



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02469/2015**

THE IMMIGRATION ACTS

**Heard at Field House
On 5 November 2015**

**Decision and Reasons
Promulgated
On 2 December 2015**

Before

**LORD TURNBULL
(Sitting as a Judge of the Upper Tribunal)
DEPUTY UPPER TRIBUNAL JUDGE MANUELL**

Between

**MR DUNCAN KASOLO
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Muzira, Solicitor (Solomons)

For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge O'Garro on 8 September 2015 against the determination of First-tier Tribunal Judge Lloyd promulgated on 11 July 2015 dismissing

the Appellant's asylum, humanitarian protection and human rights claims. Those claims had been raised in response to the Secretary of State's decision dated 27 January 2015 to deport the Appellant, made pursuant to section 32(5) of the UK Borders Act 2007.

2. The Appellant is a national of Rwanda, born there on 5 April 1991. The Appellant had entered the United Kingdom with his mother and his sister on 3 September 2001, when he was 10 years of age. His mother's asylum claim was refused on 29 November 2001, but she was granted ELR with her children as her dependants, until 29 November 2005, in accordance with the Home Office policy then in force. The Appellant, his mother and sister were granted ILR on 29 May 2007.
3. The Appellant's first criminal conviction was on 2 December 2004 at Stratford Juvenile Court, attempt/robbery. He was sentenced to a curfew order of 3 months with electronic tagging. There was an action plan order of 3 months. The extent of the Appellant's subsequent convictions (set out in the reasons for deportation decision) are not in dispute. Convictions are recorded in 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013. The last recorded conviction was on 14 October 2013, at Kingston upon Thames Crown Court. The Appellant was convicted of possession of a knife blade/sharp pointed article in a public place and burglary and theft - dwelling. The Appellant was sentenced to 36 months' imprisonment. The judge's sentencing remarks are extracted at [19] of Judge Lloyd's determination.
4. Judge Lloyd heard the appeal at Newport (Columbus House) on 5 August 2015, in the Appellant's absence. At that time the Appellant was unrepresented and was living in London. Enquiries had been made of his previous solicitors as the judge recorded at [5] and [6] of his determination. As of 11.30am the Appellant's absence was unexplained. At approximately 1.00pm the judge was informed that the Appellant had arrived at court, and had handed in a written request for an adjournment, on the notepaper of newly instructed solicitors: see [9], [10] and [11] of the determination. The judge refused to reopen the hearing or indeed to hear the Appellant. He considered that the travel arrangements which the Appellant had made to reach his hearing were "entirely unacceptable to this Tribunal". The judge went on to determine the appeal without any evidence from the Appellant.
5. When granting permission to appeal, First-tier Tribunal Judge O'Garro considered that it was arguable that Judge Lloyd had erred in law by refusing an adjournment and/or to hear the appeal after the Appellant's late arrival. It was arguable that the Appellant had not received a fair hearing.

6. The Respondent filed notice under rule 24 indicating that the appeal was opposed. Standard directions were made by the tribunal and the appeal was listed for adjudication of whether or not there was a material error of law. The Appellant was informed that, in the event that a material error of law were found, his appeal would be reheard immediately.

Submissions

7. The tribunal indicated at the commencement of the hearing its provisional view that there had indeed been manifest unfairness as indicated by the grant of permission to appeal, which necessitated the setting aside of the decision and reasons, and a rehearing. Ms Willocks-Briscoe for the Respondent indicated no dissent and further formal submissions were not required.

