Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05388/2017

THE IMMIGRATION ACTS

Heard at Field House
On 31 January 2019

Decision & Reasons Promulgated
On 05 April 2019

Before

LORD BECKETT SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MA
[ANONYMITY DIRECTION MADE]

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
We continue the anonymity direction which was made earlier in the proceedings because the case involves a child. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:

For the Appellant:	Mr Avery, Senior Home Office Presenting Officer
For the Respondent:	Ms Bond, Counsel, instructed by Freemans Solicitors

DECISION AND REASONS

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1. The Secretary of State appeals against a decision of the First-tier Tribunal (FtT) dated 19 November 2018 to uphold MA's (the claimant) appeal, on human rights grounds, against the Secretary of State's decisions of 4 March 2017 to refuse his human rights claim and on 24 March 2017 to sign a deportation order.

2. The claimant is a national of Bangladesh born 24 October 1979 who entered the UK on 15 August 1986, aged 6, as a dependent of his mother. He was granted indefinite leave to enter on arrival.

3. The Secretary of State seeks to deport the claimant on the basis that he is a foreign criminal within the meaning of UK Borders Act 2007, section 32, and as such liable to automatic deportation. In particular, on 29 April 2010 at Blackfriars Crown Court he was sentenced to imprisonment for 2 years for two charges of possessing class A drugs with intent to supply.

4. The Secretary of State also considered that deportation was conducive to the public good because of the claimant's persistent offending, he has a total of 24 convictions for 52 offences accrued between 1996 and 2014, but this aspect did not feature in the Secretary of State's grounds of appeal or submissions at the appeal before us. In light of those convictions, the Secretary of State did not accept that the claimant was socially and culturally integrated into the UK, but in his grounds of appeal the Secretary of State has not challenged the First-tier Tribunal Judge's (FtTJ) decision in that regard.

5. The FtTJ found Exception 1 (private life) within section 117C of the Nationality, Immigration and Asylum Act 2002 to be met and deemed it unnecessary to make a finding on Exception 2 (family life).

Determination of 19 November 2018

6. At para 4 the FtTJ summarised the claimant's case and at paras 5-6 the Secretary of State's case which was that on the facts of the case the exceptions in section 117C (4) and (5) of the 2002 Act were not met. The FtTJ set out the evidence before her at paras 7-19, summarising the testimony of the claimant, his sister and his brother. She recorded the Secretary of State's submissions at para 20 and Ms Bond's for the claimant at para 21. Between paras 23 and 32 she set out findings in fact and associated reasoning. Relevant law including the terms of section 117C of the 2002 Act and associated Immigration Rules is set out between paras 33 and 37. From para 38 onwards the FtTJ applied the facts to the law, stating her conclusion and decision at paras 53 and 54.

7. At para 2 the FtTJ records that between 1996 and 2014 the claimant has 24 previous convictions for 52 offences. In addition to the drugs conviction in 2010 he was sentenced to imprisonment for 16 weeks in 2014 for battery.

8. At para 4 the FtTJ records that the claimant has lived here for 32 years and has three children who are British citizens aged 14, 12 and 9 who live with their mother, also a British citizen, and maternal grandparents. The claimant does not live with them he

lives with his sister who is one of his four siblings who live in the UK and who are all British citizens by birth or naturalisation. At para 10 the FtTJ noted and accepted the claimant's evidence that since his arrival in the UK he has visited Bangladesh once, in 1997, for one month. She reminded herself of that fact in making her assessment at para 45.

9. The claimant is said to be deeply remorseful for his offending which he associates with drug addiction and mental health problems which he began to address in 2014. He is prescribed methadone and is on a structured detoxification programme and his random drugs tests have all been negative. He has long term depression for which he receives treatment and has suffered episodes of psychosis historically.

