IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001155

First-tier Tribunal No:
HU/04126/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22 June 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED SHAMSUL ABEDIN

Respondent

Representation:
For the Appellant: Mr C Williams, Senior Home Office Presenting Officer
For the Respondent: Mr M Hussain, Fountain Solicitors

Heard at Birmingham Civil Justice Centre on 2 March 2023

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Muhammed Abedin. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Abedin as the appellant, and the SSHD as the respondent.

2. The appellant is a national of Bangladesh. He arrived in the UK on 17 March 2001. On 9 April 2002 he was granted indefinite leave to remain in the UK as a spouse. On 7 August 2019 he was convicted of causing grievous bodily harm with intent, and on 28 October 2019 was sentenced

at Wolverhampton Crown Court to 4 years and 4 months imprisonment. After considering representations made by the appellant's representatives, on 3 August 2020 a Deportation Order was made in accordance with s32(5) of the UK Borders Act 2007 ("the 2007 Act") and that was served upon the appellant alongside a decision to refuse the appellant's human rights claim.

3. The respondent considered the private and family life established by the appellant but concluded that the appellant's deportation is conducive to the public good and in the public interest because he has been convicted of an offence for which he has been sentenced to a period of imprisonment of at least four years. Therefore, in accordance with paragraph 398 of the Immigration Rules, the public interest requires the appellant's deportation unless there are very compelling circumstances over and above those described in the exceptions to deportation set out at paragraphs 399 and 399A of the Immigration Rules.

4. The respondent accepted the appellant has four children who are British citizens and that two of his sons are under the age of 18. The children live with their mother, Kamrun Nahar who is also a British citizen. The respondent did not accept the appellant has a genuine and subsisting parental relationship with his children and did not accept the effect of the appellant's deportation on his partner or children would be unduly harsh. In any event, the respondent concluded that there are no very compelling circumstances, over and above those described in the exceptions to deportation.

5. The appellant's appeal against that decision was allowed by First-tier Tribunal Judge Feeney for reasons set out in decision dated 28 February 2022.

6. The respondent claims the reasoning of the First-tier Tribunal Judge falls significantly short of demonstrating any form of compelling circumstances, let alone to the required standard. The appellant was convicted of a very serious crime and it was for the appellant to establish that the circumstances here are so compelling that they displace the strong public interest in his removal. The respondent also claims Judge Feeney erred in finding the appellant is socially and culturally integrated in the United Kingdom. He was 'removed from society' when he was sentenced and that demonstrates he was not socially and culturally integrated. The respondent also claims that whilst there will be obvious difficulties for the appellant's two younger children and his partner, the difficulties do not establish that the impact of the appellant's removal upon his partner and children would be unduly harsh or that there are very compelling circumstances, over and above Exceptions 1 and 2 set out in s117C of the Nationality, Immigration and Asylum Act 2022 ("the 2002 Act"). The appellant claims the appellant's wife coped when he was serving a sentence of imprisonment and the judge gave inadequate reasons for her finding that the appellant's partner's mental health will have an impact on the family. The judge does not identify what the consequences would be in

circumstances where the appellant's partner was being treated for her mental health prior to the appellant's incarceration, and continued to receive treatment during his incarceration. The treatment continues to be available to her. It is said the judge failed to consider the potential support and input also available from family members and the appellant's two older sons.

7. The respondent refers to the decision of the Court of Appeal in SS (Nigeria) v SSHD [2013] EWCA Civ 550 in which Lord Justice Laws considered the statutory framework relating to the deportation of foreign criminals under the 2007 Act and said:

> "53. … An Act of Parliament is anyway to be specially respected; but all the more so when it declares policy of this kind. In this case, the policy is general and overarching. It is circumscribed only by five carefully drawn exceptions, of which the first is violation of a person's Convention Refugee Convention rights. (The others concern minors, EU cases, extradition cases and cases involving persons subject to orders under mental health legislation.) Clearly, Parliament in the 2007 Act has attached very great weight to the policy as a well justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers. Sedley LJ was with respect right to state that "[in the case of a 'foreign criminal' the Act places in the proportionality scales a markedly greater weight than in other cases".
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> 54. I would draw particular attention to the provision contained in s.33(7) : " section 32(4) applies despite the application of Exception 1 … ", that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8 . I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed."