The material error of law

8. No doubt Judge Lloyd was sorely tried by the Appellant's unaccountably casual attitude towards timekeeping, especially an Appellant who had such long experience of the courts. Had the Appellant simply failed to attend at all, the judge's decision would have been unimpeachable. The judge's consideration of the evidence which was available was commendably thorough. But the late arrival of the Appellant, even as the result of the Appellant's mismanagement of his travel arrangements, fundamentally changed the situation. The judge had at that point not yet given any decision in the appeal, let alone prepared a decision and reasons. Having neither seen nor heard the Appellant, but relying on an intermediary, the judge reached a decision which was in effect to exclude the Appellant and which was on its face unfair. The judge should certainly at the least have reconvened the hearing, to hear what the Appellant had to say. It was clear that the Appellant had travelled a substantial distance and was unrepresented. It was of particular relevance that the Appellant was at that time raising an asylum claim, to which the principle of anxious scrutiny always applies.
9. The tribunal finds that the judge's decision not to hear the Appellant notwithstanding his late arrival appeared unfair and was unfair, despite the reasons which the judge gave for his decision. There had not been a proper hearing. The appeal of the Appellant is allowed. The decision and reasons of Judge Lloyd is accordingly set aside.
10. In compliance with the tribunal's directions, the Appellant's solicitors had filed two bundles of evidence in the event that a rehearing was ordered. These had not reached the Respondent and so time was given to Ms Willocks-Briscoe to prepare. The Respondent's evidence was available, including the Appellant's criminal record and OASys Assessments.

The fresh hearing

11. Ms Muszira indicated that the Appellant was no longer relying on asylum grounds to contest the deportation order. He relied on Article 8 ECHR family life grounds only.
12. The Appellant gave evidence in accordance with his witness statement dated 2 November 2015. In summary in his written evidence the Appellant said that he had been released on bail to join his partner, Ms Charlotte Anne Dawson-Smith ("Dawson-Smith"), on 7 May 2015. His offending had been connected to alcohol and drugs. He was deeply remorseful. Facing deportation had caused him to reflect further on his actions. He did not intend to offend again. He was due to attend another course shortly. His son's ties were with the United Kingdom, as were his partner's. His son would be adversely affected by his absence. The Appellant was close to his own mother and siblings, especially because of the circumstances in which they left Rwanda. The Appellant had no social, cultural or family ties in Rwanda. He had lived in the United Kingdom for 14 years. The Appellant served a bundle of supporting evidence to which further reference will be made as necessary in due course.
13. In his oral evidence the Appellant said that Ms Dawson-Smith was not at the hearing because of her agoraphobia. She suffered panic attacks and stayed at home. She struggled to shop or to take their son to school. He had requested a medical report but none had been provided in the time available.
14. Cross-examined, the Appellant said that he did everything, cooking, shopping and cleaning. Ms Dawson-Smith's mother and sister lived 5 minutes away in Hammersmith and her father lived in Shepherd's Bush. There was another sister in Oxfordshire. Ms Dawson-Smith was on medication. He had been released on bail to her.
15. The Appellant was shown Ms Dawson-Smith's letter to the Home Office dated 1 April 2015, in which she stated that she and the Appellant were not living together and that their relationship had its ups and downs. He said that they had had a 2 or 3 day break when he was at his mother's. Their relationship had started when they were both young, only 19, and Ms Dawson-Smith had soon had a baby. He had only lived with her full time since he had come out of prison.
16. The Appellant said that the couple lived on Ms Dawson-Smith's income support and charity. His family couldn't afford to help him. He took his son to school. While the Appellant was in prison Ms Dawson-Smith collected him. The school was in the same road as their flat. His own mother came to visit his son quite a lot.

17. The Appellant said that he spoke no French or Rwandan. He had no house or job in Rwanda. His mother and younger brother had been to Rwanda about 4 years ago but the Appellant had never been back. The Appellant believed that his mother had caught up with a friend but he knew of no family. He did not believe that Rwanda was a safe place. The Appellant saw his brother and sister regularly. He doubted that Ms Dawson-Smith could get help from social services. The Appellant thought that his son would end up in care if he were deported.
18. Evidence was also given by the Appellant's mother, Mrs Jeanne Kimenyi, his sister Ms Cynthia Nalubwama and his younger brother Mr Joachim Ntumwa. Each had filed a witness statement, respectively dated 2 November 2015 (2) and 3 November 2015. They testified to their close relationship and requested that the appeal be allowed.
19. A witness statement dated 2 November 2015 was filed on behalf of Ms Dawson-Smith, where she identified herself as the Appellant's partner and the mother of his son. She had supported the Appellant's application for bail. She believed that he had changed for the better. He was a good father. She was emotionally dependant on the Appellant and loved him. She was unwilling to travel to Rwanda for a number of reasons which she explained. Their son would miss his father if the Appellant were deported.

