Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **HU/08759/2017**

THE IMMIGRATION ACTS

Heard at: Field House
On 14 May 2019

Decision & Reasons Promulgated
On 3rd June 2019

Before:
The Hon Mrs Justice WHIPPLE DBE
and
Upper Tribunal Judge John FREEMAN

Between:

Secretary of State for the Home Department

Appellant

and

Mohd. MOINUL ISLAM

Respondent

Representation:
For the appellant: Miss Isherwood, Home Office Presenting Officer
For the respondent: Mr M S Gill QC, instructed by Taj Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal (Judge Ceridwen Griffith), sitting at Hendon Magistrates' Court on 28 November 2018,. Judge Griffith allowed the appeal by a citizen of Bangladesh born on 9 October

1989 on human rights grounds. That appeal was in response to the Secretary of State's decision to deport him because he is a foreign criminal. We shall continue to refer to him as the Appellant even though he is the respondent to this appeal.

2. The Appellant is now 29 years old. He is a single man with no dependants. He came to the UK on 10 July 1993, a few months before his 4th birthday. He was granted indefinite leave to remain until 7 June 1994.

3. The Appellant has a history of offending. Between 2006 (when he was still a minor) until 2012 (when he turned 23) he was convicted on 14 occasions of 20 offences, ranging from offences against the person to theft, carrying an offensive weapon and drug offences. The index offence which triggered the automatic deportation proceedings was committed in 2009, when the Appellant was aged 20 or so. He was convicted on two counts of supplying cocaine, a class A drug, and sentenced to two years' imprisonment of which he served twelve months. He was released from prison in 2010.

4. The Appellant applied to be naturalised as a British citizen in April 2013 but that application was refused because he did not meet the Good Character requirement. A deportation order was served on him on 11 June 2015 and an application on human rights grounds was refused on 13 October 2015. The deportation order was signed the same day. There were various challenges to that order. On 14 June 2017, the decision dated 13 October 2015 was withdrawn as was the original deportation order. A fresh deportation decision was made; the Appellant's fresh human rights claim was refused on 2 August 2017. The Appellant had an in-country right of appeal against that decision.

5. He exercised his right of appeal to the FtT. By a decision promulgated on 20 December 2018, Judge Griffith allowed that appeal and declared the deportation decision unlawful on human rights grounds.

6. The Secretary of State now appeals against that determination.

The FtT's reasons

7. Judge Griffith recorded that the Appellant comes from a large family with 7 siblings, four of whom were born in this country. The Appellant's evidence, which was accepted, was that his father had died when he was 12, which is an event which he said had seriously affected him and had caused him to associate with a bad crowd; he had now been free of crime for 6 years, and intended to stay that way. In short he had turned his life around. He had only been to Bangladesh once, with his father in 2001 (when he was 12 years old). He has no family in Bangladesh and no one to ask for help. He lives at home with his family. He speaks the Sylheti dialect of the Bangali language which is not the same as the official language spoken in Bangladesh, which he can neither speak nor write. He did not know that he had a Bangladeshi passport and had always considered himself to be British. His appeal was supported by evidence from his mother and two of his sisters (see paras [72] - [75]).
8. The Appellant advanced two bases for his appeal, both of which arise out of s 117C Nationality, Immigration and Asylum Act 2002, which we set out in relevant part here:

> "(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."

9. First, the Appellant argued that he was in a genuine and subsisting relationship with a partner in the UK who was a "qualifying partner" for the purposes of exception 2 (s

117C(5)). Judge Griffith rejected that submission on the evidence (para [70]) and there is no appeal to us against that finding.

10. Secondly, the Appellant argued that his right to private life under Article 8 outweighed the public interest in his deportation as a foreign criminal, relying on exception 1 (s 117C(4), read with para 399A of the Immigration Rules). Judge Griffith considered each of the three limbs of exception 1. There was no dispute that that Appellant satisfied the first limb because he had been lawfully resident in the UK for most of his life (para [71]). On the second limb, Judge Griffith accepted that the Appellant's criminal past was not, on the evidence, an indication that he was not socially and culturally integrated in the UK – after all, the Appellant had long believed he was British and had not realised at the time of commission of these crimes that he held a Bangladeshi passport. Judge Griffith accepted that the Appellant had only visited Bangladesh once and had no real connection with that country. She found that the Appellant's involvement in crime was not evidence of a failure of integration; the Appellant therefore met the second limb of exception 1, because he was socially and culturally integrated in the United Kingdom (paras [72]-[73]). Judge Griffith turned to limb 3. She found that the Appellant would be a stranger and an outsider were he to return to Bangladesh, in the absence of any real ties to that country. He had only returned once for three months at the age of 12, and that was insufficient to build any form of cultural tie to that country. He cannot read or write the main language of the country and would be disadvantaged in finding work or accommodation. There were no family members in Bangladesh who could help him. He has no real employment history to rely on to enable him to find employment in that country. He receives help from family in the UK but even if that continued, it would not be sufficient to overcome the other difficulties he would face as an outsider (see para [74]-[75]).
11. Judge Griffith then reminded herself of the public interest factors. She recognised the significance of the Appellant's offending and the general public interest in deporting foreign criminals. But she also noted that this Appellant's offending was historic, some of it committed while he was a minor in circumstances where he had fallen in

