whitwell's submission that even had they considered that Miss A would have a relapse, and nonetheless this would not amount to exceptional circumstances, I do not consider that this is a decision that would necessarily have flowed from such a finding and thus I am satisfied

that the error is material and that on this basis alone the determination must be set aside and remade.

Ground 3

18. Whilst I note that the panel gave no indication that they treated Miss A as a vulnerable adult, as she is given her diagnosis, other than their reference to her being a defensive witness, it is difficult to see how this materially affected the outcome of the appeal.

19. Nonetheless, for the reasons set out above, I am satisfied that the determination of the First-tier Tribunal did involve the making of an error of law, and I set it aside.

Remaking the decision

20. I heard further evidence from Miss A who confirmed that she had been diagnosed with bipolar affective disorder but that she was not currently taking medication as she is pregnant and that she has an appointment to see a psychiatrist who specialises in the treatment of women with her condition who are pregnant on 13th August. She said that she had stopped taking some of her medication at Christmas due its side effects and due to the fact that she was beginning to feel more stable. That had been before she had found out she was pregnant. She added she that she also needed to take Thyroxine, as the lithium which she had previously been prescribed owing to her severe depression had caused damage to her thyroid. She said that she was unsure what drugs she could or could not take safely and at various stages of pregnancy and would be taking advice from a psychiatrist on this matter.

21. Miss A said that she had been discharged from the care of the consultant psychiatrist but had regular contact with a community psychiatric nurse by telephone and also in visits. She said that if the appellant were deported she would be devastated as she had become very close to him over time and felt that she had with him a second chance at life. She said she did not know how she would be able to cope were he to be deported and that she believed that as had happened to her in the past, she would become extremely depressed. She said that in the past she had, in her early 20s, had two periods of extended hospitalisation due to depression from which she had undergone 25 sessions of ECT and that this had been an extremely difficult time for her as she reacted badly to being hospitalised which made her difficulties worse. She said that her bipolarity had been characterised by periods of high mania and extreme lows. She said that in the past that when she deteriorated she had become psychotic and ended up in hospital and that this normally lasted for some two to three months before she was released and the effect of hospital was damaging on her.

22. In cross-examination Miss A said that the pregnancy had been planned and that she had taken the decision to have her contraception removed after the relationship had become stable. She said that the fact that the appellant was in a very precarious position with his immigration status had not really been a factor in her deciding whether or not to become pregnant

but that she felt also, at her age, this was her last chance. It was put to her that the chances of her relapsing were not as great as suggested and she was embellishing it. She said that was not the case and that the appellant was thoughtful, kind and someone on whom she depended.

23. In re-examination Miss A said that she could not go to live in Iran as she would not be able to get appropriate treatment as she does not speak Farsi and would not have the support network which she has here which includes her mother and the healthcare professionals on which she has relied on in the past. She said that her parents live nearby and have supported her in the past but her mother is now 73 and her father is 81. They are happy that she is in a supportive relationship. She said that although she has two older brothers, her relationship with them is not strong, she believes that this is partly because of the difficulties that had arisen between them due to her long-standing illness but she is closer to their children.

24. In response to my questions Miss A said that some three to four years ago she had had cognitive behavioural therapy ("CBT") which had helped her to manage her condition and she believes it has been very effective. She said that in the past her relapses had been characterised by extreme distress leading to anxiety and depression and then psychosis. She said a pattern had been that every one and a half to two years she would end up in hospital and on release it would take her about a year and a half to recover from the experience. She said that the CBT that had been positive for her had occurred after her last relapse and she had not had one since.

25. I then heard submissions. Mr Whitwell submitted that even taking into account any possible relapse, and the effect on Miss A, it would still be proportionate to deport the appellant given his history, convictions and the fact that the relationship had started when his situation was particularly precarious.

26. In reply Mr Harding submitted that on the basis of the medical evidence it was likely that she would suffer a relapse and that the consequences of that relapse would be particularly severe given her history and that this would have an effect on her moral and physical integrity. The effects of deporting the appellant would be to condemn her to a significant degree of distress which would in all the circumstances of the case be disproportionate.

Discussion

27. This is an appeal against a decision to refuse to revoke a deportation order against the appellant. As this is a decision which has been taken after 28 July 2014, I am bound by Section 117 of the Nationality, Immigration and Asylum Act 2002 to take into account the certain matters in respect of foreign criminals. While I was not addressed on these at the hearing, I have taken into account the subsequent submissions from Mr Harding produced subsequent to the hearing and response to my directions. The

respondent has not submitted any further argument and has chosen to make no submissions in response to those made by the appellant. I am satisfied also that, following the decision of the Court of Appeal in **YM (Uganda)v SSHD** [2014] EWCA Civ 1292 that the Immigration Rules in force from 28 July 2014 are those which must be considered.

28. Section 117 of the Nationality, Immigration and Asylum Act 2002 (as amended) provides:

117A Application of this Part

(1)This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a)breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2)In considering the public interest question, the court or tribunal must (in particular) have regard—

(a)in all cases, to the considerations listed in section 117B, and

(b)in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3)In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1)The maintenance of effective immigration controls is in the public interest.

(2)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a)are less of a burden on taxpayers, and

(b)are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a)are not a burden on taxpayers, and

(b)are better able to integrate into society.

(4)Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6)In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a)the person has a genuine and subsisting parental relationship with a qualifying child, and

(b)it would not be reasonable to expect the child to leave the United Kingdom.

117CArticle 8: additional considerations in cases involving foreign criminals

(1)The deportation of foreign criminals is in the public interest.

