IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003133
On appeal from: PA/52264/2021

IA/06728/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 10th October 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE KHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M M J
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Esen Tufan, a Senior Home Office Presenting Officer
For the Respondent: Mr Nisham Paramjorthy of Counsel, instructed by ABN solicitors

Heard at Field House on 25 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant has been granted anonymity, and is to be referred to in these proceedings by the initials M M J. No-one shall publish or reveal any information, including the name or address of the claimant, likely to lead members of the public to identify the claimant.

Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 31 March 2021 to make a deportation order and on 1 April 2021 to refuse leave to remain on human rights grounds. The claimant is a citizen of Sri Lanka.

2. The claimant is a foreign criminal as defined by section 72 of the Nationality, Immigration and Asylum Act 2002 (as amended). Section 32(5) of the UK Borders Act 2007 requires his deportation unless he can bring himself within one of the Exceptions set out in section 33 of that Act. On the facts of this appeal, only Exception 1 could avail him.

3. For the reasons set out in this decision, we have come to the conclusion that the Secretary of State's challenge to the First-tier Tribunal decision succeeds and we must substitute a decision dismissing the claimant's appeal.

Procedural matters

4. **Mode of hearing.** The hearing today took place as a blended face to face and CVP hearing. There were no technical difficulties. We are satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.

5. **Vulnerable appellant.** The claimant is a vulnerable person and is entitled to be treated appropriately, in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance. There is no suggestion that this was not done.

Background

6. The main basis of the claimant's Article 8 ECHR human rights case as now advanced is that after his release from prison he met and married a British citizen and that they have a baby, who was 5 months old at the date of hearing and is now approximately 10 months old.

7. The claimant came to the UK on 9 June 2006 as a dependent child, on a 6-month visit visa. He was 17 years old. On 21 July 2006 he sought leave to remain as a student nurse, which was refused on 27 July 2006 with no right of appeal.

8. The claimant did not embark for Sri Lanka and became an overstayer on 10 December 2006. He became an adult in March 2007 and is responsible for any overstaying thereafter.

9. On 13 January 2010, now aged 20, the claimant was convicted of criminal damage contrary to the Criminal Damage Act 1971. He received a conditional discharge and was ordered to pay costs and compensation.

10. On 31 March 2011, age 22, he was convicted of sexual assault (no penetration) and sentenced to a community order for 12 months, including 90 hours' unpaid work. He was placed on the Sex Offenders Register for 5 years, which would have expired on 31 March 2016.

11. On 10 March 2013, the claimant was encountered, served with IS.151A as an overstayer, and granted temporary admission. Just 11 days later, on 21 March 2013, he was convicted of being drunk and disorderly, fined, and ordered to pay costs and a victim surcharge. The claimant, having been notified that he was regarded as an overstayer, remained in the UK without leave.

12. On 8 May 2015, age 26, and 9 years after entering the UK, the claimant made an asylum claim and was detained. He was released on 21 September 2015. His asylum and human rights claims were refused on 4 January 2017: the claimant appealed unsuccessfully. He was appeal rights exhausted on 17 January 2018. Once again, he did not embark for Sri Lanka but remained in the UK without leave.

13. The claimant continued to offend. On 23 November 2018, he was convicted of conspiring/supplying both a Class A and a Class B drug. He was sentenced to 6½ years' imprisonment and ordered to pay a victim surcharge. That is the index offence.

14. The sentencing Judge noted that the claimant had a psychiatric report indicating that he had been mentally unwell for at least 3-4 years before his arrest with 'quite complex, severe mental health issues' including severe depression and worsening post-traumatic stress disorder. However, he had not pleaded guilty and had played a significant role in the offences of which he was convicted.

15. On 25 February 2019, the claimant was served with a Stage 1 deportation notice, which invited him to advance any human rights grounds on which he relied, which he did. On 10 March 2021, the claimant's prison sentence ended but he remained detained on immigration grounds.

16. After his release from prison in 2021, the claim met a British citizen with whom he entered into an Islamic marriage in April 2023. They have one child, born in December 2023. The claimant asserts that he has worked to rehabilitate himself.

17. A deportation order was signed on 11 March 2021 and on 1 April 2021, the claimant's human rights claim was refused. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

18. The First-tier Judge allowed the appeal by reference to Exception 1 in section 33(2) of the 2007 Act, Exception 2 in section 117C(5) of the 2002 Act, and the 'very compelling circumstances' test at section 117C(6).

19. At [55], the Judge recognised that little weight could be given to private life established while a person was in the UK precariously or illegally pursuant to subsections 117B(4)(a) and 117B(5) of the 2002 Act. The same applied to private life with a qualifying partner, pursuant to subsection 117B(4)(b).

