IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2023-005605

First-tier Tribunal Nos: HU/52175/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 22nd of May 2024

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE MANUELL

Between

KASHIF NADEEM
[ANONYMITY DIRECTION REMOVED]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Richardson, Counsel instructed by Nasim & Co solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on Friday 10 May 2024

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Farmer dated 25 February 2023 ("the Decision") dismissing his appeal against the Respondent's

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decision dated 21 March 2022 refusing his human rights claim, made in the context of a decision to deport the Appellant to Pakistan.

2. At the outset of the hearing, we queried with Mr Richardson why an anonymity direction had been made in this case. He did not know (although we observe that the Judge does say at [72] of the Decision that she imposed this because the Appellant was a minor at the time of conviction). Whilst we recognise that the Appellant was (just) a minor at the time of commission of the index offence and at the time of his conviction, that is not good reason to grant him anonymity. He is now an adult. Mr Richardson confirmed that he did not object to the anonymity direction being lifted and we have therefore done that.

3. The Appellant's human rights claim is based on his private life in the UK and his life with his family who are all in the UK (parents and siblings as well as extended family). The Appellant has lived in the UK since 2007 when he entered as a six-year-old child. He was granted leave to remain in 2014 and indefinite leave thereafter.

4. In 2018, the Appellant committed an offence of wounding with intent to do grievous bodily harm and having a blade/pointed article in a public place. He was sentenced in November 2018, a few weeks before his eighteenth birthday, to six years in custody.

5. In light of the length of sentence, the Appellant is required to show that there are very compelling circumstances over and above the two exceptions set out in section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C") by reason of Section 117C (6).

6. Judge Farmer found that the Appellant could not meet the first exception under Section 117C, it being accepted that he had not been lawfully resident in the UK for most of his life. She accepted that he was socially and culturally integrated in the UK (as the Respondent conceded) but did not accept that there were very significant obstacles to his integration in Pakistan. It was accepted that the family life exception could not apply.

7. The Judge thereafter considered whether Section 117C (6) was met. In so doing, she considered the Appellant's family circumstances, evidence about his mental health and the factors set out in <u>Maslov v Austria</u> (1638/03) [2008] EHRR 546 ("<u>Maslov</u>"). She also considered the circumstances of the Appellant's offending and the evidence about the risk which he posed. She concluded that the public interest outweighed the interference with the Appellant's private and family life and therefore dismissed the appeal.

8. The Appellant appeals the Decision on three grounds as follows:

   Ground 1: the Judge has made a material error of fact when considering the risk which the Appellant poses based on a misunderstanding of the OASys report.

Ground 2: the Judge has also misunderstood the Appellant's evidence about the impact of his father's health condition at the time of his offending.
Ground 3: the Judge has failed to take into account that the automatic deportation provisions of section 32 UK Borders Act 2007 ("Section 32") do not apply and has therefore failed to attribute correct weight to the public interest.

9. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 5 April 2023 in the following terms:

> "1. The application is in time.
> 2. The grounds argue that the Judge erred in recording the Appellant's risk of reoffending as high when the OASys Assessment was that it was low, the judge also erred on the timing of the Appellant's father's surgery and his keeping away from the family before the surgery and the Appellant's offending. It was also relevant that at the time of the offence was minor.
> 3. It is arguable that the Judge overstated the danger the Appellant presented and combined with his age and background it is arguable that the assessment made may be materially flawed.
> 4. The grounds disclose arguable errors of law and permission to appeal is granted."

10. The matter comes before us to determine whether the Decision contains an error of law. If we conclude that it does, we must then consider whether to set aside the Decision. If we set aside the Decision, we must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

11. We had before us a consolidated bundle running to 456 pages containing the core documents relating to the appeal before this Tribunal and including also the Appellant's and Respondent's bundles before the First-tier Tribunal. We refer to documents in that bundle so far as necessary as [B/xx]. We also had a skeleton argument from Mr Melvin which served as the Respondent's Rule 24 reply.

12. Having heard from Mr Richardson and Mr Melvin, we indicated that we would reserve our decision and provide that with reasons in writing which we now turn to do.