The Law

20. Since 2 October 2000, the commencement date of the Human Rights Act 1998, public authorities (including the tribunal) may not act in a way which is incompatible with the European Convention on Human Rights and the tribunal must by Section 2 take into account the body of material commonly known by the convenient term of "Strasbourg jurisprudence".
21. The burden of proof is upon the Appellant. The ordinary civil standard of proof applies to his Article 8 ECHR claim (as there is no physical and moral integrity component). The relevant date is the date of the hearing. Section 117A-D of the Immigration, Asylum and Nationality Act 2006 applies to the consideration of the Appellant's Article 8 ECHR claim.
22. Deportation orders are governed by paragraphs A398, 398, 399 and 399A of the Immigration Rules. The general law relating to deportation has been explained and usefully summarised by the Upper Tribunal in Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT 00046 (IAC). The tribunal has followed and applied MF (Nigeria) [2013] EWCA Civ 1192, where the Court of Appeal explains the approach to be taken to the assessment of proportionality under the current Immigration Rules. In brief, the new Immigration Rules, i.e., paragraphs A398, 398, 399 and 399A,

provide a complete code concerning deportation, and the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. The tribunal has also taken account of recent relevant authorities such as EV (Philippines) [2014] EWCA Civ 874 and SS (Congo) [2015] EWCA Civ 387.

Findings

23. The Appellant's witnesses were impressive and the tribunal has no difficulty in accepting them as reliable. The Appellant's own evidence was more problematic, making due allowance for the fact that he has only recently been released from custody and may be inclined to feel some degree of resentment about his situation. In the tribunal's view, the Appellant was inclined to exaggerate any difficulties which would or might be caused by his absence from the home in which his son Anthony resides. The Appellant sought to minimise his ties to Rwanda. The tribunal is, for example, satisfied that he speaks Lugandan which his mother also speaks. The Appellant stressed his involvement with his young son, but the sad reality is that his involvement has been spasmodic and recent, interrupted by the Appellant's frequent and extended periods of custody.
24. It was perhaps unfortunate that Ms Dawson-Smith was unable to attend the hearing in person. The tribunal is however satisfied from the medical records produced that Ms Dawson-Smith is suffering from a form of anxiety complex. The tribunal is not, however, satisfied from the evidence before it that this complex is anywhere near as debilitating as the Appellant claimed. The Appellant's suggestion that his son might have to be taken into local authority care if the Appellant were not able to assist in his son's life the tribunal finds was not supported by the evidence produced. There was no suggestion that Ms Dawson-Smith was other than a competent and loving mother, managing under the difficult circumstances which the Appellant's life of crime and absence from the home has helped create. The tribunal is also satisfied that Ms Dawson-Smith has a supportive family and that the Appellant's family are also supportive, and that she is able to turn to them for help. That support in the tribunal's judgment makes it unlikely that the Appellant's son is in danger of being placed into local authority care because of the Appellant's deportation.
25. The tribunal is satisfied that the quasi-marital relationship between Ms Dawson-Smith is a genuine one, and has survived under the difficult circumstances mentioned above. Like many relationships formed in late teenage years, both partners have had to come to greater maturity together. Fortunately, as already noted, they have had the benefit of the support of their respective families.

