



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16485/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 17th May 2018

Decision & Reasons Promulgated
On 12th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

E B O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Elizabeth Mottershaw (Counsel)
For the Respondent: Mr Anthony McVeety (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Sharkett, promulgated on 22nd May 2017, following a hearing at Manchester on 11th April 2017. In the determination, the judge allowed the appeal of the Appellant on human rights grounds, but dismissed it under the Immigration Rules. The Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, and was born on 27th February 1977. He appealed against the decision of the Respondent Secretary of State dated 15th June 2016

refusing his application for leave to remain in the UK with his partner and children, the partner and the eldest child both being British citizens, at the time of the hearing before Judge Sharkett.

The Appellant's Claim

3. The Appellant's claim is that, having on 13th June 2013 been convicted, and then sentenced to sixteen months' imprisonment, he was released for good behaviour in January 2014, having served nine months of his sentence. A deportation order was then made against him on 2nd May 2014. However, on 4th June 2014 the Appellant's partner, applied for leave to remain with her three children, and in this application the Appellant was a dependant on her, but whereas his wife and three children were granted leave to remain, he was not. He now states that he cannot return to Nigeria because it would mean that he would be separated from his wife and children. His wife, on the other hand, could also not return to Nigeria because the children have only known life in the UK, and would not be able to integrate into Nigerian life. His eldest daughter, was now a British citizen, and aged almost 11 years, and was under the care of a consultant for her skin condition, and she also had learning difficulties at school. The second daughter was 8 years old, at the time of the hearing before Judge Sharkett, (and at the time of the hearing before this Tribunal had also acquired British citizenship) and his son was 4 years of age at the time of the hearing. He was remorseful in respect of what he had done.
4. The Respondent in the refusal letter stated that the Appellant could not satisfy the requirements of Appendix FM as a partner, and did not meet the suitability requirements of the Rules, because there was a deportation order against him dated 2nd May 2014. It would be reasonable for his eldest daughter (who at the time had lived in the UK for more than seven years), along with the other children, to return with their mother to Nigeria so that they could all return as a single family unit.

The Judge's Findings

5. The judge held that it was not likely that the Appellant would return to Nigeria on his own, without his wife and children, and the result would therefore be that "the Appellant would be separated from his three children and the family unit would be fractured" (paragraph 46). However, the Appellant was a foreign criminal within the definition of Section 117B (paragraph 2) and the public interest was engaged. Although the children had been born in the UK (and the eldest was a British citizen now), "all three children currently live with their mother and father and I have heard evidence of the role the Appellant plays within that family unit which has been corroborated in letters received from the children's school" (paragraph 50), and there was evidence that the Appellant's partner had struggled with parenting during the time that the Appellant had been in prison and there had arisen "the need for intervention by social services" (paragraph 51). The judge in these circumstances held that the "best interests of all three children would be to remain within the complete family unit where they would benefit from care of both parents" (paragraph 52).
6. Nevertheless, against the interests of the family, there was the "public interest to deport foreign criminals and under Section 117C the more serious the offence the

greater the public interest". This was a case where the Appellant had "entered the UK using false documents in 1999 and since then he has not had a right to reside in the UK. He has had blatant disregard for the Immigration Rules of the UK and has entered into a fraudulent marriage and used false documents in order to circumvent the Rules" (paragraph 54). He had been convicted of serious offences (paragraph 55). Nevertheless, "both the Appellant's daughters are qualifying children" (paragraph 57).

7. Balancing out the facts, the judge held that, "I have regard to the circumstances of these three children, the length of time they have all been in the UK and their own personal circumstances" (paragraph 59). The judge held that she would have regard to "the instability created within the family when the Appellant was in prison" which had resulted in the Appellant's partner physically abusing the eldest child to such an extent that social services had to be involved, which only abated after the Appellant returned from prison to be a father figure in the family.
8. As the judge observed, "the creation of instability which has previously given rise to safeguarding issues and resulted in the children being the subject of protection is something that should be given significant weight" (paragraph 60). There was, inevitably, as the judge found, "a degree of speculation" as to "what may happen to these children if their father is removed from the family unit indefinitely", but there was, nevertheless, a "history in this family that can inform my conclusions".
9. What this led to the judge deciding was that

"there is suggestion in the report from Manchester Safeguarding and Improvement Unit (AB-41) that even when social services were involved the mother was continuing to hit the girls particularly the second daughter. It was only when the Appellant returned to the family home that the problem subsided and social services considered it safe to withdraw their involvement. In the circumstances I find that to remove the Appellant to Nigeria would be unduly harsh for the children because their father is a stabilising influence within that family that allows the children to remain in a family situation and free from fear of or acts of physical violence, such that their best interests are not with the public interest on this occasion" (paragraph 61).
10. The appeal was allowed under the Human Rights Act. It was not allowed under the Immigration Rules.