<u>DISCUSSION</u>

<u>Ground 1: Material misdirection of fact</u>

13. The OASys report appears at [B/377-437]. At [B/384], the report sets out a number of predictors. As is there noted, at the time of the report, the Appellant remained in custody due to a further offence of violence whilst in prison which led to a further ten-month sentence. The report is dated 9 February 2022. The Appellant's earliest release date is given as 28 April 2022. As we understand it, the Appellant was released in the summer of 2022.

14. The OASys report then sets out two percentages under the heading "OGRS3" (Offender Group Reconvictions Scale 3) giving the percentage chance of general reoffending within one year of discharge as 17% and two years as 29%. Thereafter, under the heading "Risk Serious Recidivism", the "RSR score" is shown as "2.92% Low". It is this figure and assessment which is relied upon by the Appellant.

15. The Respondent relies on the substance of the report as a whole and in particular the assessment at [B/422] that the risk to the general public following release is said to be high. As Mr Melvin pointed out, in addition to the ten-month sentence imposed for an incident of violence whilst in custody, the report refers to other adjudications during the Appellant's imprisonment and that the Appellant was at the time of the report under police investigation for a further incident. The Appellant is said to be a medium risk to prison officers whilst he remains in prison. The Appellant has also been categorised as a MAPPA offender category 2, level 1.

16. The Judge dealt with the risk which the Appellant poses at [66] of the Decision as follows:

> "Whilst in custody his behaviour was described as 'frequently poor and he has been in a number of violent altercations'. 'He has displayed poor compliance with the prison regime and lack of respect to authority figures in a custodial environment.' His violence is mostly related to his gang affiliations and it was concluded that it seems likely that this pattern of behaviour will continue to be seen whilst he has such entrenched attitudes about violence being a way to solve problems'. [CB436]. His risk of reoffending and risk to the public was categorised as high. I have already found that despite Dr Hussain recommending that the appellant undertake CBT to address his anger management issues, he has failed to do this. Although he has a supportive relationship with probation, and many supporting letters from members of his community, and I accept he has made efforts to carry out voluntary work and attend the Mosque, I find this is only with the focused support of his family, and with the threat of deportation hanging over him. I was not impressed with his failure to engage properly with his anger management issues and the way he minimised his violent behaviour in prison. This includes not sharing with his family the extent of his behaviour. His father only knew of one incident which he said was due to the appellant defending a friend. His brother thought his behaviour had been alright in prison, and so clearly either had no knowledge of what had been happening, or less likely, thought it was acceptable. The appellant has fashioned a sharp instrument out of a plastic knife, and he was found to be in possession of this in June 2020 and so sentenced to a further 10 months in prison. The appellant has minimised this behaviour and so has his family, to the extent they are aware of this. This taken together with his failure to undertake CBT and his failure to undertake any meaningful rehabilitation in custody, counts against the credibility of his claim to have learnt from his offending, to have grown up, shown remorse and learnt the error of his ways."

17. It is important to understand the various parts of the OASys report. The OGRS3 assessment scores are based on static factors relating to age at time of offending, the nature of the offence and length of sentence. Those scores are based on likelihood of reoffending assessed according to a group sample as the heading suggests. The scores in this case are not particularly low but, in any event, do not give an indication

of the likelihood of this individual reoffending. That is considered in the sections which follow based on dynamic factors such as the circumstances of the particular offence, the individual's behaviour before and since the offending, understanding of the reasons for the offending and the extent to which the individual has taken responsibility for the offence. As such, although the RSR score is said to be "Low" and refers to the score as "DYNAMIC", that has to be read in the context of the following consideration of the actual dynamic factors which feed into the final assessment of risk. For example, under the heading of "OVP" (Offender Violence Predictor) ([B/409], the scores are adjusted to 26% in year one and 40% in year two giving rise to a medium risk assessment.

18. The Appellant criticises the Judge for cherry-picking parts of the OASys report. However, when the report is read as a whole, the focus on the RSR score and the assessment of that risk as low is itself cherry-picking. The report read as a whole, as the Judge sets out, paints a very worrying picture of an individual who has failed to change even whilst in custody and has failed to recognise or alter the behaviours which led to the index offence. In support of that assessment, one only has to read what is said about the risk to the public in substance at [B/420] as follows:

> "1. The nature of the risk is of serious physical violence, involving the use of weapons (knives). There is the risk of emotional and psychological harm through being direct victims and/or witnessing such behaviour."

