



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06637/2016

THE IMMIGRATION ACTS

Heard at Field House
On 9 June 2017

Decision & Reasons Promulgated
On 21 June 2017

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

Z
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D O'Callaghan, Counsel, instructed by Barnes Harrild & Dyer
Solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case has two young children, who are both vulnerable. It is accordingly appropriate to make an anonymity direction and I do so. 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. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant, who was born in January 1965, is a national of Pakistan. He completed a Bachelor of Science degree in accounting and marketing from Winona State University, Minnesota, USA in 1992 and the following year he married his wife, who is a US citizen of Pakistani origin, who was born in 1970. They have twin sons, X and Y, who were born in May 2000. Both children are citizens of the USA and have never lived in Pakistan.
3. In 2004 the family came to the UK. The appellant's wife came as a student and the appellant and his sons came as her dependants. Thereafter the appellant returned briefly to Pakistan in order to apply for entry clearance for entry to the UK as a Tier 1 (General) Migrant and in December 2009 he was granted leave to enter in that capacity until December 2011. Before the expiry of that leave, he applied for further leave to remain which was granted and following extensions of that grant he was subsequently granted indefinite leave to remain, along with the rest of his family, on 9 December 2013.
4. Shortly after entering into the UK, the appellant worked as an accountant and in that capacity, from May 2012 he worked one day a week as the accountant for a small charity. Over the course of several months he stole £46,000 odd from this charity. The background to this offence (or at any rate the explanation he gave at the time) was that his mother was seriously ill with cancer in Pakistan and in need of expensive treatment and his sister, who was suffering from schizophrenia, also had expensive medical bills. However, the appellant [and] his wife owned three properties at the time, including a flat in London, which was in addition to the home they lived in, and whatever money might have been needed for the medical bills of the appellant's family, this could have been raised elsewhere. The appellant was arrested for this very serious offence in April 2014 following which his wife and children returned temporarily to the USA, where they remained for about a year before returning to the UK.
5. The appellant pleaded guilty to one count of fraud in July 2014, when sentence was deferred for three months to allow him the opportunity of repaying the sums which he had stolen. He did this by selling the flat in London.
6. On 8 October 2014 the appellant was sentenced to sixteen months' imprisonment, the judge having given him credit both for the repayment of the sum stolen and also for his guilty plea. The judge indicated that had the appellant not pleaded guilty and not repaid the money stolen, his sentence would have been one of three years' imprisonment. This is the appellant's only conviction.
7. Having served the appellant with notification as to his liability to deportation and considered the representations made on his behalf in response, on 7 July 2015 the respondent made a deportation order in respect of the appellant. The appellant was served with this order along with accompanying reasons dated 8 July 2015. A supplementary decision letter was issued on 26 November 2015. By Section 32(5) of the UK Borders Act 2007, the respondent was obliged to make this order under the automatic deportation provisions, as the appellant had been sentenced to a period of

imprisonment of at least twelve months, unless one of the exceptions set out within Section 33 of that Act applied, which exception includes that deportation would be in breach of a potential deportee's rights under the European Convention on Human Rights.

8. It is the appellant's case that in the particular circumstances of this case, for the reasons which will be discussed below, the deportation order is in breach of his (and more importantly his family's) Article 8 rights.
9. The respondent also certified the appellant's human rights claim under Section 94B of the Nationality, Immigration and Asylum Act 2002, in consequence of which the appellant was only entitled to exercise his right of appeal outside the UK, and he departed from this country in March 2016. The respondent did not, when certifying his claim, have the benefit of the Supreme Court decision in *Kiarie and Byndloss* [2017] UKSC 42, which was handed down on the Wednesday following the hearing of this appeal, but before this decision has been promulgated, and it may be that had the decision been made today, the appellant's claim would not have been so certified. Certainly, in light of what is discussed below, this Tribunal cannot be confident that irreversible harm has not been caused by the enforced removal of the appellant from the UK pending hearing of this appeal; also it proved logistically impossible for him to give evidence before the First-tier Tribunal and the manner in which he was able to give evidence to this Tribunal, as will be discussed below, was not entirely satisfactory.
10. In any event, after leaving the UK, on 16 March 2016, the appellant lodged notice of appeal, which was eventually listed for hearing before the First-tier Tribunal on 9 August 2016, before First-tier Tribunal Judge Traynor.
11. At this hearing, because of logistical difficulties which are explained within Judge Traynor's decision, it was not possible for the appellant to give live evidence, but since it was considered important (because of the circumstances of the appellant's children, which will be considered below) to expedite the hearing the appellant's representatives chose not to apply for an adjournment. Following a hearing, in a decision promulgated on 4 October 2016, Judge Traynor dismissed the appellant's appeal.
12. Subsequently, permission to appeal was granted by Upper Tribunal Judge Allen and in a decision sent to the parties on 25 April 2017, following a hearing on 10 March 2017, Upper Tribunal Judge Gleeson found that Judge Traynor's decision had contained a material error of law such that the decision must be remade, and ordered that the rehearing should be in the Upper Tribunal, with no findings preserved.
13. A transfer order having been made, the appeal was relisted before me.