8. The respondent claims Judge Feeney described this as "very much a borderline case", but fails to give adequate reasons to support her conclusion that the high threshold is met.

9. Permission to appeal was granted by Upper Tribunal Judge Reeds on 6 June 2022. She said:

> "It is arguable that when identifying whether there were very compelling circumstances, the FtTJ arguably erred by failing to address the issue of undue harshness (when linked with the appellant's wife's mental health) by reference to the necessary threshold in light of the evidence set out at paragraphs [30] and [32] and the potential availability of input from family members and/or the state and to

> address what the consequences would be in the event of his deportation.
>
> Whilst the grounds assert that the judge failed to take account of the best interests of the 2 elder children, they were adults at the time of the decision and the judge in any event considered their circumstances when addressing the offending."

The hearing before me

10. Mr Williams referred to the decision of the Upper Tribunal in MS (s.117C(6): Very Compelling Circumstances: Philippines) [2019] UKUT 00122 (IAC) in which it was held, at [20], that a court or tribunal, in determining whether there are very compelling circumstances, as required by [s117c(6)], must take into account the seriousness of the particular offence for which the foreign criminal was convicted, together with any other relevant public interest considerations. Mr Williams submits that although the judge acknowledged the appellant has committed a serious offence and the weight of the public interest in favour of deportation remains great, the judge failed to have regard to other factors relevant to the public interest such as deterrence and the public interest in maintaining confidence in the system that is achieved by foreign nationals understanding that a serious offence will normally precipitate their deportation.

11. Mr Williams submits Judge Feeney referred to the poor mental health of the appellant's wife at paragraph [56] as a factor that weighs in the appellant's favour. He submits that although that is relevant, Judge Feeney had noted at paragraph [30] that there is no information to suggest that the physicians responsible for the wife's care have any concerns regarding her ability to care for her children and there is no involvement from social services. The evidence as set out in paragraph [31], and accepted by the Judge was that the appellant supported his wife in the house, helped bring up the children, helped with shopping, dealing with domestic chores and he also provided her with emotional support. At paragraph [32] Judge Feeney found the appellant's wife will continue to engage with and receive support from health services and she will continue to be supported by the state while she is assessed as unfit to work. Mr Williams submits that in considering the impact on the family home given the appellant's wife is the children's' primary carer, Judge Feeney failed to have regard to the assistance that she would receive from the two eldest children who are in their twenties and the support that would be available from agencies such as social services if that were required. Mr Williams submits the judge failed to have proper regard to relevant factors that weigh against the appellant when considering whether the high threshold required under s117C(6) is met. Here, the public interest requires deportation unless there are very compelling circumstances over and above those describe in Exceptions 1 and 2.

12. In reply, Mr Hussain submits Judge Feeney carefully considered all the evidence that was before the Tribunal and noted that this is very much a

borderline case given that the public interest in deportation remains high. There can be no doubt the judge had in mind throughout the seriousness of the offence committed by the appellant. The evidence before the Tribunal included a letter from 'Sandwell Healthy Minds dated 1st June 2021 following an assessment in which the presenting problems are described as "*Issues surrounding her husband being in prison and his pending release*". The letter confirms the appellant's wife "*... has been placed on the waiting list for treatment and will be sent an appointment as soon as possible".* The evidence therefore was that her mental health had deteriorated when the appellant was in prison. Mr Hussain submits the appellant's wife receiveS counselling, but that is a 'temporary' solution and will be of little benefit because the impact upon her mental health is in part caused by the possibility of more long-term separation.

Decision

13. Section 32 of the UK Borders Act 2007 defines a foreign criminal, as a person not a British citizen who is convicted in the UK of an offence and, inter alia, sentenced to a period of imprisonment of at least 12 months. Section 32(4) of the 2007 Act sets outs out the clear proposition that deportation of a foreign criminal is conducive to the public good. That is a statement of public policy enacted by the legislature, which the courts and tribunals are obliged to respect. Section 32(5) of the 2007 Act requires the Secretary of State to make a deportation order in respect of every foreign criminal, subject to the exceptions set out in section 33.