10. In para 25 the FtTJ summarised evidence, which she accepted, from Dr John Dunn, a consultant in addiction psychiatry with Camden NHS Foundation Trust to which the claimant has been known since 2003 when he was referred at a time when he was hearing voices. This is one of two episodes of drug induced psychosis, a non-organic psychotic disorder, the other being in 2014, from which the claimant is in remission. Dr Dunn proposes that the claimant has a mental and behavioural disorder due to the use of opioids and clinical depression since 2003 for which he takes paroxetine, an anti-depressant. The claimant is slowly having his methadone prescription reduced with a view to becoming drug free and he has made significant progress since 2014. He was engaging well and had improved both physically and mentally. He has not taken illicit drugs since 2014. The FtTJ also notes that he has re-trained as a plasterer and was attending a bricklaying course. In principle he has skills which could help him find work and support himself in the longer term. She found, in para 27, that he had made a conscious decision to turn his life around.

11. At para 28 she accepted that the claimant is the father of three children and at para 29 she accepted that he had close, positive and loving relationships with them. They live with their mother, who is their primary carer, but he lives nearby and sees them regularly. He has not lived with them for many years, para 29. He has not told his children that he will be deported and there was no specific evidence as to the impact on his children. The FtTJ concluded that they would profoundly miss the claimant who, particularly since 2014, has been a present, active and loving father in their lives. They would not move to Bangladesh so his deportation would be extremely upsetting and distressing for them.

12. At para 30, the FtTJ accepted that the claimant has not personally retained any direct ties with Bangladesh. Having arrived here aged 6, some 32 years ago, he speaks and writes limited Bengali. He came from Sylhet in Bangladesh where his siblings do have ties through their spouses and his siblings visit every few years. She accepted that any financial support from the claimant's siblings was uncertain but it was likely that there would be some modest financial support for the claimant from his family, but that there is no practical, familial or emotional support in Bangladesh, para 31, and she did not consider it reasonable to suppose that his siblings' parents-in-law could be asked to support him emotionally or financially as they have no direct relationship with him.

13. At para 36 the FtTJ noted the multi-dimensional aspects to the public interest in the deportation of foreign criminals and that whilst rehabilitation and risk of reoffending are relevant, other relevant considerations included deterrence and denunciation. At para 39 the FtTJ said that she was applying,

> "the core test as set out in R v Secretary of State for the Home Department ex parte Razgar [2004] UK HL 27 whilst reminding myself of the core duty to strike a fair balance between the competing private and family life rights of the individual, the interests of the community and the public interest by the state; Hesham Ali."

14. That somewhat unnecessary observation does not feature in the grounds of appeal and the FtTJ proceeded to charter the correct course as she confirmed, in para 42:

> "I turn thereafter to the specific public interest factors applicable in deportation appeals as per section 117C."

She recognised that in the circumstances of this case the claimant's offending weighed very heavily in the balance against him.

15. At para 44 the FtTJ examined the criteria within section 117C(4) and found that the claimant is socially and culturally integrated in the UK and has lived here lawfully for more than half of his life. We have already noted that these findings are not challenged in the grounds of appeal. At para 45 she found that there is no evidence to suggest that the claimant's siblings' relatives-in-law would welcome or assist him, particularly where he has an offending history and mental health problems. She found that he retains no familiarity with Bangladesh and that the country would be alien to him. His siblings could offer him only modest financial assistance. Whilst he would have skills giving him the potential to support himself, his ability to do so and to integrate may be affected by his physical and mental health.

16. At para 47 the FtTJ considered the treatment the claimant receives through his structured drug reduction programme with associated counselling. He takes methadone in a controlled setting daily. The Secretary of State had established that psychiatric treatment for drug reduction with methadone is available in Bangladesh and Dr Dunn confirmed that this has been the position since 2010 although there are only 299 people taking methadone in a country with 20,000 opiate dependent people. The FtTJ concluded that it was very unlikely that the claimant would be able to obtain the methadone he needs as a result of which it was likely that he would "enter a detoxification state which itself carries debilitating physical symptoms, something that carries a high risk of accidental heroin overdose, with potentially fatal consequences."