20. The First-tier Judge found the claimant and his partner to be credible witnesses. His partner, and their son, were respectively a qualifying partner and a qualifying child under section 117D of the 2002 Act.

21. The evidence was that the claimant's partner was shortly to wean their child so that she could return to full time work and support the family. Her parents had assisted the couple with providing food and financial support. His friends had also helped with money towards his legal expenses. The claimant had a close relationship with his partner's family.

22. In the future, when his partner returned to work, the claimant would help by looking after his daughter, although he had looked at finding employment in the construction industry. He was functioning well without his mental health medication.

23. At [64], the Judge recorded that the claimant had produced no new medical evidence as he had stopped attending counselling or taking any medication shortly after the birth of his daughter, in early 2024. He had done so under the guidance of his GP and mental health nurse.

24. The core of the First-tier Judge's findings are at [76]-[79]:

> "76. It seems unlikely from the evidence I have heard that [his partner] would feel able to move to Sri Lanka, a country with which she has no ties, where does not speak the language such that she would struggle to work, and when such a move would involve her moving away from her mother and brothers. *Separation from his partner and daughter would have a significant impact on the appellant.*
>
> 77. I noted that Mr Paramjorthy did not wish to pursue his claim under Article 3 of the ECHR. The threshold for succeeding in such a claim on the basis of mental health is particularly high, and the appellant's improved mental health made it highly unlikely that he would succeed. *However, I do consider as part of my Article 8 assessment, the potential impact on his mental health if he was to be separated from his partner and daughter and deported to Sri Lanka.* It seems likely that there will be a causal link between removal and a deterioration in his mental health, which I have to take into account in considering compelling circumstances.
>
> 78. I also consider the private life factors set out above, but *primarily this appeal succeeds on family life rights under Article 8 ECHR, and which, although I acknowledge that the public interest requires deportation of a foreign criminal such as the appellant, I find provide compelling reasons sufficient to outweigh the public interest in this case.*
>
> **Conclusion**

> 79. On the basis of the facts before me and the reasons set out above, I find that the appellant meets the criteria under Exception 2 in s.117C of the 2002 Act, and that the decision to deport the appellant is, on balance, contrary to Article 8." [*Emphasis added*]

25. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

26. Ground 1 of the Secretary of State's grounds of appeal concerns the First-tier Tribunal's treatment of section 72 of the 2002 Act. Mr Tufan did not pursue that ground at today's hearing.

27. Ground 2 argues that the First-tier Judge's consideration of section 117(5) and section 117(6) of part 5A of the 2002 Act is inadequately reasoned.

28. Permission to appeal to the Upper Tribunal was granted by First-tier Judge Lester in the following terms, so far as relevant to Ground 2:

> "…2. The grounds state that the judge erred in that they: …
>
> (2) [Made] a material misdirection of law – inadequate reasoning of 'very compelling circumstances and application of the 'unduly harsh' test. …"

Rule 24 Reply

29. There was no Rule 24 Reply on behalf of the claimant.

30. That is the basis on which this appeal came before the Upper Tribunal.

Legal framework

31. We remind ourselves of the provisions of sections 117B and 117C of the 2002 Act, so far as relevant to these proceedings:

> **"117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest. …
>
> (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. …
>
> **117C Article 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. …

(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.*"

32. We were directed by Mr Paramjorthy for the claimant to the guidance of the Supreme Court in *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 (29 April 2020) and *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22 (20 July 2022).

33. *AM (Zimbabwe)* gives guidance on the modest extension of Article 3 ECHR in health cases, arising out of the European Court of Human Rights Grand Chamber decision in *Paposhvili v. Belgium* - 41738/10 (Judgment (Merits and Just Satisfaction) Grand Chamber [2016] ECHR 1113 (13 December 2016). In *Savran v Denmark* at [146]-[147], the Grand Chamber emphasised that the threshold for Article 3 remained as expressed in [183] of *Paposhvili* and was a high threshold. Article 3 was not relied upon and we need say no more about *AM's* case.

34. We remind ourselves that there is a degree of 'due harshness' which is caused by the deportation of a foreign criminal: see *Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348 (29 March 2011) at [27]:

> "27. The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does. Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an immigration judge. Unless he has made a mistake of law in reaching his conclusion – and we readily accept that this may include an error of approach – his decision is final. …"

35. The reasoning of Lord Carnwath JSC in *KO (Nigeria) ,* he found that

> "23. On the other hand the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set

by section 117C(1), that is the public interest in the deportation of foreign criminals. **One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent.** What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2017] 1 WLR 240, paras 55 and 64) can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more." (Emphasis added)"

36. Lord Carnwath cited with approval the self-direction on 'unduly harsh' by the Upper Tribunal in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC) at [46]:

> "By way of self-direction, we are mindful that "*unduly harsh*" does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "*unduly*" raises an already elevated standard still higher."