The Hearing

14. Judge Gleeson had directed that arrangements be put in place to enable the appellant to give his evidence by video link, and this was done. Because of the anticipated expense and difficulties of the appellant availing himself of these facilities, the Tribunal was requested to allow the appellant's evidence to be given via Skype, but having made enquiries, I directed that in the event that the appellant chose not to avail himself of the facilities which had been put in place to enable him to give evidence via video link, but to rely on Skype instead, if a Skype connection proved unworkable, it was unlikely that an adjournment would then be granted. Having considered the expense which would be incurred in order to enable the appellant to avail himself of the video link facilities, contrasted with the continuing effect which, on the appellant's case, his continued removal from the UK was having on his children, I did not consider that it would be in the interests of justice to delay these proceedings any longer than was strictly necessary.
15. In hindsight and with the benefit now of having seen the decision of the Supreme Court in *Kiarie and Byndloss*, a decision not to adjourn might have been wrong, but in the event, the appellant was able to give his evidence via video link, although this was not without difficulties. Although those present within the hearing were able to see and hear the appellant, he was only able to hear what was said at the Tribunal end, and there appeared to be a two second delay. However, the appellant gave his evidence and he was also cross-examined by Mr Wilding on behalf of the respondent.
16. The video link was only maintained while the appellant gave evidence, and the Tribunal also heard evidence from the appellant's wife. Although it had been hoped that one of the appellant's children would give evidence, it was considered that neither of them was well enough to do so.
17. I also heard submissions from the appellant's Counsel and the respondent's Presenting Officer, to both of whom I am grateful for the concise and persuasive manner in which they presented their parties' respective positions. I was also assisted by the skeleton argument prepared by Mr O'Callaghan on behalf of the appellant.

The Law

18. As already noted, by Section 32(5) of the UK Borders Act 2007, the respondent was required to make a deportation order in this case, the appellant having been sentenced to a period of imprisonment of at least twelve months, unless she felt that one of the exceptions set out within Section 33 of that Act, which includes that the deportation would be in breach of his rights under the European Convention on Human Rights applied. As noted, the challenge to the decision is on the basis of the Article 8 rights of his family.

19. When considering whether or not the removal of this appellant would be in breach of his right to respect for his family life under Article 8 (and as a result would be unlawful under Section 6 of the Human Rights Act 1998), regard must be had to Part 5A of the Nationality, Immigration and Asylum Act 2002 (inserted by Section 19 of the Immigration Act 2014) headed "PART 5A Article 8 of the ECHR: public interest considerations", and also to the relevant paragraphs of the Immigration Rules, being paragraphs 398, 399 and 399A.
20. Although it is traditional in appeals such as this for the judge to cut and paste the relevant extracts from the Immigration Rules and Part 5A into his or her decision, this is not necessary in this case, as there is no issue as to what the effect of Part 5A and the relevant Immigration Rules is.
21. It is accepted on behalf of the appellant that because the children had been in the USA for about a year before the deportation order was made, they are not "qualified children" as defined in Section 117D(1)(a) of the 2002 Act. However, the appellant's wife is a "qualifying partner" within Section 117D(1)(b) because she is settled in the UK.
22. By Section 117C(3) it is set out that the public interest would require the appellant's deportation "unless Exception 1 or Exception 2 applies" (because he had been sentenced to a period of imprisonment of over 12 months but under four years). Exception 2 is set out at subSection 117C(5) as applying