with a bad crowd. She concluded that the Appellant fell within the category of individuals where the public interest in deportation was outweighed by countervailing factors under Article 8, that category being identified by s 117C(4) (exception 1) and para 399A. The public interest did not require the Appellant to be deported (para [76]-[78]).

12. Judge Griffith identified a further public interest factor, namely the delay in taking deportation action against the Appellant. The index offence was committed in 2010 but no deportation action taken until 2015. Further, the Appellant had now been free of crime for six years which diminished the public interest in deportation (para [79]).
13. She allowed the appeal (para [80]).

Appeal

14. The Secretary of State advances a number of grounds of appeal (which we summarise):
    a. That the FtT was irrational in concluding that there were very significant obstacles to the Appellant reintegrating into Bangladesh;
    b. That the FtT was in error in concluding that the Appellant was an "outsider";
    c. That the FtT failed to give adequate consideration to the seriousness of the Appellant's criminal conduct which was not mere juvenile delinquency given that he continued to offend as an adult and had been convicted of two further offences since being released from prison on the index conviction for supplying class A drugs.
    d. That the FtT failed to give adequate consideration to the public interest in deporting criminals, even if there has not been any recent reoffending.
    e. That the FtT had failed to give clear reasons for its decision.
15. By a skeleton argument drafted by Mr T Lindsay of the Secretary of State's Specialist Appeals Team in advance of the appeal hearing, the Secretary of State raised a new point relating to limb 2 of exception 1, namely that Judge Griffith was wrong on the authorities to reject the Appellant's past criminality as evidence of lack of social and cultural integration in the UK. However, as Mr Gill pointed out, the grounds of appeal

did not contain any challenge which related to Judge Griffith's findings on limb 2, and therefore, he argued, this point was simply not open to the Secretary of State on this appeal.

16. After hearing from Miss Isherwood, we upheld Mr Gill's objection. The particular point of challenge on limb 2 was not heralded in the Secretary of State's grounds of appeal; it had been raised for the first time in a skeleton argument served just before the hearing, but apparently not seen by Mr Gill, for whatever reason, before he came into the hearing room to conduct the appeal. The ground was not pleaded; the Appellant was prejudiced by this, and could not be expected to deal with the point "on the hoof"; the point was not open to the Secretary of State to advance on appeal.
17. The essence of Miss Isherwood's remaining case before us was that although Judge Griffith had identified the correct factors to weigh in the decision, the conclusion reached was wrong in law: this was a case where the public interest plainly outweighed the Appellant's article 8 right to private life; this appeal should be allowed with the consequence that the Appellant should be deported to Bangladesh.
18. Mr Gill resisted that submission on the basis that Judge Griffith had come to a permissible conclusion on the evidence. There was no irrationality in Judge Griffith's decision in relation to limb 3, for which adequate reasons had been given (at [74]-[75]). Once the three limbs of exception 1 were satisfied, the conclusion necessarily followed that the Appellant should not be deported, there was no further or additional public interest consideration at that stage. Judge Griffith had plainly considered the case with some care; the determination should stand. The Upper Tribunal should not interfere.

Conclusion

19. As we indicated at the hearing, we dismiss this appeal. Dealing first with Mr Gill's argument on the consequences of an appellant's satisfying Exception 1, there is no need to look further than paragraph 36 of *NA (Pakistan)* [2016] EWCA 662: "In the case of a medium offender, first see whether he falls within Exception 1 or Exception

2. If he does, then the Article 8 claim succeeds." Here the only basis on which the original grounds challenged Judge Griffith's conclusion on the applicability of Exception 1 referred to condition (c), the 'very serious obstacles' test.

20. Judge Griffith was entitled to conclude that there were, on the evidence, "very significant obstacles" to the Appellant's integration if he was returned to Bangladesh and accordingly that the requirements of condition (c) of Exception 1 (and para 399A of the Rules) were met. This was essentially a question for her on the facts, on which her conclusion was rational and adequately reasoned. Judge Griffith was well aware of the public interest in deporting foreign criminals and weighed that interest against the Appellant's right to private life: the approach was sound. There is no basis for us to interfere with Judge Griffith's conclusion.

Appeal dismissed

(drafted by Whipple J and signed on behalf of both of us by)
(a judge of the Upper Tribunal)

DATE: 28.05.2019