Discussion and Conclusions

26. The tribunal finds that it would not be reasonable to expect Ms Dawson-Smith and their young son to accompany the Appellant to Rwanda, to the extent that it would amount to an unduly harsh expectation. In the first place, at the time Ms Dawson-Smith formed her relationship with the Appellant and indeed had a child with him, the Appellant was present in the United Kingdom lawfully with ILR: see paragraph 399(b)(i) of the Immigration Rules. Ms Dawson-Smith at that time had no reason to believe that the Appellant would not be remaining in the United Kingdom permanently, alongside his family members who have achieved a high level of integration. Although she is well aware of the Appellant's criminal record, the Appellant has always claimed that he has reformed himself and Ms Dawson-Smith no doubt hoped and believed that the Appellant's assertions were true. Regrettably it was not true, as his continued offences and convictions show.
27. As noted above, Ms Dawson-Smith has a close and supportive family in the United Kingdom, not only her own family but also the Appellant's mother and siblings. It would be unreasonable to the extent of being unduly harsh to expect her to forgo such important contact, for herself as much as for her son. Nor is it likely that Ms Dawson-Smith would want her son to grow up in Rwanda, as perhaps opposed to paying a visit there at some suitable stage when he is older. The benefits to a British Citizen from growing up in the United Kingdom are all obvious. There can be no sensible quarrel with the choice that he should remain in the United Kingdom.
28. It follows that the tribunal has to consider whether a family split is justified, i.e., whether there are very compelling circumstances on the facts as found. Paragraph 398 (b) and paragraph A398(c) of the Immigration Rules apply, requiring the application of paragraph 399 as noted above.
29. Plainly the best interests of the Appellant's son indicate that his father should remain in the United Kingdom. The evidence indicates that the Appellant, despite the disappointing example he has so far set for his son, is a competent and loving parent. It would be to his son's advantage that the Appellant worked and perhaps studied in the United Kingdom, as well as sharing the burdens of parenthood with the Appellant's mother. There can be no real contest about that, save that the Appellant is capable of finding work in Rwanda and providing financial support from there if he is at all serious about his paternal responsibilities, as well as his responsibilities towards Ms Dawson-Smith.
30. In the tribunal's judgment, however, the private interests of the Appellant's son and partner, and the Appellant's family in the United Kingdom are outweighed by the public interest in the Appellant's

deportation, by a clear margin. The Appellant's predilection for crime has been a pattern of worsening offences as he has become older and stronger. This can be seen from his criminal record. It may be that the Appellant has benefited from the courses he has undertaken in prison, but it is far too soon to say that with any degree of confidence. The Respondent's view that the Appellant's deportation is conducive to the public good is supported by the evidence.

31. Indeed, the OASys reports available indicate that the Appellant remains a risk to the public. The report dated 13 June 2014 assessed the Appellant as a high risk to the public. That risk has now been reduced to medium, in the latest assessment available. Now that still represents a serious level of risk of harm. The Appellant has, for example, been willing to obtain and carry a knife, despite his previous convictions. Plainly the Appellant succumbs to temptation easily and is careless of the harm he might cause to others, not least to his own loving and law abiding family. The tribunal considers that the evidence currently available shows that he presents a substantial risk of reoffending, notwithstanding the courses he has attended in prison. It is regrettable from the perspective of his son and partner, and of his mother and siblings, but the tribunal finds that there are no very compelling circumstances on the facts of this appeal. It would not be unduly harsh for the Appellant's son and partner to remain in the United Kingdom without him. The tribunal so finds.
32. As the tribunal has explained above, the tribunal is unable to find that there very significant obstacles to the Appellant's re-integration into Rwanda: paragraph 399A(c) of the Immigration Rules. He lived in Rwanda until he was 10, when he came to the United Kingdom, speaks Lugandan and has grown up within a Rwandan family. English is in any event one of Rwanda's official languages. He is of sufficient intelligence and education to readapt as necessary. Thus the Appellant must be deported.
33. The tribunal bears in mind the fact that the Appellant may be able, after an appropriate period outside the United Kingdom, to produce substantial and persuasive evidence of his reformed character. He may then be in a position to apply for revocation of the deportation order, and to seek leave to re-enter the United Kingdom. But that will be a matter for him. His appeal as remade must be dismissed.

DECISION

The Appellant's appeal to the Upper Tribunal is allowed.

The tribunal finds that there were material errors of law in the original decision, which must be set aside. The original decision is remade as follows:

The Appellant's appeal is DISMISSED

Signed

Dated

Deputy Upper Tribunal Judge Manuell