Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07120/2017

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 21 September 2018	**On 20 November 2018**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF THE STATE FOR THE HOME DEPARTMENT

Appellant

and

[R T]
~~(No anonymity order made)~~

Respondent

Representation:
For the Appellant: Mr Govan, Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. For convenience we retain the designations as they were before the First-tier Tribunal, thus, Mr [T] is the appellant, the Secretary of State the respondent.

2. The appellant is a citizen of Fiji born in 1979. His immigration history since he first arrived in the UK in 2000 is convoluted and includes a period from

2005 to 2008 when he returned to Fiji. It suffices to note that in May 2016 he was served with a decision to make a deportation order under section 5(1) of the Immigration Act 1971. He subsequently made a protection and human rights claim in December 2016. In a decision dated 13 July 2017 these claims were refused and the decision to deport was maintained.

3. He appealed.

First tier hearing

4. Following a hearing at Glasgow on 4 April 2018, at which the appellant did not attend and was not represented, Judge of the First-tier Tribunal Kempton dismissed the appeal on asylum and human rights grounds but allowed the appeal against the making of the deportation order.

5. She found that the appellant had been convicted on 29 charges from 2000 until his last conviction in 2016. His longest custodial sentence was for a period of 11 months in 2011 for dangerous driving.

6. She went on to consider paragraph 398 of the Immigration Rules which reads:

> *"398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention and ...*
>
> > *(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."*

7. She then set out paragraph 399 which provides that deportation may be avoided in a family life case in limited circumstances set out therein.

8. She noted that the appellant has three British citizen children born in 2002, 2004 and 2007 by two different women.

9. She found that there was no evidence of contact with the children. There was no evidence of family or private life.

10. She noted that the appellant had served for a year as a member of the British Armed Forces being discharged in 2001 due to a poor disciplinary record, and his claim that he had been diagnosed with PTSD after a spell as security personnel in Iraq in 2005/6. She found that he had not produced evidence in support of that claim. The only medical evidence

was from a doctor who saw him when he was detained at Harmondsworth in early 2017 and who noted that he had scars which were consistent with his claim to have been assaulted in Fiji in 2007 and that he was suffering from a depressive episode, poor sleep, thoughts of self-harm. He was then on sleeping and anti-depressant medication. There was no mention of him suffering from PTSD. It was inferred he would feel better once he was no longer detained.

11. Her conclusions are at paragraphs 35 and 36:

> *"35. I note that the respondent's view is that the appellant is a persistent offender and that it is in the public interest that he should be deported. However, I note that there is no evidence of further offending since the appellant was dispersed to Glasgow.*
>
> *36. I am not satisfied that there is sufficient current evidence before me to demonstrate that it is in the public interest or conducive to the public good to deport the appellant. If persons who serve in the armed forces are affected by what they encounter during service or in subsequent civilian but quasi military roles (as the appellant was in when in Iraq), then, it could be inferred that the state has a duty to look after such veterans. Although there is only so much which can be done if an appellant will not engage with mental health services."*

12. The respondent sought permission to appeal which was granted on 2 May 2018.

Error of law hearing

13. The appellant did not attend the hearing before us and was not represented. There was no explanation for his non response. We were satisfied that notice of hearing had been sent to his last known address on 22 August 2018.

14. We proceeded in his absence. Mr Govan in his submissions adopted the grounds, the crux of which was that the judge failed to give any clear reasons as to why the appeal was allowed. Indeed, it was irrational.

15. We agreed that the decision showed material error of law.

16. At [18] the judge correctly noted the test to be that deportation is conducive to the public good and in the public interest because in the respondent's view the appellant is a "*persistent offender who shows a particular disregard for the law*" unless exceptions apply. If no exception applies there must be very compelling circumstances over and above those set out in paragraphs 399 and 399A.

17. In this case the judge found that no exception applied, specifically, there was no evidence of family life or private life. She did not go on to consider very compelling circumstances.

18. She also found that the appellant's claim to be at risk for a Refugee Convention reason (imputed political opinion) was not made out.

19. The original grounds of appeal are in vague terms and there was nothing before the judge from the appellant to challenge the respondent's reasons. Her decision on the asylum claim is unassailable. The findings on the lack of evidence of family/private life and that the claim under Article 8 fails were clearly open to the judge on the evidence before her. There was no evidence on which she could have found very compelling circumstances.

20. It may be that the judge in the decision, nonetheless, to allow the appeal was influenced by the apparent finding at [35] that he was not a persistent offender. If so, she erred in two respects.

21. First in ***Chege*** ("is a persistent offender") [2016] UKUT 187 (IAC) it was held that:

> *"A 'persistent offender' is someone who keeps on breaking the law. That does not mean however, that he has to keep on offending until the date of the relevant decision or that the continuity of the offending cannot be broken. A 'persistent offender' is not a permanent status that can never be lost once it is acquired, but an individual can be regarded as a 'persistent offender' for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. The question whether he fits that description will depend on the overall picture and pattern of his offending history up to that date. Each case will turn on its own facts".* [Headnote].

22. In this case, as the judge noted, the appellant had been convicted on numerous occasions since his first arrival in 2000. His criminal history as noted on the PNC record which was before the judge included for the period 2000 until April 2016, 29 offences which resulted in convictions: 3 against property; 2 theft and kindred offences; 1 public order offence; 4 offences relating to police/courts/prison; 17 miscellaneous offences (mainly road traffic); 2 non-recordable offences. His longest custodial sentence was 11 months in 2012 for dangerous driving. His most recent conviction was in April 2016 for road traffic offences for which he was fined and had his licence endorsed. It appears that he was held in immigration detention from November 2016 until November 2017 when he was granted bail. He was dispersed to accommodation in Glasgow.

23. The judge materially misdirected herself on the law by concentrating solely on the brief crime free period since the appellant was dispersed.

24. Secondly, the gateway to treating an individual as a persistent offender is the Secretary of State's assessment, not the Tribunal's. The judge nowhere considers the implications of this.

25. Further, the judge appears to have found (at [34] and [36]) that the appellant suffers from PTSD and to have taken that as a factor that assisted his claim. However, the appellant had presented no evidence whatsoever to suggest that he has a current medical condition. In the only medical evidence before her, from 2017, PTSD is not mentioned. In making a finding in the absence of any evidence in support, the judge further erred.

26. These errors are such that the decision cannot stand. We set it aside.

27. We remake the decision. The position is as follows: As paragraph 398 states, deportation is conducive to the public good and in the public interest if the appellant is a persistent offender who shows a particular disregard for the law unless exceptions apply. We find that the overall picture and pattern of his offending history, as set out above, over a period of 16 years since he first arrived (less if his time in Fiji and elsewhere is taken into account) amounts to his being a persistent offender who shows a particular disregard for the law.

28. The appellant's claim for asylum has been dismissed. He has provided no evidence of family or private life. None of the exceptions apply. There is no suggestion of any very compelling circumstances over and above those described in the Rules. As indicated, the appellant has failed totally to present any arguments in support of his case since the decision. There is simply no evidential basis for a conclusion departing from the starting point that his deportation is conducive to the public good and in the public interest.

29. His appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal shows the making of material errors of law. It is set aside and remade as follows: the appeal is dismissed.

Signed Date 16 November 2018

Upper Tribunal Judge Conway