



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/10114/2015

THE IMMIGRATION ACTS

Heard at Field House
On 4 April 2018

Decision & Reasons Promulgated
On 21 May 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

A A A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R R, Sponsor

For the Respondent: Mr Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is the subject of a deportation order made on the basis that he is a foreign criminal who must be deported. His appeal against that decision was heard by the First-tier Tribunal and, in a decision promulgated on 27 February 2017, was allowed on human rights grounds.

2. The Secretary of State appealed against that decision, with permission, and in a decision promulgated on 18 December 2017 I set aside the decision of the First-tier Tribunal for it to be remade. The reasons for doing so are set out in the decision of 18 December 2017, a copy of which is annexed to this decision.
3. The findings of fact of the First-tier Tribunal are preserved but the task now before me is to consider whether on the basis of those facts and any new evidence brought before me, the effect of deportation is unduly harsh on the appellant's partner and children, that is, whether the provisions of the Immigration Rules are met and if not whether the decision is nonetheless a disproportionate interference with in the appellant's Article 8 rights.
4. I heard brief additional evidence from Ms R who explained that there was no new documentary evidence to be submitted. She said she had been able to afford the cost of a social work report on the family. Turning to her children she said that the younger is about to start school in September and currently assessed as having some developmental delay, that he is shy and cannot express himself easily. She said that she studies herself and works and that the appellant's position in Nigeria is not stable. She explained that it was extremely difficult to deal with the children who did not at their young age really understand why their father had been separated from them. She said that communicating with him over Skype is difficult given that the signal often broke down leading to frustration. She said that she could not take the children to live in Nigeria given the lack of stability, the lack of a permanent job and the lack of accommodation as opposed to what they had in the United Kingdom which was schooling and the assistance of her family.
5. Ms R said it was particularly difficult in explaining to a 4 year old why his father could not come back to him and that this had caused difficulties with his nursery school in that he had been approaching other fathers and hugging them, causing distress. She has as a result decided to collect him early from nursery to avoid this scenario.
6. Miss Royal said also that her husband felt that he had failed as a father given the situation that now existed between him and his children and that he felt that his state of mind was slipping and he did not appear as stable as he had in the past.

The Law

7. The appellant is a Nigerian national who was sentenced to a term of imprisonment for twelve months.

Revocation of deportation order

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of an effective immigration control;

- (iv) the interests of the applicant, including any compassionate circumstances.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
- (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
 - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
 - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.”

8. In reaching my decision I bear in mind that there are a number of factors to be taken into account in assessing undue harshness. Undue harshness is to be interpreted in accordance with the ordinary meaning. In doing so I consider that the factors set out in Section 117B and 117C of the 2002 Act must be taken into account.
9. The starting point in this case is assessing the best interests of the children given that this is a primary concern. This must be assessed at this stage without taking into account any countervailing factors.
10. The children are British citizens and have been since birth. Whilst I have not had the assistance of an expert social work report, I have no reason to doubt the account that has been given to me by the sponsor as to their circumstances. Whilst the younger child is still under 5, he does at least have some stability in the United Kingdom, is attending nursery, and the elder child is at school. They have not known anything else other than the United Kingdom and have connections with the sponsor’s family who, although they do not see them every day, are closely involved with them. They are properly cared for by their mother who is able to provide them with a home and they

are educated. I accept that both of them may have additional needs which would be provided for by the education system.