17. At paras 48 and 49 the FtTJ considered the claimant's mental health which she described as very fragile. In a finding which sits somewhat uneasily with earlier references to two historic episodes of drug induced psychosis, she uncritically accepted evidence from Dr Dunn to the effect that the stress of deportation raised the risk of a psychotic breakdown, supporting her conclusion with evidence of the claimant's fear and panic at the prospect of deportation. She noted evidence from Dr

Ofori-Attah, psychiatrist, who supervises the claimant on his drug reduction programme, to the effect that he has struggled with increased suicidal ideation owing to his possible deportation which has caused him to engage more intensively with mental health services. The FtTJ considered that this had implications for the claimant's ability to cope and function in the short to medium term following his arrival in Bangladesh. She noted evidence procured by the Secretary of State to the effect that mental health care did not function well there and was limited in its availability so that access to necessary support and treatment would be highly uncertain for the claimant. Amongst her conclusions is the following:

> "… The stigma attached to psychiatric disorders would also be relevant to this appellant's ability to integrate in the longer term, as he has in the past experienced a psychotic breakdown characterised by auditory hallucinations..."

18. At paras 50 and 51, the FtTJ reached her conclusions on section 117C(4):

> "50. In the light of these findings, his mental history and his opioid dependency, and having regard to the opinions of both Dr Dunn and Dr Ofori-Attah, I conclude that deportation will likely trigger a mental relapse for this appellant, separate and additional to the risk of relapse caused by enforced detoxification due to lack of methadone availability. I find this would be exacerbated by the lack of any immediate emotional, practical and medical care or support awaiting him in Bangladesh, a country he is no longer familiar with or connected to in any active or meaningful way. Dr Dunn identifies his lack of any support networks as an additional breakdown risk factor also.
>
> 51. For all these reasons, and after careful consideration, I find that the appellant meets the Exception set out at s117C (4) and paragraph 399A because he has shown that there are very serious obstacles to his integration into Bangladesh if he is deported there now. This is owing firstly to a likely lack of methadone treatment and the consequent risk of relapse and accidental overdose. He also faces a very real risk of psychotic breakdown, triggered by the stress of deportation, whilst social stigma and a lack of appropriate mental health care provision or in situ family support are all additional, important contributory factors. These all represent very serious obstacles to his integration in Bangladesh both now and in the longer term."

Whilst in para 51 the FtTJ uses the word "serious" instead of "significant," she had correctly directed herself as to the correct statutory criterion in quoting para 117C at para 34 and IR 399A at para 35. At the conclusion of para 44 she had correctly directed herself that,

> "The critical question in this appeal is whether there would be very significant obstacles to his integration into Bangladesh."

We note that in the grounds of appeal, at para 2, the Secretary of State refers to para 44 and appears to accept that the correct test had been applied and Mr Avery did not found on the use of the wrong word in para 51.

19. The FtTJ went on to state in para 52 that in light of the decision on Exception 1, it was not necessary to determine whether the claimant's deportation would be unduly harsh on the claimant's children.

The Secretary of State's Challenge

20. The grounds of appeal comprise 8 enumerated paragraphs. Para 1 of the grounds focuses the challenge exclusively on the decision made in respect of section 117C (4). Accordingly, the critical issue is identified as the FtTJ's finding that there would be very significant obstacles to the claimant's integration into Bangladesh. The FtTJ is said to have erred in that regard with references to article 8 case law: Bensaid v United Kingdom (2001) 33 EHRR 10; SL (St. Lucia) v Secretary of State for the Home Department [2018] EWCA Civ 1894; MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279. The Secretary of State's challenge is encapsulated in para 6 of the grounds:

> "The fact that the appellant may have difficulty in getting treatment, may have to travel for it, may have to pay for it and the fact that if he does not have the treatment his condition may conceivably deteriorate are not matters which show that his removal would be disproportionate and similarly would not amount to very significant obstacles."

21. In paras 7 and 8 the Secretary of State sets out other considerations deemed relevant to the question of very significant obstacles: the claimant has some extended family members in Bangladesh, his siblings travel there regularly, he has transferable skills in the building trade and the possibility of some financial support from family. In para 8 the Secretary of State contends that against this background, the obvious difficulties associated with removal would not meet the threshold of very significant obstacles.

