



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14900/2016

THE IMMIGRATION ACTS

Heard at Field House
On 22 May 2018

Decision & Reasons Promulgated
On 09 July 2018

Before

THE HONOURABLE MR JUSTICE GARNHAM
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMMED KHURAN SHEZAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the Respondent: Mr Abid Mahmood, instructed by M J Immigration

DECISION AND REASONS

Introduction

1. The Secretary of State appeals against a decision of First Tier Tribunal Judge Parkes, who by a decision promulgated 23 November 2017 allowed an appeal by Mr Mohammed Shezad against a decision of the Secretary of State, taken on 20 December 2015, to deport him. The basis of the Secretary of State's decision was that his

presence in the UK was not conducive to the public good. The basis of his successful appeal to the First Tier Tribunal was that his deportation would breach his human rights.

2. The Secretary of State appeals by permission of the designated judge of the First Tier Tribunal, Judge Woodcraft, dated 12 December 2017. The Secretary of State was represented on this appeal by Stefan Kotas; the Respondent by Abid Mahmood. We are grateful to both for their submissions.

The Factual Background

3. The factual background in this case is not in dispute between the parties. It is common ground that Mr Shezad arrived in the UK on 8 December 1996 to join his British spouse. He was granted indefinite leave to remain on 3 December 1997 on the basis of marriage. He and his wife now have four children, the older two of whom are adults.
4. The Secretary of State's decision to make a deportation follows the conviction of Mr Shezad in the Crown Court at Peterborough on 9 November 2017 on a count of theft. On 30 November 2015, he was sentenced to 8 months imprisonment. In her sentencing remarks, Judge Langdale, said this;

“You had a relationship with (the victim) that was steeped in trust. You met him when you were a carer and you were employed to care for him for a period of time. You became friends... At the end of that time you exploited his loyalty and friendship.

You earned debt with a severe gambling habit. You knew that he had savings and you deceived him into giving you his bank card... When he trusted you and gave you his card and his pin number, you set about milching his account and when he found out that he was overdrawn he did not even have enough money to buy food. You accompanied him to the bank to top-up his current account from his savings so that you could continue to milch his account. In the meantime you were spending his money on scratch cards, while he was reliant on you for handouts to buy food.

In my judgment, this was a gross breach of trust, even though you were no longer employed to care for him. You carried on stealing his money for a period of 6 weeks. In my judgment, you have shown no remorse but you tried to manipulate (the victim) into not reporting the matter by offering to repay the money... (The victim) who was blind from birth, the most vulnerable of men, was caused real distress. Indeed, it was clear to me that he found the trial process very intimidating and distressing.”

5. On 17 December 2015, the Secretary of State wrote to Mr Shezad notifying him that because of that criminal conviction she had decided to make a deportation order. In response, Mr Shezad's solicitors submitted representations dated 21 January 2016 setting out their case as to why he should not be deported. By letter dated 23 May

2016 the Secretary of State responded to those representations. The Secretary of State asserted that Mr Shezad's deportation;

“is conducive to the public good and in the public interest because you have been convicted of an offence which has caused serious harm. This is because you have convicted of the serious offence of theft from a person, for which you were sentenced to 8 months imprisonment. Therefore and in accordance with paragraph 398 of the immigration rules, the public interest requires your deportation unless an exception to deportation applies. The exceptions are set out in paragraph 399 and 399A of the immigration rules” (emphasis added).

6. The letter then set out and addressed the relevant provisions of the immigration rules. The Secretary of State acknowledged that three of Mr Shezad's children are under the age of 18 and are British citizens. It was accepted that Mr Shezad had a genuine and persisting relationship with those three children. It was not accepted, however, that it would be unduly harsh for those children to live in Pakistan with Mr Shezad, were he to be deported. It was pointed out that they had been raised from birth within a Pakistani household and therefore would be familiar with the culture and customs of that country. They were of a Pakistani descent and were young enough to adapt to living in Pakistan with the support of their parents if that was what Mr and Mrs Shezad decided.
7. It was also not accepted that it would not be unduly harsh for the children to remain in the UK if Mr Shezad were to be deported. Accordingly, it was not accepted that Mr Shezad met the requirements of the exception to deportation on the basis of family life of the child.
8. The claim was also considered on the basis of the Respondent's family life in the UK with his wife, Zelay. It was accepted that Zelay was a British citizen with whom Mr Shezad had a genuine and subsisting relationship. But it was not accepted that it would be unduly harsh either for Zelay to live in Parkistan or for her to remain in the UK if he were deported.
9. Consideration was also given, pursuant to paragraph 399A, as to whether the Respondent met the private life exception. It was not accepted that he had been lawfully resident in the UK for most of his life given that he had spent almost 23yrs in Pakistan before arriving in the UK. It was not accepted that there would be significant obstacles to his integration into Pakistan. Furthermore, it was not accepted that there were other very compelling circumstances which led to a conclusion that he should not be deported.
10. It was noted that there was a significant public interest in deporting Mr Shezad. The Secretary of State noted that the sentencing judge had highlighted the fact that Mr Shezad had shown no remorse for his offence and tried to manipulate his victim into not reporting the matter. The Secretary of State said that his actions demonstrated “a complete lack of respect” for his victim and UK law. In those circumstances, the human rights claim was refused and a decision to deport was maintained.