"where [an applicant] 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 [his or her] deportation on the partner or child would be unduly harsh".
23. Although this does not appear to have been conceded at the time of the hearing before the First-tier Tribunal, it was made clear before this Tribunal that the respondent accepts (rightly in my judgment, for reasons which I will give below) that in the circumstances of this case it would not be reasonable to expect or require the children to relocate to Pakistan. The appellant's wife, as the sole remaining carer of her children could not be expected to leave them behind and relocate herself to Pakistan without her children; it follows therefore that the effect of deportation on this family would be one of separation, unless they were able to locate as a family to the USA. I can deal with this possibility very shortly. I heard evidence, which I accept as true, that the appellant made enquiries through lawyers in the USA as to whether or not he would be likely to be granted admission and was told that in the circumstances of his case he would not. As he is a Pakistani Muslim with a serious conviction for fraud, I entirely accept, beyond the balance of probabilities, this it is very unlikely indeed that he would be allowed now to return to the USA with his family, should they choose to go back. Accordingly, he will either be allowed to return to the UK, or he will be separated from his wife and children.

24. The question of whether or not the effect on the appellant's wife would be "unduly harsh" requires this Tribunal to undertake a proportionality exercise, as indeed is the case when considering whether or not the permanent removal of this appellant is in breach of his Article 8 rights, having considered the best interests of his children. For this purpose it is necessary to have in mind what is agreed by both parties as a correct statement of the current law, as set out within the Immigration Rules and the 2002 Act, and explained by current jurisprudence.
25. My starting point must be that there is a very significant public interest in the deportation of this appellant. Although he was only sentenced to sixteen months' imprisonment, which is at the lower end of the scale between one year's imprisonment and four years' imprisonment, and although the money was eventually repaid, this is a professional man who, from a position of trust, stole a significant amount of money from a charity. The revulsion rightly felt by members of the public towards such offences is very great indeed and it is also important to deter other foreign citizens from committing similar offences. Accordingly, the effect upon the appellant's wife of deporting the appellant can only be said to be "**unjustifiably** (my emphasis) harsh" in the circumstances of this case or his deportation disproportionate if there are very compelling reasons indeed which could be said to be so weighty as to outweigh the very great public interest which exists in the appellant being deported. It is only where there are such extremely compelling reasons that exceptionally a decision can properly be taken that notwithstanding the very great public interest in deportation, that course would nonetheless be disproportionate.
26. Accordingly, I turn now to consider the evidence on the basis that the public interest in deporting this appellant is very high and that it is only if he can establish that the countervailing factors are very compelling indeed that his deportation could be said not to be proportionate, such that Exception 2 would apply.
27. As already noted, I heard evidence from both the appellant and his wife, who both adopted the witness statements they had previously made and were cross-examined. I say at the outset that I found both of them to be truthful witnesses, whose evidence remained consistent during cross-examination, and I make my findings on that basis. What I found particularly impressive about their evidence was that at no time did either the appellant or his wife even attempt to suggest that the offence was not deplorable and nor did either of them attempt to excuse it. The appellant in particular, when asked who was responsible for the situation his children now found themselves in (which is discussed below) said that no-one was to blame but himself, and I found his remorse genuine. He acknowledged that given the seriousness of the offence, were it not for the effect on his children, his appeal would be hopeless. He acknowledged also that in light of his conviction, he would clearly be unable to obtain any work as an accountant again, but he believed that he would be able to use his other qualification in marketing. He is not a man who has any other convictions, and on the basis of all the evidence in this case, I do not consider that he presents any real risk of reoffending. Of course, his deportation is still very much in the public interest (primarily because of the need to deter others and to give effect to the

revulsion felt by members of the public towards offences of this kind) but his continued presence in the country will not carry with it, in my judgment, any real risk to the public at large.