14. Part 5A of the Nationality, Immigration and Asylum Act 2002 NIAA 2002 informs the decision making in relation to the application of the section 33 exceptions. Section 117A in Part 5A provides that, when a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8, and, as a result, would be unlawful under section 6 of the HRA 1998, the court, in considering the public interest question, must (in particular) have regard to the considerations listed in section 117B and, additionally, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C. Section 117C specifically deals with the weight to be attached to the public interest in deporting foreign criminals and provides a structure for conducting the necessary balancing exercise, dependent in part, on the length of sentence imposed.

15. There is no doubt the appellant is a 'foreign criminal' as defined in s117D. Applying s117C(6) of the 2002 Act, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

16. It is now well established that it will often be sensible first to see whether the case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a

helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under s117(6). .

17. Judge Feeney found Exception 1 set out in s117C(4) of the 2002 Act does not apply. She said, at [36]

> "In terms of the exceptions, the appellant has been lawfully resident in the UK for 21 years but that is not most of his life. I find he is socially and culturally integrated in the UK for reasons set out in previous paragraphs. I find that there would be no very significant obstacles to his integration in Bangladesh for the following reasons."

18. Her reasons for finding the appellant has not lived in the UK for most of his life are set out in paragraph [21]. Her reasons for finding the appellant is socially and culturally integrated in the United Kingdom are set out in paragraphs [22] and [23]. Her reasons for finding there would not be very significant obstacles to the appellant's integration into Bangladesh are found at paragraphs [37] to [38] of the decision.

19. I reject the respondent's claim that Judge Feeney erred in finding the appellant is socially and culturally integrated in the United Kingdom. Whether a foreign criminal is socially and culturally integrated in the United Kingdom is to be determined in accordance with common sense. The fact that the appellant has been sentenced to a period of imprisonment is relevant but it is only one relevant factor. At paragraphs [21] to [23] of her decision Judge Feeney carefully set out her reasons for concluding the appellant is socially and culturally integrated in the United Kingdom. She considered the length of time the appellant has spent in the UK, his employment history and strong work ethic, the view of the Offender Manager that there is no evidence here of pro-criminal views but "*an out of character act, albeit one which is serious*". She noted that that while the appellant was in prison he was excluded from outside society, but there is no other evidence, aside from this sentence of imprisonment that he had a history of committing offences or of exhibiting anti -social behaviour. It is clear from what is said in her decision that Judge Feeney carefully addressed whether the appellant's offending had broken the continuity of his social and cultural integration in the UK. She considered the matters relied upon by the respondent but said there are many years of law-abiding behaviour and examples of integration. It was in my judgement open to Judge Feeney, when considering relevant factors holistically, to find the appellant's social and integrative links have not been broken by the single offence and sentence of imprisonment.

20. As far as Exception 2 set out in s117C(5) of the 2002 Act is concerned, Judge Feeney found, at [41], that the appellant has a genuine and subsisting relationship with his wife who is a British citizen. She concluded, at [44], that it would be unduly harsh for the appellant's wife to live in the UK without the appellant because of her longstanding mental health condition, the support the appellant has been able to provide to her

over the years to help mitigate the effects of her poor mental health, and the deterioration of her condition in his absence.

21. The evidence before the Tribunal regarding the mental health of the appellant's wife is set out at paragraphs [26] to [32] of the decision. Judge Feeney accepted the appellant's wife suffers from longstanding mental health difficulties and that hat she has experienced a deterioration in her condition which is why she has now been referred for counselling. She noted, at [30], that there is no information to suggest that the physicians responsible for the wife's care have any concerns regarding her ability to care for her children and there is no involvement from social services. At paragraph [32] Judge Feeney found the appellant's wife will continue to engage with and receive support from health services and she will continue to be supported by the state while she is assessed as unfit to work. She said the fact the appellant's wife is now receiving counselling because her condition has deteriorated suggests that she will be negatively affected by her husband's removal and her mental health is likely to have an impact on the family home given she is the children's' primary carer in his absence.