37. In *HA (Iraq),* Lord Hamblen JSC, with whom Lord Reed PSC, Lord Leggatt JSC, Lord Stephens JSC and Lord Lloyd-Jones JSC agreed, considered the 'very compelling circumstances' test in section 117C(6). Drawing on the reasoning of Lord Reed JSC in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, and that of Lord Justice Jackson in *NA (Pakistan) v Secretary of State for the Home Department & Ors* [2016] EWCA Civ 662 (29 June 2016), Lord Hamblen summarised the position of 'serious' offenders as opposed to 'medium' offenders thus:

> "49**.** As explained by Lord Reed in his judgment in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799 at para 38:
>
> > "… great weight should generally be given to the public interest in the deportation of [qualifying] offenders, but … it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the *SS (Nigeria)* case [2014] 1 WLR 998. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State."
>
> **50.** How Exceptions 1 and 2 relate to the very compelling circumstances test was addressed by Jackson LJ in *NA (Pakistan)*. In relation to serious offenders he stated as follows:
>
> > "30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to

> describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of article 8." "

38. At [51], Lord Hamblen explained the continuing relevance of the factors set out in *Üner v the Netherlands* [2006] 45 EHRR 14, while noting at [52] that in *Hesham Ali* at [35] Lord Reed observed that the European Court 'acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. In UK law, the balance between the competing considerations is set out at part 5A of the 2002 Act.

39. That is the primary legal framework against which we consider this appeal.

Upper Tribunal hearing

40. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. We had access to all of the documents before the First-tier Tribunal and have considered all the evidence and authority to which we were taken during the hearing.

41. The Secretary of State challenges the First-tier Tribunal's finding that the claimant meets Exception 2 in section 117C of the 2002 Act and thus Exception 1 in section 33 of the 2007 Act. Mr Tufan reminded us of the case law set out above and argued that the high standard for very compelling circumstances was not met.

42. For the claimant, Mr Paramjorthy acknowledged that there was only the partner's letter of support to assist the Tribunal in determining what effect the claimant's removal would have on her or their baby daughter.

Conclusions

43. The assessment of the claimant's relationships with his partner and child are not constrained by the earlier asylum appeal: the relationship with his partner did not exist then, and he had no children in 2017. There is no *Devaseelan* starting point here. However, that also means that his partner entered into the relationship with the claimant after he was released from prison and must have been aware of his history.

44. The claimant's partner did not give oral evidence but we take into account what she says about their relationship. Her statement is undated: given the timing of her pregnancy, it seems that the statement must have been written in May or June 2023, because she says she is three months

pregnant and the child was born in December 2023. She says that they met at a friend's wedding in November 2021 and had by then been together about 18 months. She says that his mental health is fragile and that she fears for him if he is removed as he has no family or support network in Sri Lanka. There is no updated statement about the situation after the birth of their child.

45. The claimant's witness statements focus on his international protection claim, which has been heard and determined and is not in issue before us. His latest statement, made on 2 May 2024, explains how committed he is to his new family and in particular to his daughter. He asserts that he would have difficulty adapting to life in Sri Lanka, having left when he was 17 years old, and that it would be unreasonable and unjust for him to be expected to return to Sri Lanka.

46. There is no medical or social worker evidence, nor, apart from the partner's assertion, is there anything which tends to show that his removal would be unduly harsh for his partner or the baby, which is the applicable test under Exception 2 in section 117C(5).

47. We remind ourselves that the claimant no longer takes medication for his mental health issues and no longer attends counselling. His evidence was that he was coping well without that support. His partner was planning to return to work by the middle of last year, with the claimant assisting by looking after their daughter, but we also noted that he hoped to find work in the construction industry. She has a supportive family and a network of friends who would be able to help.

48. We accept that it may be uncomfortable, inconvenient, undesirable and/or difficult for the parties either to reside in Sri Lanka together or for the partner to continue to raise their daughter in the UK without him. We do not, however, find that it would be unduly harsh. We remind ourselves of Lord Justice Sedley's observations in *Lee* that criminal activity does break up families in this way, and 'that is what deportation does'. We do not find that the standard for Exception 2 in section 117C(5) is made out.

49. Even if it were, section 117C(5) requires a foreign criminal who is sentenced to imprisonment for more than 4 years to be deported unless there are 'very compelling circumstances, over and above those described in [Exception 2]'. No such circumstances have been advanced or appear to exist here.

50. Accordingly, removal of this claimant to Sri Lanka would not breach the UK's Convention obligations and Exception 1 in section 33 of the 2007 Act is not engaged.

51. The Secretary of State's appeal succeeds and we dismiss the claimant's appeal.

Notice of Decision

52. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of an error on a point of law.
We set aside the previous decision.
We remake the decision by dismissing the claimant's appeal.

Judith Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 1 October 2024