28. Mrs Z's evidence was consistent with that of her husband, and I believe that the appellant's primary concern is to try to take care of his children, and to repair the damage they have suffered as a result, he believes, of his own criminal activities.
29. One factor which appears to have influenced the First-tier Tribunal Judge in reaching his decision (see for example at paragraph 71 of his decision) was the possibility that X's mental health problems (discussed below) in particular may not have been as a result of the threatened and then actual removal of his father but could have had genetic causation (the judge at paragraph 71 referred to the "history of other family mental health illness, in which regard I refer to his sister who suffers from schizophrenia"). During the course of the hearing, I heard evidence which has convinced me that whatever the cause of the difficulties currently faced by the two children, it is not related to any genetic factors on their father's side. Following discussion during the hearing, it was agreed by both parties that it would not be necessary for me to set out my reasoning in reaching this conclusion, save to say that it is founded upon evidence which I heard and which I accept.
30. I turn then to consider the position of the appellant's children, which is, in my judgement, tragic. Prior to the appellant's arrest, all the evidence suggests that this was a happy, close family in which the children both thrived at school. Academically, they were doing exceptionally well, and barring unforeseen developments (such as in fact occurred) both would have been predicted to go on to complete GCSEs and A levels successfully and gain admission to good universities.
31. Regrettably that situation has now changed. X's psychiatric history is summarised by Dr Willis in his report of 27 July 2016 and includes the following:

"X's admission [to hospital] was precipitated by aggression towards his mother when she was trying to get him to attend an outpatient appointment. There had been a significant deterioration in his mental state since October 2015 [which is after the deportation order had been made] associated with social withdrawal, worsening of school performance plus suspension from school, aggression towards family members requiring police involvement, eating and drinking excessively since January 2016 and talking to himself. These changes are completely out of character for X, particularly the aggression. It started a short while after he returned from living in the US for one year. There was a significant assault on his brother in January 2016 which led to his brother moving out to stay with a family friend and around this time the excessive eating and drinking started. An additional family stress occurred when his father was deported in March 2016".

32. As a result of X's deteriorating behaviour, he had to be admitted to Cygnet Hospital Woking, for assessment and treatment after being sectioned under Section 2 of the

Mental Health Act 1983. He remained there for some four months before being transferred to another institution under Section 3 of that Act. The institution to which he was transferred is a secure mental health service accommodation to which he had to be referred by a psychiatrist. He has returned home and is responding to some extent to treatment which he has received, in particular his drugs, but his current prognosis is as set out in the report of Dr Crespo, consultant psychiatrist, dated 26 May 2017, the contents of which are summarised from paragraph 43 of the skeleton argument. The summary contained within the skeleton argument is accurate, and I set out below what is summarised at paragraph 45 of the skeleton argument:

“X has been diagnosed with suffering from a mental disorder terms first case psychosis. His symptoms are:

- hallucinations;
- delusions;
- slow cognitive processing and responses;
- extreme violent tendencies particularly towards family members;
- lapses in memory and extreme difficulty in concentrating;
- confused thinking;
- socially withdrawn and difficulty in understanding normal daily activities;
- compulsive eating and drinking water;
- talking and laughing to himself and making strange head and facial gestures”.

In his skeleton argument, Mr O’Callaghan cited the relevant parts of Dr Crespo’s report, which I now repeat below. Dr Crespo’s opinion was as follows:

“... A strong, stable and consistent family support significantly improves the long-term prognosis of young people with psychosis. X’s continued separation from his father, and the impact of [his] deportation on the entire family had a significantly adverse effect on X’s mental health as well as on his development...

X’s mental health is still very serious as he is on antipsychotic drugs, showing delay in cognitive processing, lapses in memory and difficulty in concentrating. I have recently referred X to an outpatient forensic psychiatrist as I believe [his] serious mental condition merits a higher level of specialised care...

X’s current mental health is very fragile too and is very susceptible to a relapse. It is extremely important for his recovery that there are no pressures, worries and uncertainties around [him] and [that he] has unwavering support from his family”.

33. Dr Crespo then set out his views regarding the separation of X from his father, as follows:

“X was unable to comprehend the family situation and was coping badly with the imminent deportation of his dad, demonstrating extreme violent behaviour, slow cognitive responses, speech impediment, compulsive eating and drinking disorder and unable to attend school. The actual deportation of X in March [2016] caused additional stress for X. Such stressors and life events are well-recognised to trigger and worsen psychotic episodes and it is likely to have been the case for X as he had no history of mental illness.

The situation deteriorated significantly immediately after Z’s departure in March [2016] and Mrs Z and her other son Y was subjected to physical abuse by X and police had to be called on two occasions.

X’s continued separation from his father, and the impact of his deportation on the entire Z family is having an adverse effect on X’s mental health and his long-term prognosis.

X has been regularly discussing with CAMHS about his father’s absence, how it is creating anxiety, worries, raises question marks on his schooling and life in general, and how he longs for his father’s presence, support and help.