Submissions for the Secretary of State

22. Mr Avery did not add a great deal to his grounds of appeal, founding particularly on the decision of the Court of Appeal in *SL (St. Lucia).* The FtTJ did not adequately address circumstances which were relevant to the claimant integrating in Bangladesh; his siblings had regularly travelled there; he has family contacts there; there is no reason why his family could not make arrangements for him to return and travel with him to help him get established; they could inquire as to how he may engage with facilities for his continuing methadone treatment which do exist. This was a family with continuing connections with people who had the wherewithal to assist the claimant financially which the FtTJ had not factored into her evaluation on the prospects for integration. The FtTJ had failed properly to engage with the issues highlighted in the judgment of the Court of Appeal in Secretary of State for the Home Department v Kamara [2016] 4 WLR 152.

Submissions for the claimant

23. In her skeleton argument, Ms Bond observed that the cases of *SL (St. Lucia)* and *MM (Zimbabwe)* were not put before the FtTJ who cannot therefore be in error in not referring to them. In any event, the FtTJ's decision was not undermined by the decisions or reasoning in those cases.

24. The claimant submits that his private and family life is of special and compelling character given that he has lived in the UK for 32 years since he arrived at the age of 6. He could not be enough of an insider to develop a private life in Bangladesh in the sense explained in *Kamara*. He has a relationship with his three children. He is receiving specialist support from Camden Specialist Drug Services for his drug addiction and mental health problems.

25. His treating consultant psychiatrist, Dr Dunn, had explained that heroin addiction is widespread in Bangladesh and treatment places are only available in Dhaka and for only 400 people. A lack of access to methadone would trigger a high risk of relapse to heroin use which carried a high risk of accidental overdose according to Dr Dunn. Dr Dunn suggested that the claimant would have limited access to community mental health treatment services and he would have to pay for anti-depressant medicines privately. His situation would be exacerbated by isolation and stress which might provoke the claimant's non-organic psychotic disorder. With family and professional support, the claimant's prognosis is good according to Dr Dunn.

26. In her response to Mr Avery, Ms Bond submitted that the FtTJ had addressed the potential for family support in Bangladesh and found as a matter of fact it was absent which could be seen in para 31 of the decision.

27. The medical evidence on which the claimant relied had not been challenged before the FtT. Dr Dunn had explained that mental illness was stigmatised in Bangladesh. The scarcity of methadone treatment, the scarcity of mental health treatment more generally and the claimant's longstanding addiction and mental illness gave rise to very significant obstacles in light of his very limited connections with a country he had left at the age of 6. This was not a case about the relative quality of medical treatment, it was a case about interference with an established private and family life in the UK which would be disproportionate. There was no error of law and certainly there was no material error of law and the decision of the FtTJ should stand.

Analysis

28. The 2002 Act provides in section 117 C:

> "**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.

(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.

(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.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

29. In NA (Pakistan) v Secretary of State for the Home Department [2017] 1 WLR 207 the Court of Appeal explained that the words "unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2" should be read in at the end of subsection 3, which has the effect of rendering subsection 3 consistent with Immigration Rule 398 (b). The FtTJ did not go on to consider that issue having been satisfied that Exception 1 was met.

30. In *Kamara* Sales LJ explained at para 14 of his judgment, with which his colleagues were in agreement:

> "14. In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C (4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

31. In KO (Nigeria) v Secretary of State for the Home Department, [2018] 1 WLR 5273, whilst the Supreme Court was primarily examining the proper application of section 117C Exception 2, Lord Carnwath explained at para 14 of his judgment, that in Part 5A of the 2002 Act Parliament had expressed the intended balance of relevant factors under ECHR article 8 in direct statutory form. At para 21 he was considering whether it was appropriate to go outside the terms of the exceptions in section 117C to assess the relative seriousness of an offence. He concluded that it was not, Exception 1 was to be treated as self-contained in its application and he put it this way:

> "21. … Exception 1 seems to leave no room for further balancing. It is precisely defined by reference to three factual issues: lawful residence in the UK for most of C's life, social and cultural integration into the UK, and "very significant obstacles" to integration into the country of proposed deportation. None of these turns on the seriousness of the offence; but, for a sentence of less than four years, they are enough, if they are met, to remove the public interest in deportation. For sentences of four years or more, however, it is not enough to fall within the exception, unless there are in addition "very compelling circumstances"."