11. In contrast, if moved to Nigeria, they would face a situation in which they have no home to go to. Their education if available would be disrupted and it would be difficult both for the father and mother to provide for them given that although the appellant has been able to find some work, this has been of an intermittent nature and he has had to rely on relatives and other contacts to obtain accommodation which is suitable only for himself as a single man. Accordingly, I am satisfied that it would be in the children's best interests to remain in the United Kingdom.
12. I am satisfied also that in the circumstances it would be better for both parents to be living with the children. There is consistent evidence of a strong bond between the father and the children despite the fact that he has had to keep contact through Skype and other electronic means and I have no doubt that he does feel that he has failed as a father and wishes to be more involved with his children. I accept also that this is putting a great strain on the sponsor and that it is difficult for the children to understand why their father is separated from them.
13. The mere fact that there is a detrimental effect on the best interests of the children where the parent is deported where the children cannot follow him does not by itself constitute exceptional circumstances.
14. I bear in mind that the conditions whereby under Rule 399A the public interest in deportation is outweighed is a rare occasion see AJ (Zimbabwe) [2016] EWCA Civ 1012 at [17].
15. I am satisfied that removing the children to Nigeria would not be in their best interests given the severe difficulties they would have in continuing the life they have, the disruption that they would encounter and the difficulty there would be in them having the kind of life in establishing a proper safe family life in Nigeria.
16. In assessing whether that life would be unduly harsh, I bear in mind that, following MM (Uganda) v SSHD [2016] EWCA Civ 450 at [26] the expression "unduly harsh" acquires regard to be had at the circumstances including the criminal's immigration and criminal history. In this case, I bear in mind that the appellant had not had leave to remain in the United Kingdom; that he had committed a number of criminal offences; that his conviction was for a number of offences as identified in a decision of the First-tier Tribunal.
17. Whilst I note that it had been found previously that it would not be harsh to expect the partner to go to Nigeria, that is not the same situation in reality as considering whether they could go as a unit. The judge appears to have considered that looking at whether the mother could, if there were no children, be expected to go to Nigeria that it would not be unduly harsh to expect her to do so. That, however, an artificial way of looking at the situation in this family.

18. The scenario of the family having to live together in Nigeria is entirely different from the family living together in the United Kingdom. I am satisfied that this scenario of living in Nigeria would be considerably more damaging to the children given the change in circumstances rather than a continuation of the situation which now exists whereby they are separated from their father. Whilst that is far from ideal, it is at least a continuation of the status quo.
19. Bearing in mind the public interest I bear in mind that the starting point is that very strong weight is to be attached to the public interest in deporting foreign criminals. The offence in this case was clearly serious it involving a course of conduct and the making of false representations for gain.
20. I am satisfied that in this case the first limb of the test set out in 399 (a) (ii) is met for the reasons set out above. I do, however, consider that there is nothing in this case which takes it out of the usual consequences of the deportation of a parent, in this case a father. It is clearly, I accept, distressing for all concerned and causes a significant degree of distress to the children, to the appellant and to the sponsor. But that is what the public interest requires. That is what parliament has said is in the public interest. The structure of the legislation is such that it pre-supposes separation of children from their parent and the consequences which naturally flow from that.
21. In the circumstances, bearing in mind the public interest which has to be taken into account in assessing whether the effect on the children is unduly harsh if their father remains outside the United Kingdom, I find that there is nothing in this case such that the public interest in deportation is outweighed and accordingly, I am not satisfied that the separation is unduly harsh and that accordingly the requirements of the Immigration Rules are not met.
22. I am satisfied also that for the same reasons exception 2 within Section 117C of the 2002 Act is not met.
23. Further, I do not consider that there is anything outwith the factors already considered that would make this case such that there is anything which is very compelling such that despite the fact that the exceptions do not apply, maintaining the deportation order would be a disproportionate breach of the appellant's Article 8 rights.
24. Accordingly, for these reasons, I dismiss the appeal on Article 8 grounds.

Notice of Decision

- (i) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
- (ii) I remake the decision by dismissing the appeal on all grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their 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.

Signed

Date 18 May 2018

A handwritten signature in black ink, appearing to read 'Jonathan Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW DECISION



IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/10114/2015

THE IMMIGRATION ACTS

Heard at Field House
On 10 November 2017

Decision & Reasons Promulgated

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Before
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A A A

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr Chakmakjian, instructed by Mondair Solicitors

DECISION & REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Ford, promulgated on 27 February 2017 in which she allowed the respondent's decision May 2015 to refuse his human rights claim. That decision was certified pursuant to section 94 (1) of the Nationality, Immigration and Asylum Act

2002, and the appeal could, in those circumstances, only be brought once the respondent had left the United Kingdom, which he did.