In relation to the immediacy of any risk, the following is said:

> "1. The general public - Should Mr Nadeem continue to have the view that carrying a weapon is appropriate way of defending/protecting himself and that that violence is an appropriate way of dealing with conflict. Given Mr Nadeem's disclosures regarding his gang affiliations, his perceived loyalty to his associates could also be potential risk factors, in particularly if he feels they have been disrespected/threatened. Additionally, should Mr Nadeem feel that he has been violated by others and therefore has a desire to gain back a sense 'pride', which is linked to rumination and grievance thinking, also appear to be potential risk factors. The risk of serious harm to members of the public is not assessed as imminent or immediate given that Mr Nadeem remains in custody. However, should he be released in the community this would be assessed as high".

19. We have read the OASys report carefully against the Judge's assessment of risk at [66] of the Decision. We conclude that her assessment chimes with the overall tenor of the OASys report. She has not made any material error of fact. She has not specifically referred to one figure which, taken out of context might suggest that she has overstated the risk posed but taken in context, is not reflective of the risk assessment made by that report. She was of course also entitled to make her own assessment of continuing risk based on the OASys report taken with the other evidence.

20. For those reasons, we are satisfied that the first ground discloses no error of law.

Ground 2: Material misdirection of fact in relation to the Appellant's evidence

21. This ground focusses on one of the reasons given by Appellant as explaining his offending behaviour.

22. At [14] of his statement ([B/30]), the Appellant gives reasons for his offending as follows:

> "However, as I became a teenager, life threw a curveball at me, as I started going through a lot of social and moral difficulties. One of my friends was killed by stabbing. I also lost my aunt in Pakistan who looked after me when I was in Pakistan. My father went through major heart surgery. I also experienced a lot of teasing at school and then I was stabbed which left me shocked and fearful. It reminded me of my friend's death. I thought I will be killed too. I was always so angry and frustrated that I started hanging around with bad company to make myself powerful and protected. This all had a big impact on my life as it was putting me through a lot of depression and anxiety, and the failure of telling my family what I was going through just rubbed salt into the wound."

23. The Appellant goes on to explain at [26] of his statement ([B/33]), the position in relation to his father as follows:

> "It is important to note that my father went through a major heart bypass operation in September 2018. My father was very unwell and stayed away from the family for the surgery. This was a very hard and emotional time for me as I did not want to worry my father from the stresses which I experienced at work with my work colleague. I instead took it upon myself to resolve the situation in a negative way without thinking of the consequences and outcome of my behavior [sic] on the victim and my own family."

The Appellant places particular reliance on the second sentence of that paragraph which it is said that the Judge failed to take into account.

24. The Judge dealt with the reasons given by the Appellant for his offending behaviour at [61] and [62] of the Decision as follows:

> "61. The appellant has sought to blame his offending behaviour on a number of adverse factors in his life around the time the offence was committed. One of these was the death of his aunt in Pakistan which he has claimed happened just before he committed the offence in May 2018. In the SAB 17 her death certificate has now been produced. I note that she dies of a heart attack on 16 January 2009. This was over 9 years before he committed the offence. I find that his attempt to blame her death on his behaviour is to his detriment. It is unfortunate that despite stating that he feels remorse and shame and has taken responsibility for his actions, he still seeks to rely on matters which cannot reasonably be connected, like his aunt's death.
>
> 62. He has also referred to his father's bypass surgery, but this also happened after the offence, on 13 September 2018 [SAB 4] and so again, I find this cannot excuse or explain his behaviour."

25. The Appellant accepts that his father's surgery was carried out after his offending but says that the Judge has misunderstood his evidence which was that his father had absented himself from the family in the period leading up to the surgery and he had not wished to worry his father with his problems given his ill-health.

26. The Appellant places additional reliance on the sentencing remarks where the Judge noted the Appellant had "a supportive family and he got no advice because he did not ask for it". It is submitted that the Appellant had provided a reason why he did not seek that assistance which Judge Farmer had not taken into account.