32. Having examined all of the evidence before her, the FtTJ determined that the claimant has lived lawfully for most of his life in the UK and that he is socially and culturally integrated. Neither conclusion is subject of challenge. The FtTJ also determined that, in the whole circumstances, there were very significant obstacles to the claimant's integration into Bangladesh where he would be deported. If she was entitled to reach that conclusion and made no material error in law in reaching it, the claimant was bound to succeed in his appeal against the Secretary of State's decision.

33. It is not contended that this was a conclusion which was not reasonably open on the evidence. The Secretary of State contends that the FtTJ erred in reaching her decision only on the two grounds we have summarised at paras 20 and 21 above.

34. In *Bensaid* the ECtHR examined the circumstances of a proposed removal, to Algeria, of a man who was considered to have entered a sham marriage in the UK. B was suffering from schizophrenia, a psychotic illness, which had been treated for several years in the UK. He had been present in the UK for 11 years, for most of which time the government was seeking to remove him. B argued his case primarily under article 3 on the basis that there would be a deterioration in his mental health which might occur in circumstances where appropriate medicine would be less readily accessible.

35. Under article 8, B argued that in the absence of his medication there was a real risk that he would self-harm in response to hallucinations which would affect his psychological integrity. In addition to any ties deriving from his eleven years in the United Kingdom, his medical treatment there was all that supported his precarious grip on reality, which allowed him some level of social functioning. Without his treatment, he would be unable to interact in the community and establish or develop relationships with others.

36. In para 47 of its judgment, the ECtHR acknowledged:

> "47. … Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."

37. Although the ECtHR was prepared to assume that B would have acquired some private life over 11 years in the UK, the judgment discloses no specific features of private life on which B had founded. Whilst he had undergone what was alleged by the Government to be a sham marriage, it is not apparent that he founded on family life. He would return to a village in Algeria where his parents and five siblings lived. His whole claim rested on his mental health and the potential for it to deteriorate. The evidence disclosed that the drug he was taking in the UK to treat his schizophrenia was available in a hospital about 70 miles away from his village in Algeria.

38. The ECtHR observed that whilst B feared he would have a relapse of his illness in Algeria, he might also relapse if remaining in the UK. The ECtHR concluded that the fact that the applicant's circumstances in Algeria would be less favourable than those enjoyed by him in the United Kingdom was not decisive from the point of view of article 3 of the Convention. The problems he had identified in obtaining treatment in Algeria were not really vouched by evidence and largely speculative. The court was not persuaded that there was a sufficiently real risk that the B's removal would be contrary to the standards of article 3.

39. This decision was not noticed in *SL (St. Lucia)* but the court examined some of the same case-law which influenced the ECtHR in *Bensaid* together with more recent examination of similar issues in both the Court of Appeal and ECtHR, notably Paposhvili v Belgium [2017] Imm AR 867.

40. The appellant in *SL (St. Lucia)* was seriously mentally ill but had little private life and no family life in the UK. It was proposed to remove her to St. Lucia because she had overstayed. It was not a case involving deportation of a foreign criminal. Having examined relevant case law, Hickinbottom LJ giving judgment in the Court of Appeal endorsed the judgments of the Court of Appeal in GS (India) v Secretary of State for the Home Department [2015] 1 WLR 3312 and *MM (Zimbabwe)*. The first passage quoted below is from *GS (India)* in which the court quoted from *MM (Zimbabwe)*:

> "86. If the article 3 claim fails (as I would hold it does here), article 8 cannot prosper without some separate or additional factual element which brings the case within the article 8 paradigm — the capacity to form and enjoy relationships — or a state of affairs having some affinity with the paradigm. That approach was, as it seems to me, applied by Moses LJ (with whom McFarlane LJ and the Master of the Rolls agreed) in *MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279* at [23]:
>
> > 'The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be

relevant to article 8 , is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage article 8 . Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under article 8 . That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported.'

87. With great respect this seems to me to be entirely right. It means that a specific case has to be made under article 8 …".

Hickinbottom LJ continued:

23. To that, having also referred to the same passage from *MM (Zimbabwe)*, Underhill LJ added this (at [111]):

"I think it is clear that two essential points are being made. First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging article 8: if that is all there is, the claim must fail. Secondly, where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the 'no obligation to treat' principle."