11. Mr Shezad appealed to the First Tier Tribunal whose initial decision was promulgated on 14 December 2016. First Tier Tribunal Judge Robertson allowed the appeal, concluding that paragraph 399 was applicable because the effect of deportation would be unduly harsh on Mr Shezad's children. She said that the Appellant's family life out-weighted the public interest in deportation. The Secretary of State sought permission to appeal. Permission was granted on 6 June 2017 when it was held that it was arguable that the judge failed properly to conduct the "unduly harsh" test in paragraph 399 and failed to comply with the guidance in *MN Uganda* [2016] EWCA Civ 617.
12. That appeal was heard in July 2017 by Upper Tribunal Judge Kekic. He noted, in particular, that there was no explanation for why the factors pleaded for the appellant were so exceptional and compelling as to out-weight the public interest, particularly when there was a wealth of factors against him. In those circumstances, Judge Kekic held that the First Tier Tribunal's decision was flawed by error of law. He set aside the decision and directed the matter by re-listed for a different judge.
13. It was against that background that this case came on for hearing before First Tribunal Judge Parkes in November 2017. It is against his decision that the Secretary of State now appeals.

The Statutory Scheme

14. By s3(5) of the Immigration Act 1971 a person who is not a British citizen is liable to deportation if "...the Secretary of State deems his deportation to be conducive to the public good". Under paragraph 396 of the Immigration Rules there is a presumption that a person liable to deportation should be deported.
15. s117D of the Immigration, Nationality and Asylum Act 2002, as amended, defines "foreign criminal":
 - "(2) In this Part, "foreign criminal" means a person—
 - (a) who is not a British citizen,
 - (b) who has been convicted in the United Kingdom of an offence, and
 - (c) who
 - (i) has been sentenced to a period of imprisonment of at least 12 months,
 - (ii) has been convicted of an offence that has caused serious harm, or
 - (iii) is a persistent offender."
16. Paragraphs 398 of the Rules provide as follows:
 - A398. These rules apply where:
 - (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
 - (b) a foreign criminal applies for a deportation order made against him to be revoked.

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

- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
- (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (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.

399. Paragraph 399 and 399A provides:

This paragraph applies where paragraph 398 (b) or (c) applies if -

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
- (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
 - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
 - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if -

- (a) the person has been lawfully resident in the UK for most of his life; and
- (b) he is socially and culturally integrated in the UK; and
- (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

17. For reasons that will become apparent, it is also useful to note here the terms of s117C of the 2002 Act:

- (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.
- (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...

The Decision of FTT Judge Parkes

18. Having accurately set out the legal framework and the factual background, Judge Parkes turned to address the question whether Mr Shezad is to be regarded as a foreign criminal. He concluded that because he was not a “persistent” offender and had only been sentenced to a term of eight months *“the only route by which the Appellant could be regarded as a foreign offender is if his offence caused serious harm”*. We agree.
19. At paragraph 19, he referred to Home Office guidance “Criminality: Article 8 ECHR cases” which defines “serious harm” as serious physical or psychological harm which followed the offence”. Judge Parkes said that there was only one victim and the only evidence as to the offence came from the sentencing remarks of Judge Langdale. He noted that there was no physical harm. There was no medical evidence as to the effect of the offence on the victim. He went on:

“The fact that the offence caused him real distress and that he found the trial process intimidating and distressing is hardly surprising and applies to most victims but does not indicate that it had any long term consequences for him”
20. At paragraph 20 he said, correctly, that the refusal letter of 29 December 2015 makes no reference to serious harm but the refusal letter of 23 March 2017 did refer to it. As noted above, it says that deportation “is conducive to the public good ... because you have convicted of the serious offence of theft from a person, for which you were sentenced to 8 months imprisonment.”
21. The crucial paragraphs are paragraphs 21 and 22. Judge Parkes says:

“The reasoning applied does not show that the victim ... suffered serious harm as defined in the guidance and the reasoning appears circular... evidence would be needed of serious psychological harm and there is no evidence beyond the difficulties he experienced in the immediate aftermath of the offence and in giving evidence. Both would be expected for a victim of

crime and so evidence is required otherwise the exercise is entirely speculative.

In the circumstances I cannot find that the consequences of the Appellant's offending on the victim are such that the victim suffered serious harm and accordingly I cannot find that the Applicant meets the definition of a foreign criminal...

22. The judge then considered the circumstances of the Appellant and his family and the balancing exercise to be conducted between the public interest in deportation and what he described as the "best interests of the family to remain as a single unit". He concluded that deportation would be a disproportionate interference with the family's article 8 rights.

The Argument

23. On behalf of the Secretary of State, Mr Kotas argues that Judge Parkes erred in requiring the Secretary of State to provide reasons for why it was considered that Mr Shezad had been guilty of an offence which caused serious harm. It was said that that was inconsistent with the Court of Appeal's decision in *LT Kosovo* [2016] EWCA Civ 1246. Mr Kotas said that it was for the Secretary of State to decide whether the relevant offences amounted to serious harm and that the tribunal should accord significant weight to his view. It was not for the Secretary of State to justify that conclusion. In any event, Mr Kotas said that the circumstances of this theft from this vulnerable person should be deemed to have caused serious harm.
24. In response Mr Mahmood on behalf of Mr Shezad referred us to the decision of the Court of Appeal in *SC (Zimbabwe)* [2018] EWCA Civ 929 and in particular to paragraph 19 of the judgment of McCoombe LJ. He said that, in the light of that observation, the case had to be viewed through the prism provided by s117D (2) (c).

Discussion

25. In our judgment, there are grounds for some criticism of Judge Parkes determination. First, in our view, he was in error in paragraph 19 when he appeared to place significance on the fact that the distress and upset the victim suffered was "to be expected" and would be shared by many victims. In our view, neither of those features would, of itself, serve to support a conclusion that the victim had not suffered serious harm.
26. Second, Judge Parkes suggested, also in paragraph 19, that the question was whether the offence had any long term consequences for the victim. We disagree. Long term consequences are one means, perhaps the usual means, by which "serious harm" may be demonstrated. But it is perfectly possible that the acute nature of the damage done might constitute severe harm, even if its effects were not long-lasting.
27. However, neither of these points go to the heart of Judge Parkes' analysis. What was crucial to his reasoning was the absence of positive evidence that the victim suffered any serious harm. Although such evidence is not a precondition for a finding of

serious harm, it is right to observe that there was no medical or psychiatric evidence to support a conclusion the offence had serious psychological consequences for the victim.

28. In the light of the way the respective cases were put, it is useful to set out here paragraph 21 of the judgment of Laws LJ in *LT Kosovo* and paragraph 19 of the judgment of McCombe LJ in *SC (Zimbabwe)*. Laws LJ said

“If it were suggested that the tribunals were bound by the Secretary of State's opinion as to serious harm I would disagree. Such a conclusion would nullify the right of appeal and reduce it to a residual *Wednesbury review* [1948] 1 KB 223 , whereas it is elementary that the right of appeal to the FTT is on the merits (see now section 84 of the Nationality, Immigration & Asylum Act 2002 , to which Mr Sedon took us this morning). That position is not shifted by the reference in paragraph 398(c) to the Secretary of State's view. ... But that is not to say that the reference to the Secretary of State's view is of no significance. The Secretary of State is the primary decision-maker. She has a constitutional responsibility to make judgments as to the force of the public interest in deportation cases. That circumstance has to be balanced against the appellants' right to a merits appeal. In my judgment, that is to be done by requiring the tribunals in a paragraph 398(c) case, while considering all the facts put before them, to accord significant weight to the Secretary of State's view of “serious harm” . They are not to be bound by it, but they are to treat it as an important relevant factor. I should add that I cannot see that this approach is in any way undermined by the new provisions in section 117C and D of the Nationality, Immigration & Asylum Act 2002 , to which Mr Sedon referred this morning.”

