Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06731/2017**

THE IMMIGRATION ACTS

Heard at Field House
On 2 January 2019

Decision & Reasons Promulgated
On 15 January 2019

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MEA

(ANONYMITY ORDER PREVIOUSLY MADE)

Respondent

Representation:

For the Appellant: Ms A. Everett, Home Office Presenting Officer

For the Respondents: Mr. F. Mahfuz of counsel, instructed by Hamlet Solicitors LLP

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Bangladesh. He entered the United Kingdom as his mother's dependent on her spouse visa in June 1994 at the age of one and has remained here ever since.

2. His father and all but one of his siblings were British citizens by birth and his mother subsequently was granted indefinite leave to remain on 24 January 2011. The Respondent was not entitled to British citizenship as he had been born in Bangladesh to a father who, although a British citizen himself, had also been born in Bangladesh and was not able to pass his British citizenship on to a child who was born abroad. The Respondent's father was wrongly advised by previous legal representatives that the Respondent was a British citizen by reason of his birth and, therefore, no alternative application for British citizenship or leave to remain in the United Kingdom was made when the Respondent's initial expired on 12 June 1995. As a consequence, he has been an overstayer since that date.

3. Between 12 March 2008 and 6 February 2017 the Respondent was convicted of three public order offences, nine counts of failing to comply with community service and supervision orders, two counts of possession of a Class B drug, five driving offences, such as driving whilst under the influence of alcohol and driving without a licence or insurance, one count of being drunk and disorderly and one count of racially aggravated harassment, one of sexual assault and one of criminal damage. He was never sentenced to any term of imprisonment which was not suspended.

4. On 24 September 2016 the Respondent was arrested for an alleged offence of affray and served with notice as an overstayer. His father made submissions on his behalf on 3 November 2016 but on 14 March 2017, the Appellant made a decision to deport the Respondent from the United Kingdom on the basis that his presence in the United Kingdom was not conducive to the public good, as he was a persistent offender. On 20 March 2017 the Respondent made submissions in response relying on his rights under Article 8 of the European Convention on Human Rights but this human rights claim was refused on 23 May 2017.

5. The Respondent appealed on 7 June 2017 and his appeal came before First-tier Tribunal Judge Morgan who allowed his appeal on human rights grounds in a decision promulgated on 26 June 2018. The Appellant appealed and First-tier Tribunal Judge Parkes refused him permission to appeal on 8 August 2018. However, Upper Tribunal Judge Grubb granted the Appellant permission to appeal on 5 November 2018

ERROR OF LAW HEARING

6. The Home Office Presenting Officer submitted that First-tier Tribunal Judge Morgan had given too much weight to speculation on the part of the Respondent that if his father had applied on his behalf for British citizenship or leave to remain in the United Kingdom at any earlier stage, one or both of these applications would have succeeded.

ERROR OF LAW DECISION

7. As the Respondent had not been sentenced to any term of imprisonment, which was for at least 12 months, he was not liable to automatic deportation under section 32 of the UK Borders Act 2007 but the Respondent did find that his presence in the United Kingdom was not conducive to the public good for the purposes of section 3(5)(a) of the Immigration Act 1971.

8. The Respondent had relied upon his rights under Article 8 of the European Convention on Human Rights when challenging the decision to deport him from the United Kingdom. Therefore, First-tier Tribunal Judge Morgan was obliged to take into account section 117A-C of the Nationality, Immigration and Asylum Act 2002 and paragraphs 398 – 399A of the Immigration Rules when considering whether his deportation would breach his human rights. In addition, he had to follow the guidance provided by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60. In paragraph 32 of that case, Lord Justice Reed found that:

> "Whether the situation is analysed in terms of positive or negative obligations is, however, unlikely to be of substantial importance. Whether the person concerned enjoys private or family life in the UK depends on the facts relating to his relationships with others: whether, for example, he is married or has children. Where he does enjoy private or family life in the UK, he has a right under article 8 to respect for that life, whatever his immigration status may be (although that status may greatly affect the weight to be given to his article 8 right, as *Jeunesse* makes clear). Whether one poses the question whether, striking a fair balance between the interests of the individual in his private or family life

> and the competing interests of the community as a whole, his right to respect for his private and family life entails an obligation on the part of the state to permit him to remain in the UK; or whether, striking a fair balance between the same competing interests, his deportation would be a disproportionate interference, one is asking essentially the same question. It is true, as counsel pointed out, that the onus is on the state to justify an interference, whereas there is no such onus on the state to demonstrate the absence of a positive obligation, but questions of onus are unlikely to be important where the relevant facts have been established. Ultimately, whether the case is considered to concern a positive or a negative obligation, the question is whether a fair balance has been struck".