41. Hickinbottom LJ continued at para 27, in a passage quoted in the Secretary of State's grounds of appeal:

"27. … As I have indicated and as *GS (India)* emphasises, article 8 claims have a different focus and are based upon entirely different criteria. In particular, article 8 is not article 3 with merely a lower threshold: it does not provide some sort of safety net where a medical case fails to satisfy the article 3 criteria. An absence of medical treatment in the country of return will not in itself engage article 8. The only relevance to article 8 of such an absence will be where that is an additional factor in the balance with other factors which themselves engage article 8 (see *(MM (Zimbabwe)* at [23] per Sales LJ). Where an individual has a medical condition for which he has the benefit of treatment in this country, but such treatment may not be available in the country to which he may be removed, where (as here) article 3 is not engaged, then the position is as it was before *Paposhvili* , i.e. the fact that a person is receiving treatment here which is not available in the country of return may be a factor in the proportionality balancing exercise but that factor cannot by itself give rise to a breach of article 8 . Indeed, it has been said that, in striking that balance, only the most compelling humanitarian considerations are likely to prevail over legitimate aims of immigration control (see *Razgar* at [59] per Baroness Hale)."

42. Whilst *SL (St. Lucia)* provides a helpful contemporary review of ECtHR and Court of Appeal understanding of how Articles 3 and 8 may bear on decisions to remove a person who has no right of residence in the UK in the context of serious health

problems and a lack of treatment in the country of destination, it was not a case involving a foreign criminal liable to deportation. The Court of Appeal did not have reason to examine section 117C. However, the Court's analysis suggests that the type of evaluation considered where health problems are proposed to constitute relevant considerations under article 8 could readily fit within the framework of part 5A of the 2002 Act.

43. As we have noted above, the FtTJ proposed by way of background to perform a *Razgar* assessment through part 5A of the 2002 Act and associated immigration rules, but omitted to refer to what Lady Hale had to say at para 59 of the House of Lords judgment:

> "59. Although the possibility cannot be excluded, it is not easy to think of a foreign health care case which would fail under article 3 but succeed under article 8. There clearly must be a strong case before the article is even engaged and then a fair balance must be struck under article 8(2). In striking that balance, only the most compelling humanitarian considerations are likely to prevail over the legitimate aims of immigration control or public safety. The expelling state is required to assess the strength of the threat and strike that balance. It is not required to compare the adequacy of the health care available in the two countries. The question is whether removal to the foreign country will have a sufficiently adverse effect upon the applicant. Nor can the expelling state be required to assume a more favourable status in its own territory than the applicant is currently entitled to. The applicant remains to be treated as someone who is liable to expulsion, not as someone who is entitled to remain."

However, such a balance has been struck by Parliament for foreign criminals in part 5A of the 2002 Act as Lord Carnwath explained in *KO (Nigeria).* We note also that the ECtHR's decision in *Bensaid* was examined closely by the House of Lords in *Razgar*, Lord Bingham describing it as the bedrock of B's claim which may have some relevance to a ground of appeal based on failure to apply the decision in *Bensaid*.

44. We consider that it is clear from the post-*Razgar* cases we have examined that, as a matter of generality, an article 8 claim based only on a claimant's ill health and the impact of removal on the claimant's state of health cannot succeed if it is the only basis to resist removal unless the impact was such as to reach the threshold for article 3. The high threshold for an article 3 claim on health grounds was authoritatively determined by the House of Lords in *N v Secretary of State for the Home Department* [2005] 2 AC 296; and by the ECtHR in *N v United Kingdom* (2008) 47 EHRR 39. As the Court of Appeal explained in *SL (St. Lucia),* with reference to *GS (India)* and *MM (Zimbabwe):*

> "An absence of medical treatment in the country of return will not in itself engage article 8. The only relevance to article 8 of such an absence will be where that is an additional factor in the balance with other factors which themselves engage article 8."

45. As Lord Carnwath explained in *KO (Nigeria)* at paras 13 and 14 the version of Immigration Rules 398, 399 and 399A introduced in 2014 was intended to reflect an assessment of all factors relevant to the application of article 8 and the amendment of

the 2002 Act went further by expressing the intended balance of relevant factors in direct statutory form.