(2)The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3)In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4)Exception 1 applies where—
(a)C has been lawfully resident in the United Kingdom for most of C's life,
(b)C is socially and culturally integrated in the United Kingdom, and
(c)there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5)Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6)In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7)The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1)In this Part—
"Article 8" means Article 8 of the European Convention on Human Rights;
"qualifying child" means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;
"qualifying partner" means a partner who—
(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that 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)For the purposes of subsection (2)(b), a person subject to an order under—
(a)section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
(b)section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c)Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

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

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(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)include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5)If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it

29. It is not submitted in the refusal letter that the appellant is a foreign criminal. Indeed, at [94] it is accepted that he does not fall within paragraph 398 of the Immigration Rules. That is because he has not committed an offence for which he was sentenced to 12 months' imprisonment, nor is it asserted that the appellant is a persistent offender who has shown a particular disregard for the law, the alternate basis on which paragraph 398 could have applied to him.

30. There is no submission from the respondent that he falls within the amended version of paragraph 398, and I am not satisfied that he does. I find that section 117C is not applicable as the appellant is a not a foreign criminal as defined in section 117D (2). It is, however, evident that section 117B applies to this case.

31. The relevant provisions of the Immigration Rules are set out at paragraph 390:

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

(i) the grounds on which the order was made;

(ii) any representations made in support of revocation;

(iii) the interests of the community, including the maintenance of an effective immigration control

(iv) the interests of the applicant, including any compassionate circumstances

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

> 396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007

32. As paragraph 398 does not apply, paragraph 390A does not apply. This is not a case in which section 32 of the 2007 Act applies either. Nonetheless, there remains a presumption that the public interest requires deportation

33. I found Miss A to be an articulate witness who has considerable insight into her condition. I accept that she has in the past been sectioned under the Mental Health Act on some six occasions and also on the basis of the evidence from her doctor that this has been traumatic for her given that hospitalisation has a detrimental effect on her condition. The letter from Dr Read of 21 July 2014 bears out her evidence of an unfortunate cycle of deterioration, hospitalisation and recovery followed by a further deterioration, and so on. The letter concludes:-

> "From 2011 until recently her mental state has been stable and she has been discharged from the assertive outreach team. Emma tells me that her partner [the appellant] is a key part of her recovery process and I would concur that Miss A's psychotic illness has been characterised by stress – vulnerability picture and has been precipitated by relationship breakups in the past. Therefore it is not unreasonable, if thinking in psychodynamic terms that, now she is in a steady and supportive relationship this does not occur. Therefore it would also seem logical that any enforced separation is likely to increase the risk of relapse.
>
> I am providing this report free of charge as I believe Miss A's relationship with [the appellant] is a key component to her recovery and ongoing wellbeing. Given the intensity of support from statutory services and hospitalisation she has needed in the past there would seem to be financial benefit to the state as well as the psychological benefit to Miss A herself of allowing this appeal."

34. In the light of this report I consider that there is a realistic chance that if the appellant were to be deported, that Miss A would suffer a relapse as she has in the past, resulting, as it has done on several occasions, in her compulsory hospitalisation and treatment due to the psychotic nature of her illness. Given the expert evidence that the nature of her condition means that she responds badly to hospitalisation, this exacerbates the likely effect

35. I do not consider that Miss A could reasonably be expected to go to Iran. At present she has a significant support network and there would be, I accept, difficulties in her engaging with psychiatric therapy as she does not speak Farsi. She has also lived in the United Kingdom for 42 years since birth. It is evident that this support and treatment is something to which she is entitled as a British Citizen, and the effect of removal to a

country where she would, apart from her partner, be isolated, is likely to cause serious distress owing to her illness.

36. I am, in the circumstances, satisfied that the effect of deporting the appellant to Iran would cause very serious hardship to Miss A, and that there would be, in reality, insurmountable obstacles to her joining the appellant in Iran. That is a factor which weighs in the appellant's favour.

37. There is, however, little else in the appellant's favour, other than the fact that he speaks English. He has a long criminal record, albeit for relatively minor offences, and he has fabricated a claim for asylum. His relationship with Miss A commenced well after a deportation order had been signed, and his status here was, to say the least, precarious. He had no leave to be here, although his presence here was tolerated as his claim for asylum was under consideration. That does not, however, make his presence lawful – see **ST(Eritrea) v SSHD** [2013] UKSC 12. What is under consideration here is whether his presence here is lawful in the context of immigration, and thus what was said in **Szoma v Secretary of State for Work and Pensions** [2006] 1 AC 564 is not applicable here.

38. Accordingly, by operation of section 117B (4), I attach little weight to the family life the appellant has developed with Ms A, even though the effect on her will be serious. I also attach little weight to the appellant's private life which in turn means I can attach little weight to the delay in this case.

39. I accept that by virtue of section 117A, the matters to be taken into account within section 117B are not exhaustive, and I accept that Ms A is pregnant. It is not, however, arguable that the unborn child has any rights.

40. As noted above, the appellant does not have leave to be here, nor has he ever had leave to remain. There is a public interest in maintaining Immigration Control, as set out in section 117B (1) and in paragraph 390 of the Immigration Rules.

41. In the circumstances, while I accept that the appellant has established a family life in the United Kingdom with Ms A, and that his deportation would cause her suffering to the extent that it would be unduly harsh, in light of the factors set out in section 117B of the 2002 Act, I cannot attach weight to the appellant's family life with his partner or to his private life, and accordingly, given the presumption in favour of deportation and the public interest in maintaining Immigration Control, I am compelled by statute to consider that the interference with the right to respect for private and family life is proportionate.

42. Accordingly, I dismiss the appeal on all grounds.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside

2. I remake the decision by dismissing the appeal on all grounds.

3. I maintain the anonymity order made by the First-tier Tribunal

Signed Date: 5 November 2014

Upper Tribunal Judge Rintoul