



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01362/2017

THE IMMIGRATION ACTS

Heard at Glasgow  
on 16 January 2018

Determination issued

On 24 January 2018

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

E M

Respondent

For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer  
For the Respondent: Mr S Winter, Advocate, instructed by Gray & Co, Solicitors

DETERMINATION

1. Parties are as above, but for continuity and ease of reference, the rest of this determination describes them as they were in the FtT.
2. This determination should be read in the context of the following:
  - (i) The respondent's decision dated 12 January 2017, giving her reasons for refusing the appellant's human rights claim and for finding that he is a foreign criminal whose deportation is conducive to the public good and to whom no exceptions apply.

- (ii) Deportation order, of the same date.
  - (iii) The appellant's grounds of appeal to the FtT, attached to his notice of appeal filed on 17 January 2017.
  - (iv) The decision of the FtT (Judge Farrelly and Dr Winstanley) allowing the appellant's appeal, promulgated on 27 July 2017.
  - (v) The respondent's grounds of appeal to the UT, attached to her applications for permission dated 27 July and 14 September 2017.
  - (vi) The UT's decision promulgated on 5 December 2017, setting aside the decision of the FtT for error of law.
3. The hearing on 16 January 2018 was for purposes of remaking the decision of the FtT.
4. The primary facts, not in contention, are these:
- (i) The appellant is a citizen of Kenya, born in 1977.
  - (ii) Immigration history: In the UK with leave from 2003 to January 2010. Application for leave on 30 January 2010, rejected as invalid on 26 February 2010. Application for leave as an innovator on 1 October 2013, refused on 21 January 2014. 30 January 2014, served with papers as an overstayer. Application for leave on 20 October 2015 on family life grounds, granted on 29 January 2016 (until 29 July 2018).
  - (iii) Criminal history: 29 December 2016, dangerous driving, community payback order 100 hours, disqualified 2 years 6 months; failing to provide sample, community payback 100 hours; 5 July 2015, attempting to pervert the course of justice, 12 months' imprisonment (all at Kilmarnock Sheriff Court).
  - (iv) The appellant is in a genuine and subsisting relationship with his partner, N, a UK citizen. She is a medical graduate, nearing the end of her training as a GP.
  - (v) The appellant and his partner have two daughters, E, born on [ ] 2013, and another, born shortly before the hearing, both UK citizens.
  - (vi) The appellant's daughter T was born on [ ] 2013. His relationship with her mother, A, ended before the child was born. Mother and daughter are citizens of Eritrea, lawfully resident in the UK. The indications are that their long-term future lies here.

5. It is common ground that there is family life among the appellant, N, and their two daughters, also encompassing T, who regularly spends time with them.
6. The three areas of evidence disputed were: whether the appellant's offending involved any deliberation; whether he knew that he had no immigration status from 2010 - 2015; and the degree of difficulty which would be encountered by his partner and daughters if they were to live in Kenya.
7. The appellant adopted as his evidence-in-chief his prior statements, up to and including one dated 28 December 2017. His account of his offending is that when driving home he felt dizzy and so stopped in a layby; he did not know he had been trailed by the police; his recollection is very limited, until he woke next morning in a cell and was referred to by a friend's name; the citation was read to him at 4pm, when he could not believe what was happening, and panicked.
8. In cross-examination the appellant was equally vague, and reluctant to be drawn even on matters which must have been within his knowledge. He accepted that he had another person's driving licence in his wallet, and said that he might have taken it out in error for the police, rather than his own. He had that licence because its owner has gone back to Kenya, did not need his UK licence, and the appellant used it as an identity for his friend's trading activities. He adhered to his evidence that he drank 3 or 4 pints of lager, and that he suspected one of his drinks was "spiked". The events not only of the night but of the following day (when he appeared in court and was convicted under a false name) were a blur. He had been going to tell his case worker about his conviction in another identity. He had not noticed that the fee of £820.00 for the application made in 2010 were never taken from his account. He had at times been away from the address he used over that period, and had no knowledge of the decision being communicated in a recorded delivery letter to that address.
9. In response to my question, the appellant said he had been due to see his case worker (presumably about carrying out his community payback order) about 13 or 15 days after his conviction. He was going to tell the case worker that day, but the police called him before he could do so.
10. There was no re-examination.
11. The appellant admits to drinking a quantity which, even if true, indicates at least carelessness, if not indifference, about drinking and driving.
12. An explanation of a "spiked drink" is easily invented.
13. The allegation of blurred memory conveniently avoids having to explain dangerous driving, giving a false identity, and not providing a specimen for testing.