46. We note that the Court of Appeal in *NA (Pakistan)* at para 38 identified where there could be room for consideration of convention jurisprudence, for example in considering the provisions of section 117C (5) and (6), whilst also explaining, at para 39:

> "39. Even then it must be borne in mind that assessments under article 8 may not lead to identical results in every Convention contracting state. To the degree allowed under the margin of appreciation and bearing in mind that the Convention is intended to reflect a fair balance between individual rights and the interests of the general community, an individual state is entitled to assess the public interest which may be in issue when it comes to deportation of foreign criminals and to decide what weight to attach to it in the particular circumstances of its society. Different states may make different assessments of what weight should be attached to the public interest in deportation of foreign offenders. In England and Wales, the weight to be attached to the public interest in deportation of foreign offenders has been underlined by successive specific legislative interventions: first by enactment of the 2007 Act, then by promulgation of the code in the 2012 rules and now by the introduction of further primary legislation in the form of Part 5A of the 2002 Act and the new code in the 2014 rules. Statute requires that in carrying out article 8 assessments in relation to foreign criminals the decision-maker must recognise that the deportation of foreign criminals is "conducive to the public good" (per section 32(4) of the 2007 Act) and "in the public interest" (per section 117C(1) of the 2014 Act)."

47. Such authoritative statements render it abundantly clear that the FtTJ was bound to determine this case within the framework of part 5A of the 2002 Act.

48. We find no material inconsistency between how the task of balancing the public interest in removal was envisaged to proceed in *SL (St. Lucia)* and the approach taken by the FtTJ in this case. Even if there was inconsistency, the FtTJ was bound to apply the provisions of part 5A of the 2002 Act. Accordingly, the decisions and reasoning of the court in *SL (St. Lucia)* and *MM (Zimbabwe),* or omitting to refer to them, do not demonstrate that the FtTJ erred.

49. We do not consider the decision or reasoning in *Bensaid* to demonstrate that the FtTJ erred in her treatment of the issues she required to resolve under part 5A of the 2002 Act. *Bensaid* does not demonstrate that no weight can be attached to medical circumstances falling short of article 3 as para 47 of the judgment seems to us to make clear. It appears to us that this was accepted by the majority of the House of Lords in *Razgar,* where *Bensaid* was carefully examined, albeit in that case Lord Bingham (at para 10) envisaged that there might be a case where medical circumstances which fell short of the article 3 threshold might sound for article 8.

50. In any event, this was not a case in which the FtTJ was being asked to determine a claim periled only on article 3 grounds pled as such or disguised as article 8 grounds.

In this case the FtTJ had to assess a multi-faceted article 8 claim which fell to be determined within the structure of part 5A. Notwithstanding her reference to *Razgar*, the FtTJ faithfully applied the approach laid down in part 5A, and particularly section 117C.

51. We recognise that another judge might have reached different conclusions on the same facts but that is not sufficient to demonstrate that the FtTJ erred in law. The Secretary of State has not advanced a ground of appeal contending that the decision reached by the FtTJ could not reasonably have been reached on the evidence. The assessment of the evidence before her, which included evidence from witnesses, was primarily for the FtTJ to make. We are not persuaded that the grounds of appeal demonstrate that she erred in making her evaluative assessment of the evidence as to the current state of the claimant's connection with Bangladesh, the likelihood of his being offered support by members of his extended family, the modest financial support he could expect from his immediate family, his very limited facility in Bengali and the effect of his longstanding mental illness and drug-addiction on his ability to integrate into a country he left at the age of 6 in 1986. We are not persuaded that, in the light of the FtTJ making findings which she was entitled to make, it has been demonstrated that she erred in reaching her conclusion that the claimant met the criteria for Exception 1 in section 117C (4).

52. For these reasons we dismiss the Secretary of State's appeal.

<u>Notice of Decision</u>

The decision of the FtT does not involve the making of an error of law.

We uphold the decision of First-tier Tribunal Judge promulgated on 19 November 2018 with the consequence that MA's appeal remains allowed.

Signed Dated 4 April 2019

Lord Beckett sitting as an Upper Tribunal Judge.