29. McCombe LJ said

“The *LT* case was concerned solely with the application of paragraph 398 (c) of the Rules. With respect to the short obiter dictum in the last sentence of the passage just quoted, I do not agree. It seems to me to be quite clear that once the matter comes before a tribunal or a court, what has to be applied is s.117D(c) of the Act. The words of that provision are the words which Parliament has chosen to enact, without more. The three elements of that paragraph of the subsection are in clear terms and do not require any gloss to be put upon them by the reference to the Rules. The view of the Secretary of State or indeed of a judge in sentencing remarks may be of assistance to a tribunal or court in deciding whether an offence has caused serious harm or whether an offender is a persistent offender, but I do not see that the statutory words compel any particular weight to be given to the Secretary of State's view on either in the assessment...”

30. Neither Mr Mahmood nor Mr Kotas argued that those paragraphs of the leading judgments in the Court of Appeal constituted the ratio of the decision. Whether or not that is so, it seems to us, with respect, that McCombe LJ was correct. The determining question for the Tribunal, since the 2002 Act was amended to introduce s117D(2)(c) is whether the appellant has been convicted of an offence that has caused serious harm. On an appeal that must be the question for the Tribunal. (We note in

passing that the judgment appears to contain a typographical error; there is no s.117D(c); McCombe LJ must have been referring to s117D(2)(c))

31. It is to be noted that the Court of Appeal in *SC Zimbabwe* did not expressly disagree with any other part of the judgment of Laws LJ's in *LT Kosovo*. At paragraph 24 of his judgment Laws LJ rejected a submission that the Secretary of State would have to provide "narrative reasons" for concluding that an offence caused serious harm. He said:

"It is a question of social and moral judgment. The Secretary of State with her constitutional responsibilities is entitled to take the overall view she did and express it as she has."

32. In our view, however, it is implicit in McCombe LJ's judgment that the absence of reasoning from the Secretary of State may well be highly significant when s117D(2)(c) is considered. He went on in *SC Zimbabwe* to say at paragraph 19 that

"The view of the Secretary of State or indeed of a judge in sentencing remarks may be of assistance to a tribunal or court in deciding whether an offence has caused serious harm or whether an offender is a persistent offender, but I do not see that the statutory words compel any particular weight to be given to the Secretary of State's view on either in the assessment."

33. It follows that whilst acknowledging the Secretary of State's views, the First Tier Tribunal judge has to come to his or her own conclusion on whether the statutory test is satisfied. The fact that the Secretary of State, exercising the social and moral judgement to which the Court of Appeal referred in *LT Kosovo*, concluded that this was a case of serious harm may be of some assistance to the tribunal. But we agree with Judge Parkes that the weight to be attached to the Secretary of State's views must reflect not only her constitutional position but also the quality of the reasoning that led to that conclusion. Here there was, in truth, no explanation for her views beyond simple reference to the facts of the conviction. And no further evidence or argument has been advanced before us as to why this case involved "serious harm". Furthermore, it seems to us that in the passage set out at paragraph 5 above, the Secretary of State was equating an offence which causes serious harm with a serious offence; but the two are not necessarily the same. In any event, it is for the Secretary of State, who makes this assertion, to prove it.

34. This was undoubtedly a very nasty crime. Mr Shezad was guilty of a serious breach of trust, exploiting his knowledge of, and "friendship" with, the victim, so as to gain access to his bank accounts. He then took everything the victim had, leaving him penniless and dependant on hand-outs to eat. That would have been a serious offence in any circumstances. The fact that the victim was blind and plainly vulnerable made it all the worse. But there is no evidence of the victim suffering significant harm in consequence and, in our judgment, it cannot properly be said that serious harm to the victim must be regarded as implicit.

35. In those circumstances, and in the absence of evidence or explanation from the Secretary of State as to how it can be said that this offence caused serious harm to the victim, Mr Shezad cannot be regarded as a foreign offender. No other ground of challenge was mounted to Judge Parkes determination and in those circumstances this appeal must be dismissed.

Conclusions

36. Accordingly, for these reasons, we consider that the grounds are not made out. We are not satisfied that the decision of the First-tier Tribunal involved the making of an error of law and we uphold it.

NOTICE OF DECISION

- 1 The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

Signed

Date: 5 June 2018

Garnham J