22. At paragraph [42] Judge Feeney noted the appellant's wife is settled in the UK and that she has a home and a supportive family network. She is reliant on NHS support to help her with her mental health problems. She said that importantly, the appellant's wife is the children's primary carer and subject to the findings she made about the appellant's minor children, while the appellant's wife remains responsible for them, it is unduly harsh to expect her to live abroad. She noted, at [43] that if the appellant is removed, his children are unlikely to see him again physically for some time, although they will be able to keep in contact with him by remote means.

23. Judge Feeney found, at [45], that the appellant does have a genuine and subsisting relationship with his children who are British Citizens. Judge Feeney set out her reasons for her finding that it would be unduly harsh for the children to live in the UK without the appellant at paragraphs [46] to [49] of her decision. She accepted, at [46], that it is in the children's best interests to be brought up by both parents and found, at [47], that it is in their best interests to remain in the UK where they have a stable home and social setting.

24. Judge Feeney noted, at [49] that the best interests assessment is distinct from an assessment as to whether the appellant's removal would be unduly harsh on the children. At paragraph [49] she concluded:

> "The question I must ask is whether it would it be unduly harsh for the children to remain in the UK without the appellant? This is a cohesive family unit. As explained previously the family finances are such that it is unlikely that the children will be able to visit their father although they will be able to communicate with him remotely. This will nonetheless weigh heavily on the younger children. The children will have support from their mother but she will in turn be affected by his

> long-term absence and her mental health condition will inevitably have an impact on the household. My view is that these specific circumstances render it unduly harsh for the children to live in the UK without the appellant."

25. The findings made by Judge Feeney are to the effect that it would be unduly harsh on the appellant's wife and children to remain in the UK without the appellant. As Lord Hamblen reiterated in HA (Iraq), at [72], it is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular: (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49; [2008] AC 678* per Baroness Hale of Richmond at para 30.

26. Throughout her decision, Judge Feeney concludes the effect of the appellant's deportation on his partner and children would be unduly harsh. Judge Feeney was entitled to have regard to the adverse impact that the appellant's absence would have upon his wife's mental health and the impact that in turn would have upon the household. Judge Feeney set out the factors which she considered supported her conclusion that the effect on the appellant's partner and the children of remaining in the UK without the appellant meets the elevated unduly harsh test. That was an evaluative judgement for Judge Feeney on the basis of the full evidence before her. Her findings of fact are such that the conclusion she reached of undue harshness was open to her.

27. That however was not the end of the matter since section 117(c)(6) of the 2002 Act provides that in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, as here, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2. Judge Feeney properly noted, at [50], that the appellant has been sentenced to a period of imprisonment of at least four years and the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2.

28. In the decision of the Supreme Court in HA (Iraq), Hamblen LJ said:

> "48. In Rhuppiah v Secretary of State for the Home Department [2016] 1 WLR 4203 *at para 50* Sales LJ emphasised that the public interest "requires" deportation unless very compelling circumstances are established and stated that the test "provides a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life

considerations are so strong that it would be disproportionate and in violation of article 8 to remove them."

29. He went on to say:

> “51. When considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in deportation. As explained by Lord Reed in *Hesham Ali* at paras 24 to 35, relevant factors will include those identified by the European Court of Human Rights ("ECtHR") as being relevant to the article 8 proportionality assessment. In *Unuane v United Kingdom (2021) 72 EHRR 24* the ECtHR, having referred to its earlier decisions in *Boultif v Switzerland (2001) 33 EHRR 50* and *Üner v The Netherlands (2006) 45 EHRR 14* , summarised the relevant factors at paras 72-73 as comprising the following:
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> > "• the nature and seriousness of the offence committed by the applicant;
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> > • the length of the applicant's stay in the country from which he or she is to be expelled;
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> > • the time elapsed since the offence was committed and the applicant's conduct during that period;
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> > • the nationalities of the various persons concerned;
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> > • the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
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> > • whether the spouse knew about the offence at the time when he or she entered into a family relationship;
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> > • whether there are children of the marriage, and if so, their age; and
> >
> > • the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.
> >
> > • the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
> >
> > • the solidity of social, cultural and family ties with the host country and with the country of destination."
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> 52. The weight to be given to the relevant factors falls within the margin of appreciation of the national authorities. As Lord Reed explained in *Hesham Ali* at para 35:
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> > "35. While the European court has provided guidance as to factors which should be taken into account, it has 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. The Convention on Human Rights can thus accommodate, within limits, the judgments made by national legislatures and governments in this area."