9. He went on to note in paragraph 26 that:

> "In *Boultif v Switzerland* (2001) 33 EHRR 50, para 48, the court said that it would consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children of the marriage, and if so, their age; and the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled"

10. However, in this case *Boultif* had been settled in Switzerland and Lord Justice Reed went on to find that:

> "27. As the Grand Chamber noted in *Jeunesse v Netherlands* (2014) 60 EHRR 17, para 105, these criteria cannot be transposed automatically to the situation of a person who is not a settled migrant but an alien seeking admission to a host country: a category which includes, as the facts of that case demonstrate, a person who has been unlawfully resident in the host country for many years. The court analysed the situation of such a person, facing expulsion for reasons of immigration control rather than deportation on account of criminal behaviour, as raising the question whether the authorities of the host country were under a duty, pursuant to article 8, to grant the person the necessary permission to enable her to exercise her right to family life on their territory. The situation was thus analysed not as one in which the host country was interfering with the person's right to respect for her private and family life, raising the question whether the interference was

justified under article 8(2). Instead, the situation was analysed as one in which the person was effectively asserting that her right to respect for her private and family life, under article 8(1), imposed on the host country an obligation to permit her to continue to reside there, and the question was whether such an obligation was indeed imposed.

28. In addition to identifying the issue in *Jeunesse* as concerning a positive obligation under article 8(1) rather than a negative obligation under article 8(2), the court also identified a number of factors as being relevant: factors which overlapped with those mentioned in the *Boultif* line of cases but were also different in some respects. Factors to be taken into account were said in *Jeunesse* to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were insurmountable obstacles (or, as it has been put in some other cases, major impediments: see, for example, *Tuquabo-Tekle v Netherlands* [2006] 1 FLR 798, para 48, and *IAA v United Kingdom* (2016) 62 EHRR SE 19, paras 40 and 44) in the way of the family living in the country of origin of the alien concerned, and whether there were factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (para 107). Another important consideration was said to be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. Where this is the case, the court has said that it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8 (*Jeunesse,* para 108). The court has found there to be exceptional circumstances in situations where, notwithstanding the importance of that consideration, removal failed to strike a fair balance between the competing interests involved. In the *Jeunesse* case, for example, a prolonged delay in removing the applicant from the host country, during which time she had developed strong family and social ties there, constituted exceptional circumstances leading to the conclusion that a fair balance had not been struck (paras 121-122)".

11. First-tier Tribunal Judge Morgan did not explicitly give any weight to the fact that the Respondent had not had settled status in the United Kingdom. At most he found in paragraph 22of his decision he found that there were insurmountable obstacle to him returning to Bangladesh and that this "weighs in the [Respondent's] favour in the balancing exercise albeit that given his residence had been unlawful it does not carry the weight it otherwise would".

First-tier Tribunal Judge Morgan also did not give weight to the fact that his leave to remain had been precarious for a short period of time and had then been unlawful.

12. Section 117C (1) of the Nationality, Immigration and Asylum Act 2002 states that "the deportation of foreign criminals is in the public interest" and in paragraph 17 of his decision First-tier Tribunal Judge Morgan took this into account. However, he did not explicitly take into account that section 117C(2) also states that "the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal", which could have been a factor which assisted the Respondent within any balance sheet.

13. It was accepted by both parties that the exceptions in section 117C(4) and (5) did not apply to the Respondent.

14. Paragraph 398 of the Immigration Rules also states that:

> "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 interests because, in the view of the Secretary of State, …they are a persistent offender who show a particular disregard for the law
>
> …the public interest in deportation will only be outweighed by other factors where they are other very compelling circumstances over and above those described in paragraphs 399 and 399A".

15. The factors referred to in paragraph 399 do not apply to the Appellant as he did not have a genuine and subsisting parental relationship with a child who was under 18 who is in the United Kingdom and who is a British citizen or has lived here continuously for the 7 years immediately preceding the deportation decision and the effect to his deportation would be unduly harsh on him. It also does not apply as he is not in a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled here.

16. Paragraph 399A does not apply as he has not been lawfully resident in the UK for most of his life; having only been lawfully present here for a year. Therefore, the public interest in

deporting the Respondent could only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

17. In paragraph 22 of his decision, First-tier Tribunal Judge Morgan gave weight to the very significant obstacles which would face the Respondent in establishing a private life in Bangladesh on his own given his diagnosis of paranoid schizophrenia. He also gave weight to the length of time he had lived here with his family even though this was not a factor which was over and above the factors contained in paragraph 399A.

18. He also failed to consider how the particular factors in the Respondent's case were exceptional even though he had not made any explicit findings as the extent of his social and cultural integration in the United Kingdom.

19. This was a case where the contents of the expert psychiatric report were supported by medical notes compiled by his GP and other treating clinicians but First-tier Tribunal Judge Morgan did little more than summarise the findings made by the consultant psychiatrist in paragraph 16 of his decision. He did not attempt to analyse how the seriousness of the chronic mental illness he now suffered from may give rise to very compelling circumstances which outweighed his previous persistent offending and lack of social and cultural integration in the United Kingdom or consider whether he may have been suffering from some form of mental illness before he was actually diagnosed and whether this may have explained some of his behaviour.

20. There was also a lack of detailed evidence of the extent of his dependence upon his parents even though he is a young adult.

21. As a consequence, there were errors of law in First-tier Tribunal Judge Morgan's decision.

Decision

(1) The appeal is allowed.

(2) The decision of First-tier Tribunal Judge Morgan is set aside.

(3) The appeal is remitted to the First-tier Tribunal at Taylor House to be heard *de novo* before a First-tier Tribunal Judge other than First-tier Tribunal Judge Morgan or Parkes.

Nadine Finch

Signed Date 7 January 2019

Upper Tribunal Judge Finch