It is very important and vital for X’s well-being and better prognosis that his father is able to join him soon in [the] UK [my emphasis]”.

34. Regarding Y, although his symptoms are not as severe as X’s he has also been very badly affected by the absence of his father. Like his brother, he too has been unable to fulfil his potential at school that he had previously shown and he has failed some of his mock examinations (which would have been a considerable surprise but for present circumstances). He was also referred to CAMHS having lost about a stone in weight and having been very depressed and anxious, and been subject to fits of anger, problems with concentration, lack of energy and the like. He has also repeatedly expressed suicidal ideation, which has been detailed in Dr Crespo’s report.
35. The evidence of both the appellant and his wife was entirely consistent with the expert evidence which was before the Tribunal, and I entirely accept that the concern which the appellant had expressed about his children’s prospects and their need of his support is genuine. Mrs Z told me, and I accept, that she has very limited contact now with other members of their family who are in the UK because of shame about what the appellant has done. Also, it is very difficult for the children to have any kind of social contact with the rest of the family now.
36. Of course, this Tribunal is required, by Section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of the appellant’s children and their best interests are a primary consideration, but they are not paramount and there will be many cases where even though it can properly be said that the best interests of children are to have a parent remain within the UK, those interests do not outweigh the very large public interest in removing that person. It is only when the factors weighing against the

deportation of a foreign criminal are so very compelling that they outweigh the very large public interest in removing that foreign criminal (which will be rare) such that, exceptionally, deportation can properly be said to be disproportionate.

37. In my judgement, this is such a case, and it is right to record that on the facts of this case, I do not regard this decision even to be finely balanced. The evidence which is before the Tribunal, both from the appellant and his wife (and the witness statements/letters from both children, who were said to be too ill to give evidence in person) coupled with the consistent psychiatric evidence and evidence from the children's school, is so compelling as to make his continued deportation from the UK disproportionate, notwithstanding the very great public interest in deporting foreign criminals who commit offences such as this appellant has. The children have gone from being model students with excellent prospects to being in a situation where, at 17, they have yet to sit for their GCSEs, and both of them in different ways are exhibiting severe indications of mental illness (in the case of X, very severe). Although X's behaviour has been improved to a limited extent (as acknowledged by Z in his evidence) it is quite clear from the expert evidence that the prospects of both boys (or either of them) regaining their prospects in life and indeed, arguably, their sanity, will be improved hugely if their father is now allowed to return. The difference his return would make, on the balance of probabilities, is so huge, in my judgement, as to outweigh, by some considerable margin, the public interest in maintaining his deportation now, even though, as I have stated repeatedly above, that public interest is very great indeed. The appellant and his family (and in particular his children, who are blameless) have paid a very high price indeed for the serious crime which the appellant committed, and which would, all other things being equal, have led inevitably to his deportation. But all other things are not equal in this case, and for the reasons I have given, I find that his deportation would be disproportionate, and therefore in breach of his and his family's Article 8 rights.
38. It follows that his appeal against the respondent's decision to deport him must be allowed and I so find.

Decision

I set aside the decision of the First-tier Tribunal, dismissing the appellant's appeal and substitute the following decision:

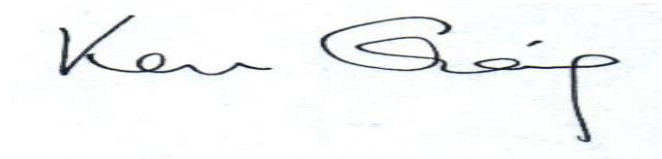
The appellant's appeal against the respondent's decision to deport him (having refused his article 8 claim) is allowed.

Postscript

In my judgment, on the evidence I have heard, the continued exclusion of the appellant from the UK, pending final determination of this appeal, carries with it the very real risk of further irreversible harm to his children. In these circumstances, even should the

respondent wish to consider lodging an appeal against this decision, it is to be hoped that in the meantime she will permit the return of the appellant to the UK, without further delay.

Signed:

A handwritten signature in black ink on a light blue background. The signature reads "Ken Craig" in a cursive, slightly slanted script. The first name "Ken" is written in a simple, rounded cursive, and the last name "Craig" is written in a more fluid, connected cursive style.

Upper Tribunal Judge Craig

Date: 20 June 2017