14. It is inherently unlikely that the only information the police took from the appellant was sight of a driving licence. Their procedures involve the careful taking and recording of identity details.
15. If matters did unfold from the unlucky mishap of taking the wrong licence from his wallet, the appellant had his first opportunity to correct that when addressed by the wrong name the next morning. If that was not part of a conscious plan, and came as an unpleasant surprise, there would no reason not to react by putting matters right.
16. It is easy to say that he later decided to correct matters, but there is little reason to believe it, when he had the chance over a two-week period, and did not do so before he was caught out.
17. Events could only have transpired as they did by the appellant sticking persistently to a false identity.
18. The appellant produces a letter dated 6 February 2014 from the respondent (item 8 of his inventory in the FtT) which at first sight might support his contention that he did not know about his lack of immigration status. However, on a more careful reading, the sense of the letter is, more likely, that he was not issued with a letter on 31 May 2013, a date when he had a voluntary departure interview with the respondent. The appellant's evidence when contending that he did not know either that £820 was not taken from his account, or that he had been sent a recorded delivery letter, was confused and unclear. He has turned out otherwise to be generally a witness of no credibility. This issue is also resolved against him. It is not as significant as his denials in matters of crime, but it is part of his general ready avoidance of responsibility for his actions.
19. The reasons advanced against the appellant's partner and children moving to Kenya were based partly on what they would lose in the UK (which is not in dispute) and partly on what they would face there. On the latter aspect, reference was made to difficulty in transferring medical skills to Kenya; language barriers; security and terrorism-related risks; the crime level; health and education.
20. It would be an understandable choice for the appellant's partner not to move to Kenya if he were to be deported. She confirmed her evidence to that effect at the hearing, adding that she could not justify doing so in the interests of the two children.
21. The evidence does not show that disadvantages in Kenya would be as great as portrayed. Information from the FCO in the appellant's bundle shows that while healthcare is expensive, there are major private hospitals with good facilities and highly trained staff. Both health and educational facilities are available to high international standards. They are not accessible to the mass of the population, but the appellant and his partner are both well-educated and qualified. He is a law and business graduate, and she is a medical doctor. No doubt there are differences, but

there is no evidence that a UK qualified doctor would not be able to have her qualifications recognised or re-validated, or to obtain employment at an appropriate level. English is widely spoken and a national language (along with Swahili). There are security worries, but every country has those in some degree. The family would be among the privileged not among the disadvantaged classes.

22. In his submission, Mr Matthews applied firstly the rules and then part 5A of the 2002 Act, while Mr Winter preferred the reverse order, on the basis that statute comes first; if the case succeeded thereunder, there was no need to look further; and s.117C does not express the requirement in ¶399 to show both that it is unduly harsh for a child to live in the country of deportation, and unduly harsh to remain in the UK without the appellant. Matters are taken in the appellant's order.
23. 2002 Act, section 117B (1): The maintenance of immigration controls is in the public interest.
24. S.117B (2): The appellant speaks English. S. 117B (3): The appellant is not a burden on the state. Those two factors are of no significant force in the scheme of statute and the rules in respect of deportation.
25. S. 117B (4): Little weight is to be given to a relationship with a qualifying partner (N) established at a time when the appellant was in the UK unlawfully. Mr Winter accepted that this applies, but argued that "little weight" should be overridden as the case was sufficiently strong, and as the appellant had been granted leave based on the relationship. This issue is subsumed into what follows.
26. S. 117C (1): The deportation of foreign criminals is in the public interest.
27. S.117C (2): The more serious the offence, the greater the public interest in deportation.
28. Mr Winter submitted that the offending was not at the most serious end; did not involve violence, sex crime, or drugs; and this reduced the public interest, and helped to show undue harshness.
29. The appellant did not help his case by minimising his offending almost to vanishing point through a long series of incredible excuses.
30. The appellant's partner, more understandably, was also reluctant to face up to the seriousness of his offending. She describes this as a "criminal case secondary to driving offences", which is an unrealistic portrayal of an attempt to pervert the course of justice. The suggestion that the outcome reflected deficiencies in legal advice has no foundation.
31. The driving offences themselves were not trivial, even if not of a nature leading to deportation. The Sheriff's sentencing remarks confirm that the attempt to pervert the course of justice was a serious offence, attracting 18 months imprisonment, but for the guilty plea.