27. The Appellant's father paints a slightly different picture in his evidence. At [3] of his witness statement, he says that the Appellant is close to his mother but that his mother was unable to give the Appellant full attention due to his own medical problems which led to the bypass operation in 2018. He makes no mention of absenting himself from the family home at that time. This is however noted at [B/400] in the OASys report although apparently again based on the Appellant's self-reporting (as is the aunt's death which it transpires did not occur when the Appellant said it did).

28. Whatever the position, however, the Judge was correct to note that the Appellant's father did not undergo surgery until after the offence. Having regard to what is said at [14] of the statement which refers only to the surgery itself and that the Appellant's evidence about the impact of the death of his aunt could not be trusted for the reasons given at [61] of the Decision, the Judge was entitled to be sceptical about the Appellant's own evidence as to the reasons for the offending.

29. We also observe that, as said at [66] of the Decision cited above, even when the Appellant could have shared information with his family he has chosen not to do so (as regards his behaviour in prison). Further, the OASys report points out that, in spite of protective factors such as his family, the Appellant did commit a serious offence. The report also advises against release of the Appellant to his family home given his potential gang affiliations.

30. The Judge was therefore entitled to find that the reasons given by the Appellant did not excuse or explain his behaviour. Even if she did not note what is said at [26] of the Appellant's statement, any error in failing to do so could not be material when that part of the case is looked at in the round.

31. The Appellant's second ground does not disclose an error or if there is an error, it could not make any difference to the outcome given the other reasons provided by the Judge.

<u>Ground 3: Failure to take into account Section 32</u>

32. We confess to being somewhat mystified by this ground. The Appellant was a minor at the time of the offence and conviction and, as such, Section 32 has no application to

his case. The Respondent rightly recognised that and therefore the deportation decision proceeds with no reference to Section 32. It is correctly made under section 5(1) Immigration Act 1971 by reference to section 3(5)(a) of that Act.

33. Notwithstanding that Section 32 was not relevant to the Appellant's case, it appears that the Appellant raised with Judge Farmer the impact of that section not applying. She dealt with the Appellant's argument at [27] to [30] of the Decision as follows:

> "27. Mr Youssefian also addressed me on the provisions of section 32 and 33 of the UK Borders Act 2007. Section 32(4) states that for the purpose of section 32(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good and (5) The Secretary of State must make a deportation order in respect of a foreign criminal.
> 28. Section 33(1) states that section 32(4) and (5) do not apply where one of the exceptions listed applies and are subject to sections 7 and 8 of the Immigration Act 1971. Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 years on the date of conviction. It is accepted that the appellant was 1 month short of his 18th birthday when convicted, therefore exception 2 applies.
> 29. Section 33(7) then states that the application of an exception (a) does not prevent the making of a deportation order; and (b) results in it being assumed neither that the deportation of the person concerned is conducive to the public good nor that it is conducive to the public good.
> 30. I accept that these provisions apply to the appellant and I must factor in this test when carrying out the balancing exercise of the public interest/public good."

34. It is to be noted that this section of the Decision also takes into account the legislation dealing with foreign criminals namely Section 117C. Having set out those provisions so far as relevant at [19] to [24] of the Decision, the Judge went on to say this:

> "26. Parliament has determined that the seriousness of an individual's offending behaviour reflected in a term of imprisonment of 4 years or more, merits the recognition of an enhanced public interest in deportation. However I must, when considering his article 8 claim, give proper consideration to the seriousness of the offending, and not simply rely on the length of the sentence passed. There are three possible routes whereby an appellant's personal circumstances may be sufficiently compelling to outweigh the public interest in deportation. These are:
> (i) Whether the appellant can meet statutory Exception 1, and can demonstrate in addition very compelling circumstances sufficient to outweigh the public interest (private life considerations);
> (ii) Whether the appellant can meet statutory Exception 2 and, can demonstrate in addition very compelling circumstances to outweigh the public interest (family life considerations), and; (NB it is accepted that this Exception cannot apply)
> (iii) Whether there are other very compelling circumstances which are not covered by (i) or (ii) above but outweigh the public interest."

That is an entirely proper self-direction in relation to the application of Section 117C. It is not criticised by the Appellant. When the Judge says as she does at [30] of the Decision, she is there referring not only to the Section 32 issue raised by the

Appellant but also to Section 117C. It is worthy of note that Section 117C has no carve out for those foreign criminals who offend or are convicted as minors.