Grounds of Application

11. The grounds of application stated that the judge had failed to apply the Rule in **Devaseelan [2002] UKIAT 00702** in circumstances where the Appellant's previous deportation appeal had been dismissed two years before. Moreover, the judge failed to apply the "unduly harsh" test correctly in the proportionality exercise.
12. On 13th December 2017 permission to appeal was granted on the basis that given that the judge had accepted (at paragraph 61) that there was an element of speculation in

finding the effect of the Appellant's deportation upon the children as being "unduly harsh" it was arguable that the correct reasoning had not been given in this case.

13. On 12th March 2018, a Rule 24 response was entered by Ms Elizabeth Mottershaw, of Counsel, on behalf of the Appellant.

The Hearing

14. At the hearing before me on 17th May 2018, Mr McVeety, appearing as Senior Home Office Presenting Officer on behalf of the Respondent Secretary of State, submitted that, having discussed this matter, at the outset of the hearing with Ms Mottershaw, on behalf of the Appellant, he would have to accept, that the grant of permission, on the basis that the Rule in Devaseelan had not been applied, was unsustainable given that no mention whatsoever had been made of Devaseelan at the hearing before Judge Sharkett. Indeed, there was no mention of this even in the refusal letter. Mr McVeety submitted that having read the Rule 24 response of Ms Mottershaw, he would have to accept that the basis of the grant of permission was to that extent questionable.
15. For her part, Ms Mottershaw submitted that the Respondent had indeed not previously ever suggested that this was a case where the principles set out in Devaseelan should apply. There had been ample opportunity to do so. Yet, Devaseelan was not mentioned in the reasons for refusal letter of 15th June 2016. Moreover, the earlier decision of 25th August 2014, which had refused the Appellant's appeal against deportation, and on the basis of which it was now being argued that this decision should have been taken into account in the refusal letter of 15th June 2016, was not even included in the Respondent's bundle for the hearing of the appeal on 11th April 2017 against that decision. There were no questions or submissions ever made on this matter during the hearing either.
16. Ms Mottershaw went on to make the following three submissions as well.
17. First, the appeal in this case had no merit. The two appeals, in any event, had different applications and related to different circumstances, so that even if Devaseelan had been raised, it would not have applied. The 2014 First-tier Tribunal decision had understandably for that reason not been put into the evidence for the latest appeal because it had not been considered applicable or relevant by the Respondent. Had it been considered to be relevant, it doubtlessly would have been submitted and made relevant.
18. Second, to allow an appeal on this basis now would run contrary to the principles of fairness, which have been set out in **RR (Challenging Evidence) Sri Lanka [2010] UKUT 000274**, the headnote 4 of which reads that, "if the Respondent does not put its case clearly it may well be very difficult for the Tribunal to decide against an Appellant who has not been given an opportunity to deal with the Respondent's concern". Such was indeed the position here. It would now be very difficult for the Tribunal to decide against the Appellant. This is exactly what Judge Sharkett had had faced.
19. Third, even if the Upper Tribunal were to now find that Judge Sharkett had erred in law, the error would not be material if the Rule in Devaseelan were to be properly

understood. Whilst it is the case that the first determination should be a “starting point”, **Devaseelan** makes it clear that the first determination is only an authoritative assessment of the Appellant’s status “at the time it was made” and that “facts happening since the first Adjudicator’s determination can always be taken into account by the second Adjudicator” (at paragraph 39 of **Devaseelan**).

20. What the judge in this case had done was to have expressed regard to the position of the children, and especially of their safety, which had resulted in the involvement of social services, and the stabilising influence of the returning father, the Appellant, once he had been released from prison.

No Error of Law

21. I am satisfied that the making of the decision did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.
22. First, and as Mr McVeety has wisely accepted, the **Devaseelan** argument was never raised before Judge Sharkett. The 2014 decision did not form part of the bundle before the judge. Even going further back, there is no reference to it in the latest refusal letter. There cannot be an error of law on the basis of an argument that has never been raised, and the case of **RR (Challenging Evidence) Sri Lanka [2010] UKUT 000274** is a salutary reminder of this fundamental principle.
23. Second, even if it were to be relevant, it remains the case, as Ms Mottershaw has argued, that “facts happening since the first Adjudicator’s determination” are such that they made a material difference to the outcome of the appeal. In what is plainly a nuanced and sophisticated determination by the judge, the appeal was expressly not allowed under the Immigration Rules, but allowed on human rights grounds, on the basis that, in circumstances where the Appellant’s family would not accompany him to Nigeria, the emerging result “would be unduly harsh for the children because their father is the stabilising influence within that family”.
24. Indeed, the judge went on to say that the father’s presence in the family “allows the children to remain in a family situation free from fears of or acts of physical violence” (paragraph 61).
25. This decision was arrived at by the judge because even after the involvement of social services “the mother was continuing to hit the girls particularly the second daughter” (paragraph 61), so that with the father off the scene, there is every possibility that the children would not be allowed to remain in the family situation.
26. Whereas that may, as the judge frankly conceded, amount to “speculation”, what is not speculation is that the effect of the father not being in the family home would be such as to have consequences that that were “unduly harsh for the children because their father is the stabilising influence within that family” (paragraph 61).

Decision

There is no material error of law in the original judge's decision. The determination shall stand.

Anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

8th September 2018