32. However, the sentence, as Mr Winter said, comes only at the trigger point for automatic deportation. The degree of harshness to be shown is not increased by the nature of the offending. That exercise begins at a neutral point.
33. The case then comes to s. 117C (5), exception 2: Whether the effect of deportation on N and the 2 qualifying children would be unduly harsh. (T is not a “qualifying child” in the statutory scheme.)
34. Factors relied upon here were:
- (i) The children’s dual ethnic background. I accept that the appellant’s presence in the UK would be of substantial help in that respect. However, there could hardly be a rule that a parent of the same ethnic background as the other parent and their child is to be deported, but not a parent of a different background. This is relevant, but short of decisive.
  - (ii) The appellant pled guilty. This is true, but he had no possible defence. The offence by its nature is one of defying not accepting justice. This feature counts for little.
  - (iii) and (iv) Low risk of re-offending, and no significant risk of harm to others. I accept both. They reinforce the starting point as a neutral one.
  - (v) The appellant’s wife works shifts, and there would be child care issues. I accept this. She would face difficulties. As Mr Matthews submitted, they would be the real but common difficulties of a single working parent, many of whom are not in such good employment as N.
35. There is nothing in any of those factors which matches (or comes close) to the harshness of separation itself, which is inherent in deportation if family members do not choose to accompany the deportee. Nothing lifts this case significantly beyond the inevitable.
36. Account is taken of the appellant’s submissions that factors do not need to be unusual or untypical; but if the unduly harsh arose from simply applying the statute, that would be a circular exercise, depriving the statute of meaning.
37. I conclude that s. 117C (5), exception 2, is not satisfied.
38. The appellant then turns to ¶399 (a) (ii) (a) of the rules: Whether it would be unduly harsh for the 2 children to live in Kenya. The appellant argued:
- (i) Loss of contact with T. I accept that if they move to Kenya contact with T will be very much reduced, restricted probably to holiday periods back in Scotland, and that would be a loss to all the children.
  - (ii) No ties with Kenya. This is true, but I have found above that it represents nothing more serious than is regularly encountered by children moving around the world with their families, as many do.

(iii) Language issues. There is no evidence of any significant problem faced by English speakers in Kenya.

(iv) All their family are in Scotland. The appellant appears to have one sister in Kenya, with whom he says he has little contact. The family is close to N's parents, brother and others. There is some substance in this. Family visits in both directions would be possible, but given the time, distance and expense, would perhaps be annual at most. Contact would be significantly reduced, but it would not be extinguished. (N and the children live in Ayrshire, and her parents in Orkney.)

(v) They have accommodation in Scotland. True, but neutral; there is nothing to suggest this is not a resource which might be of use towards obtaining accommodation of a suitable standard in Kenya.

(vi) Their mother is in employment. To obtain equivalent employment may not be completely straightforward. Equally, however, there is no reason to doubt that the appellant is or could readily become employable in Kenya. There are sizable health sectors, both public and private.

(vii) Their mother is fearful of the security situation. Her concern is genuine, but there is no evidence of such general security concerns as might deter similar families from residing in Kenya.

39. The only aspect of the above which is not inherent in most deportations of a family member is factor (i), loss of contact with T. It is common for children from separate but related nuclear families (such as other half-siblings, step-children, or cousins) to grow up apart, and even in different countries. This is unfortunate, but not a matter which makes it unduly harsh for the 2 children to live in Kenya.
40. I conclude that ¶399 (a) (ii) (a) is not satisfied.
41. In any event, the appellant would have to show that ¶399 (a) (ii) (b) of the rules is also satisfied: Whether it would be unduly harsh for the children to remain in the UK without the appellant. That is the same issue as under s. 117C (5), exception 2, on which I have found against the appellant above.
42. The appellant's case is put finally under ¶398: Whether, ¶399 not applying, the public interest is outweighed by very compelling circumstances over and above those described in ¶399.
43. Factors assessed above remain relevant at this stage, which is cumulative.
44. The target of circumstances which go over and above those already rehearsed, and which are not only compelling but very compelling, is high.
45. All possible factors are set out in the written submission for the appellant at 8 (i) – (xxiii). Most of these have been considered above.

46. At (v) and (vi) the appellant cites loss of contact with T and her close relationship with E, and at (xvi) the fact that E and her mother have no other family in the UK. The loss of any substantial contact between the appellant and T is a near certainty, and reduction of contact among the 3 children is another harsh result, but this is of the nature of deportation, and not a very compelling circumstance of the force required.
47. Factors (vii), (viii) and (ix) are the value of N to the community, the time and money spent on her training, and the struggles of the NHS to retain doctors. Those are all valid points in themselves, but they are not of the nature sought by the rule. Those are matters of the public interest, which on this issue is fixed by statute.
48. The appellant's evidence includes strong, heartfelt expressions of support from his partner, her parents, friends and colleagues. Some of that chapter of the evidence characterises the deportation decision as if it were an arbitrary whim of the executive. Applying the law to the facts of the case, however, it is a clear one, leaving little (if anything) to discretion. Deportation is plainly (if not unavoidably) an outcome which statute and the rules require, following the actions of the appellant.
49. Another way of testing the strength of the cumulative factors weighing against the public interest in the appellant's deportation might be this: if he and his partner were to *choose* to move to Kenya with their children, that would not call for any intervention of the UK authorities in the best interests of the children. As the respondent's decision says at p.4, "Many parents reasonably and legitimately choose to take their children to live in other countries". Tens of thousands of UK citizens live in Kenya. Such a course would not strike any outside party as outrageous.
50. Every possible matter which might have been advanced has properly been advanced, but the circumstances do not, even together, reach the high level demanded by ¶398.
51. The decision of the FtT has been **set aside**, and is remade thus: the appeal, as brought by the appellant to the FtT, is **dismissed**.
52. An anonymity direction was made in the "error of law" decision. Parties did not address the matter further. As the case involves three young children, that direction is maintained. 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.



Upper Tribunal Judge Macleman

22 January 2018