2. It must be noted first that the respondent is a foreign criminal due to his being sentenced on 6 June 2013 to 12 months' imprisonment. The Secretary of State signed a deportation order on that basis on 18 November 2014, and on 21 November 2014 refused his asylum claim and human rights claim, but that was certified under section 94B of the 2002 Act.
3. The judge noted that the respondent had lived with his partner before his imprisonment and after his release, and that they have two children together. There is also an older child of the respondent's family who forms part of the family.
4. The judge found that there was concern for the older of the respondent's children, who appears to be vulnerable and has developmental delay.
5. With regard to the Immigration Rules, the judge found [35] – [36] that the respondent had not shown that it would be unduly harsh to expect his partner to live in Nigeria. She did, however find [42] that it would be in the best interests of the respondent's older child that he be reunited with his father, and that it would be in his best interests to remain in the United Kingdom [43], concluding that [45] the decision is unduly harsh. She also concluded, in the alternative [46] that it is disproportionate.
6. The Secretary of State was granted permission to appeal on broadly two principal grounds:
 - (a) That the judge had failed properly to explain why the public interest in this case was outweighed; and,
 - (b) That the judge had failed properly to assess why it would be unduly harsh for the children to go to Nigeria, having concluded it would not be so for the partner, and having found that the respondent did not face very significant obstacles to reintegration.
7. I heard submissions from both representatives.
8. The decision is, I consider, not well structured. While the judge sets out at [21] a proper self-direction as to the law, there are passages in the final sentence of paragraph [41], in the first sentence of paragraph [44] and in paragraph [47] (albeit that is a consideration in the alternative) which are framed in terms of a judicial review type analysis of the refusal letter. The passage at [44] is not at all clear, and it is not clear from paragraph [45] what weight was attached.
9. Further, while it was open to the judge to find that the best interests of the children were to remain in the United Kingdom, and that it would be unduly harsh to expect them to leave, there is no proper consideration of the second limb of the test, whether it would be unduly harsh for the children to be separated from their father. What is found at [45] is ambiguous, and there is no proper consideration of why that is so by reference to the

public interest, an issue compounded by the phrase “Even attaching considerable weight to the public interest”.

10. There is little or no consideration of why, having found it would not be unduly harsh to expect the partner to go to Nigeria (which of necessity would involve a consideration of what would happen to her children, one of whose fathers is not the respondent) or to be separated from him, it would nonetheless be unduly harsh for the children to go to Nigeria, or to remain in the United Kingdom without him. This exhibits an inconsistency in reasoning.
11. In considering undue harshness on the children, it is hard to discern why the judge believed that it would be unduly harsh for them to be separated from their father and remain in the United Kingdom, given that is the normal effect of deportation.
12. With respect to the alternative findings, given that if the requirements of the rules are met, there would need to be very compelling circumstances, and the public interest stronger, there is no proper consideration of the latter in the conclusion that removal would, even were the requirements of the rules not met, be disproportionate.
13. For these reasons, I am satisfied that the decision of the First-tier Tribunal did involve the making of an error of law, and I set it aside.
14. I consider that the decision should be remade in the Upper Tribunal, preserving the findings of fact; the Upper Tribunal will need to make fresh findings as to whether the effect of the deportation is unduly harsh on his partner and children, that is, whether the provisions of the Immigration Rules are met; and, if not, whether the decision under appeal is disproportionate in article 8 terms

SUMMARY OF CONCLUSIONS

1. The decisions of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. The decision will be remade in the Upper Tribunal.
3. If either party wishes to adduce further material, it must be served on the Upper Tribunal and on the other party at least 10 working days before the resumed hearing and supported by a statement pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed

Date 15 December 2017



Upper Tribunal Judge Rintoul