30. As far as the offence committed by the appellant is concerned, she said:

> "16. The appellant committed a serious and grave offence. It was a violent offence using baseball bats and it had significant physical and emotional consequences for his victim as well as causing damage to the victim's vehicle. A particularly aggravating feature was the fact he involved his sons. As a result of their involvement, they both have criminal convictions. The gravity of the offence is reflected in the sentence. There are no other offences and he was previously of good character."

31. Judge Feeney referred, at [17], to the OASYS report and noted the Offender Manager's view is that the offence was out of character for the appellant and evidences a significant lapse in thinking skills and consequential thinking. Judge Feeney noted the appellant is assessed as being of medium risk to the public, specifically future acquaintances who the appellant should experience a grievance with, albeit there is a low likelihood of serious reoffending.

32. Judge Feeney referred to the evidence before the Tribunal regarding rehabilitation and remorse drawing upon the evidence set out in particular in the OASYS report and the Offender Manager's views. The judge again referred to the evidence before the Tribunal regarding the mental health of the appellant's wife and said that she was satisfied that the appellant has been instrumental in helping his wife mitigate the effects of her poor mental health which in his absence has deteriorated such that she now receives counselling. The Judge also had regard to the close relationship between the appellant and his children.

33. At paragraphs [53] to [57] of her decision, Judge Feeney set out the factors that weigh in favour of the appellant. They include the evidence before the Tribunal of rehabilitation, remorse, his history of working and the fact that he has been instrumental in helping his wife mitigate the effects of her poor mental health which in his absence deteriorated. She found it is likely that their mother's poor mental health will have a bearing on the family home. Judge Feeney also accepted the appellant has a close relationship with his children.

34. At paragraphs [58] and [59] Judge Feeney concluded:

> "58. Weighing against the appellant is the fact that he committed a serious offence and the weight of the public interest, in favour of deportation remains great. I emphasise that both physical and emotional harm was caused to the victim in this case and a particularly aggravating feature is the use of baseball bats and his involvement of

> his two older children who now hold criminal convictions because of their father's actions. He does not meet the exceptions in section 117C for reasons set out above.
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> 59. This is very much a borderline case given that the public interest in deportation remains high. I weigh the factors set out in the balancing exercise above and find the culmination of all the factors in the appellant's favour mean that the appellant makes out the very compelling circumstances threshold. In particular I bear in mind his wife's mental health condition and the support the appellant has provided for her in the past and the consequences his absence will have on her health and on the family unit as a whole."

35. Judge Feeney was satisfied that the culmination of all the factors in the appellant's favour mean that the appellant makes out the very compelling circumstances threshold. She described it as very much a "borderline case", and it seems that the appellant's wife's mental health, the support the appellant has provided to her in the past and the consequences the appellant's absence will have on her health and on the family unit as a whole, was the decisive factor.

36. The assessment of an Article 8 claim such as this and the consideration of whether removal is proportionate, is always a highly fact sensitive task. The findings and conclusions reached by Judge Feeney were in my judgment, neither irrational nor unreasonable in the Wednesbury sense, or findings and conclusions that were wholly unsupported by the evidence. They were based on the particular facts and circumstances of this appeal and the strength of the evidence before the Tribunal. Where a judge applies the correct test, and that results in an arguably generous conclusion, it does not mean that it was erroneous in law.

37. It follows that in my judgment the decision of First-tier Tribunal Judge Feeney is not vitiated by a material error of law and her decision to allow the appeal stands.

Notice of Decision

38. The respondent's appeal is dismissed.

V. Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 June 2023