35. The Appellant also placed reliance on the case of Maslov due to the Appellant's age when he came to the UK and at date of conviction. The Judge considered those principles at [60] to [71] of the Decision. She confirms at [69] that she had considered "the four criteria set out in Maslov".

36. Returning then to the Appellant's third ground, it is asserted that, although the Judge took into account Section 32 to the effect that "there was no assumption that [the Appellant's] deportation would be conducive to the public good", "this significant feature of the case was not taken into account by [the Judge] in her consideration under [Section 117C (6)]".

37. We struggle to understand this ground. Section 32 where it applies contains a presumption in relation to deportation. The fact that the foreign criminal is a minor means that no such presumption applies. Section 33 makes clear that there is then no presumption either way. It does not presume that deportation is not in the public interest.

38. Section 117C on the other hand contains no carve out for minors. A minor is under that section still within the definition of a "foreign criminal" in Section 117D. As such, Section 117C (1) applies ("deportation is in the public interest") as does Section 117C (2) ("the more serious the offence the greater the public interest in deportation"). More importantly, the test as applied by the Judge under Section 117C (6) is the correct one. That was the test which the Judge applied. She was bound by statute to proceed in that way. The grounds cite no authority for the proposition that the public interest is lessened due to age and such a proposition would be inconsistent with the statutory scheme.

39. Further and in any event, it cannot sensibly be argued that the Judge failed to take into account the Appellant's age at time of sentence and conviction. The Judge refers to this at [16] of the Decision, when dealing with Section 32 at [28] of the Decision, and at [56] of the Decision when considering the Appellant's family circumstances.

40. More significantly, the Judge finds at [60] of the Decision that, by application of the principles in Maslov, "[j]uvenile offending should not be approached in the same way as adult offending" and that "there ought to be very serious reasons to justify [the Appellant's] deportation". Thereafter, the Appellant's age at time of the offence is considered at [70] of the Decision as follows:

> "He has spent over 15 years in the UK and was only 6 ½ years when he arrived. His nuclear family are all in the UK. He went to school here and has some friendships and since leaving custody in the summer of 2022 he has fostered some wider community ties, no doubt with the support of his family. I also take into account his lack of living independently from his family prior to custody, his age of 17 years 11 months when sentenced, not being able to read or write Urdu or Punjabi, and only having extended family in Pakistan. These are factors against deportation."

41. The Judge thereafter considers the public interest and other factors weighing against the Appellant at [71] of the Decision as follows:

> "Against this I put the seriousness of his offence, his very poor behaviour in custody, including the increase in his sentences, his failure to undertake any meaningful rehabilitation, the fact he has extended family in Pakistan, his own family's close links to Pakistan, the frequency with which his family travel to Pakistan and the availability of his parents to do this. Although there is now several years since the offence, his behaviour in custody with 7 violent incidents being raised against him including a further 10 months being imposed is significant and counts against him. His attempt to minimise this behaviour, his failure to take responsibility for it and blaming it on others is not to his credit. The fact that he has visited Pakistan since he left, is in good health and able to work and he speaks Urdu and Punjabi. He has not demonstrated any family links, friendships or employment over and above those considered above. I bear in mind that the public interest in deportation is not based only on the need to protect from further offending, but on wider concerns of deterrence and public confidence. He is no longer on anti-depressant medication (if he ever started to take this, which is unclear from his evidence). He is having no other therapy. He has engaged with his probation officer but does not appear to have addressed his anger management issues. Very compelling circumstances means circumstances which have powerful, irresistible and convincing effect. I am not satisfied based on the totality of my findings that there are any such circumstances in this case. I therefore conclude that the public interest in deporting the appellant outweighs his right to a family and private life. I find there are no very compelling circumstances when taking all these factors into account."

42. Taking the Judge's reasoning as a whole, including her self-directions in relation to Section 117C and Maslov, there is no error of law in the balancing exercise which she conducted nor the conclusion which she reached.

43. The Appellant's third ground therefore discloses no error of law.

CONCLUSION

44. For the foregoing reasons, we conclude that there is no error of law in the Decision. Accordingly, we uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

NOTICE OF DECISION

The Decision of Judge Farmer dated 25 February 2023 did not involve the making of an error of law. We therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
13 May 2024