



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01991/2014

THE IMMIGRATION ACTS

Heard at Field House

On 10 June 2015

Determination

Promulgated

On 25 June 2015

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

**DENNIS NOI NORTEY
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J. Heybroek, Counsel

For the Respondent: Ms A. Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Ghana whose date of birth is 31 August 1981. He appealed against the respondent's decision to make a deportation order under section 32 of the UK Borders Act 2007 ("the UKBA 2007"). First-tier Tribunal Judge S.J. Clarke dismissed his appeal in a decision promulgated on 01 April 2015.

2. The appellant was granted permission to appeal against the decision. The grounds of appeal argue that the First-tier Tribunal judge erred by starting her consideration of Article 8 with reference to section 117 of the Nationality, Immigration and Asylum Act 2002 (“NIAA 2002”) rather than considering the case through the lens of the immigration rules. The grounds go on to argue that the First-tier Tribunal then failed to conduct an adequate balancing exercise. The First-tier Tribunal placed too much reliance on the respondent’s guidance relating to the interpretation of the “unduly harsh” test contained in section 117C and paragraph 399(a) and (b) of the immigration rules and failed to carry out the assessment in light of the relevant Strasbourg authorities. It was also argued that the First-tier Tribunal failed to give adequate consideration to the relevant factors outlined in section 117, the relevant case law relating to Article 8 or section 55 of the Borders, Citizenship and Immigration Act 2007 (“BCIA 2007”). The First-tier Tribunal Judge was wrong to apply a test of “excessively severe”, which was not supported by the wording of the immigration rules or the relevant case law.
3. The matter comes before the Upper Tribunal to determine whether the First-tier Tribunal decision involved the making of an error of law.
4. I heard submissions from both parties, which have been noted in my record of proceedings and where relevant are incorporated into my findings.

Decision and reasons

5. After having considered the grounds of appeal and oral arguments I find that the First-tier Tribunal decision did not involve the making of an error of law.
6. In this case the First-tier Judge quite clearly stated that her starting point was section 117A-D rather than the exceptions contained in paragraphs 399 and 399A of the immigration rules [14]. The appellant contends that this approach amounted to a material error of law. The “unduly harsh” test is mentioned in section 117C(5) and the immigration rules. The wording of the exceptions contained in paragraph 399(a) and (b) of the immigration rules relating to relationships with a qualifying child or partner is slightly different but only in terms of the decision maker having to consider additional stages of the assessment. However, the exceptions contained in the immigration rules, certainly relating to children, are in essence very similar. The central question that needs to be addressed in the rules and the statute is whether the effect of deportation would be “unduly harsh” on a qualifying child.
7. While there is authority from the Upper Tribunal in *Chege (section 117D - Article 8 - approach)* [2015] UKUT 00165 to suggest that it would be appropriate for a decision-maker to begin by considering whether an appellant meets the requirements of the exceptions contained in paragraph 399 of the immigration rules, for the reasons given above, I find that the “unduly harsh” test contained in paragraph 399(a) and (b) and

section 117C(5) of the NIAA 2002 is likely to be so similar that the mere fact that the First-tier Judge took the statute as her starting point did not amount to a material error of law. In substance she applied the same test as the rules.

8. I was not referred to, and am not aware of, any current authority on how the “unduly harsh” test should be applied in the context of deportation. The First-tier Tribunal Judge referred to paragraph 2.5.2 of the Immigration Directorate Instructions (Chapter 13: criminality guidance in Article 8 ECHR cases), which considered the dictionary definition of the words “unduly” and “harsh”. Using these basic definitions the First-tier Tribunal Judge concluded that the appellant had to show that the consequences of deportation would be “excessively severe”. Using the dictionary definition as an aid to interpretation is a proper approach to the initial interpretation of a provision and discloses no material error on the part of the First-tier Tribunal Judge.
9. It was argued that the First-tier Tribunal Judge then placed undue weight on the respondent’s interpretation of how the test is to be applied as set out in paragraph 2.5.3 of the guidance. The guidance states:

“The effect of deportation on a qualifying partner or a qualifying child must be considered in the context of the foreign criminal’s immigration and criminal history. The greater the public interest in deportation, the stronger the countervailing factors need to be to succeed. The impact of deportation on a partner or child can be harsh, even very harsh, without being unduly harsh, depending on the extent of the public interest in deportation and of the family life affected.”
10. In addition paragraph 3.5.2 of the guidance also sets out the following in relation to how the respondent interprets the term “unduly harsh”:

“When considering whether the effect on a child of deporting a foreign criminal is unduly harsh, the strength of the family life claim, including the best interests of the child, must be balanced against the public interest in deportation. As a general principle, the greater the public interest in deporting the foreign criminal, the more harsh the effect of deportation must be on the child before it is considered unduly harsh.”
11. The respondent’s guidance suggests that some form of partial balancing exercise should be conducted when assessing whether a deportation decision would be “unduly harsh” on a partner or child. I say partial because the guidance indicates that the public interest in deportation should only be balanced against the best interests of the child in assessing whether the effect on the child is “unduly harsh” for the purpose of the rules or statute. It does not seem to import a global balancing exercise which takes into account all the circumstances of the case. Paragraph 6.6 of the guidance suggests that it is only when the respondent moves on to consider whether there are “very compelling circumstances” under paragraph 398 that she will consider all the relevant factors:

“When considering whether or not there are very compelling circumstances decision-makers must consider **all** relevant factors that the foreign criminal raises. Examples of relevant factors include:

- the best interests of any children who will be affected by the foreign criminal’s deportation;
- the nationalities and immigration status of the foreign criminal and his family members;
- the nature and strength of the foreign criminal’s relationships with family members;
- the seriousness of the difficulties (if any) the foreign criminal’s partner and/or child would be likely to face in the country to which the foreign criminal is to be deported;
- the European Court of Justice judgment in Ruiz Zambrano (European citizenship) [2011] EUECJ C-34/09;
- how long the foreign criminal has lived in the UK, and the strength of his social, cultural and family ties to the UK;
- the strength of the foreign criminal’s ties to the country to which he will be deported and his ability to integrate into society there;
- whether there are any factors which might increase the public interest in deportation – see section 2.3;
- cumulative factors, e.g. where the foreign criminal has family members in the UK but his family life does not provide a basis for stay and he has a significant private life in the UK. Although under the rules family life and private life are considered separately, when considering whether there are very compelling circumstances, both private and family life must be taken into account.”

12. Unlike the clear wording of paragraph 398 of the immigration rules the wording of the exceptions contained in paragraph 399(a) & (b) and section 117C(5) of the NIAA 2002 does not, on the face of it, appear to import any particular wording that implies that even a partial form of balancing exercise should be carried out when assessing whether deportation would be “unduly harsh” on a partner or child. The fact that wording of paragraph 398 of the immigration rules provides a full balancing exercise where all the circumstances of a case are assessed is the reason why the Court of Appeal in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 concluded that the immigration rules relating to deportation provided a “complete code” to Article 8 [44].
13. I accept the appellant’s submission that the interpretation set out in the Immigration Directorate’s Instructions is not to be treated as an aid to construction of the rules: see *AH (Bangladesh) v SSHD* [209] EWCA Civ 8. The way the judge sought to apply the admittedly various and increasingly complex provisions relating to deportation does seem a little confused in places. In paragraph 16 she relied heavily on what the respondent says in her guidance about the application of the “unduly harsh” test. But there would appear to be a tension between this and her later finding that the “unduly harsh” test requires a “child focussed approach” [21]. It is also the case that the First-tier Tribunal Judge did not specifically refer to relevant authorities such as *Uner v Netherlands* [2006] ECHR 873 or *Maslov v Austria* [2008] ECHR 546.

14. I find that even if some criticism could be levelled at parts of the approach taken by the First-tier Tribunal Judge in relation to her assessment of the “unduly harsh” test it would not have made any material difference to the outcome of the appeal because she did, as a matter of fact, consider all the factors that were likely to be relevant to a full assessment under Article 8 that was also in accordance with the relevant authorities. Even on the face of the plain wording the phrase “unduly harsh” imports a fairly stringent test. It is insufficient to show that the effect of deportation would merely be “harsh” or even “very harsh” on a child and something more is likely to be required to show that it would be “unduly harsh” such that deportation would be unreasonable or disproportionate for the purpose of Article 8 of the European Convention. Although the First-tier Tribunal Judge asked herself if deportation would be “excessively severe” on the children it is quite clear from her concluding line in paragraph 22 that she was in fact applying the “unduly harsh” test.
15. The First-tier Tribunal Judge accepted that the appellant was in a genuine and subsisting relationship with his partner and children. She went on to consider the best interests of the children within the context of section 55 of the Borders, Citizenship and Immigration Act 2009 and concluded that it would be in the best interests of the children to be brought up by both parents [20]. She took into account the serious impact that deportation would have on the children, and in particular, the appellant’s oldest child [21]. She took into account the fact that they were British citizens [22] and gave weight to the best interests of the children, which were “uppermost” in her mind [22]. Alongside the sentencing remarks [17] the First-tier Tribunal Judge also took into account the relatively short length of the sentence and the fact that it was not at the most serious end of the scale of offences [22]. She also took into account the appellant’s young age when he came to the UK as well as his length of residence [22]. She gave adequate reasons to explain why she didn’t think that there were very significant obstacles to the appellant being able to reintegrate in Ghana given that he still had family members there [15-16].
16. There is no current authority on how to interpret the phrase “unduly harsh” but even if the test does not import a partial balancing exercise it is apparent that the judge considered, on the plain wording, whether the effect of deportation would be “unduly harsh” on the appellant’s partner and children. Even if some of the First-tier Tribunal’s findings are a little unclear in places I conclude that it makes no material difference to the outcome of the appeal. The First-tier Tribunal Judge went on to consider whether there were “very compelling circumstances” that might outweigh the strong public interest in deportation of someone who had committed a criminal offence in the UK. She made clear that she had considered all the relevant factors cumulatively but concluded that they were insufficient to show “very compelling circumstances” that outweighed the public interest in deportation [24]. In other words she conducted a full Article 8 proportionality assessment taking into account all the relevant facts.
17. In light of the appellant’s age on arrival in the UK, his length of residence and his undoubtedly strong private and family ties to the UK, and in the

context of the relatively low level of sentence and the non-violent nature of the crime, it is possible that another First-tier Tribunal Judge may have come to a different conclusion on the facts of this case. However, the decision shows that the First-tier Tribunal Judge took into account all the relevant factors and after having weighed them up concluded that the appellant's personal circumstances were not sufficiently compelling to outweigh the strong public interest in deportation. The appellant will no doubt consider it a harsh decision but I find that it was within the range of reasonable responses that are open to a First-tier Tribunal Judge and that her findings could not be said to be irrational or to disclose a material error of law that might justify setting aside the decision.

18. As such I conclude that the decision of the First-tier Tribunal did not involve the making of a material error on a point of law. The First-tier Tribunal decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed  Date 25 June 2015

Upper Tribunal Judge Canavan