



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02116/2017

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal
On 20 June 2018

Decision & Reasons Promulgated
On 25 June 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KC
(anonymity direction in force)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: in person – letter from appellant’s representative dated 20 June 2018 received confirming they are not attending the hearing and that the appellant will be representing himself.

For the Respondent: Mr Mills – Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals, with permission, a decision of First-tier Tribunal Judge Ford promulgated on 7 June 2017 in which the Judge dismissed the appellant's human rights appeal.

Background

2. The appellant, a national of Zimbabwe, is the subject of a deportation order made against him on 16 March 2015. The appellant contacted the respondent to make representations resisting deportation, not seeking to rely on any protection ground but asserting he has a valid human rights claim. The Secretary of State noted representations had been made to the effect the appellant faced persecution in Zimbabwe and so he was interviewed, leading to a decision of 10 July 2015 to refuse his protection claim which the appellant did not seek to challenge; his appeal relying solely on article 8 ECHR grounds.
3. The Judge sets out the appellant's offending behaviour at [5 - 7] of the decision under challenge. The Judge thereafter records the refusal letter and events at the hearing before moving on to findings of fact from [34] of the decision under challenge. The core findings can be summarised in the following terms:
 - a. The appellant is a persistent offender who has shown a particular disregard for the laws of the United Kingdom, having started offending in 2007 when he was 21 years of age [34].
 - b. The appellant was warned about the consequences of his behaviour twice in 2012 and warned he may face deportation if he continued to offend but in 2014 displayed very similar behaviour of driving whilst disqualified and in giving false details when challenged [35].
 - c. The appellant has used at least five false names and given three different dates of birth [36].
 - d. In 2012 the appellant was 26 years of age and old enough to realise that his offending behaviour was unacceptable and would have consequences [37].
 - e. Given the number of offences, the nature and seriousness of the offences, the period of time in which they were committed, the appellant's attitude towards law enforcement as illustrated by his propensity to give false details when challenged, the fact he committed further offences after being warned more than once that he faced deportation, the Judge was satisfied the appellant was someone who had shown a particular disregard for the laws of the UK and is a persistent offender [39].
 - f. The appellant has a genuine and subsisting parental relationship with all three of his children who are aged 8, 7 and 1. The Judge was satisfied on the balance of probabilities the appellant lives with his wife and three children and has a genuine and subsisting parental relationship with them [40].
 - g. The Judge had confirmation from the child T's school of the appellants parental involvement and a letter from a special educational needs social worker confirming the child E has a diagnosis of autistic spectrum

disorder and is mainly non-verbal in his communication, has a statement of special educational needs, and attends a special school in Rugby and is supported in his home by his mother, father, and additional support provided by SEND (Social care) [41].

- h. The child E requires regular supervision throughout the day and routines within his life which is provided by his mother and father. The social workers letter states disruption in the child's life would not be in his best interests emotionally and therefore stable family life with both parents supporting will be important in maintaining his emotional state [42].
- i. The Judge was not provided with copies of any special educational needs statement or reports for E. The Judge was told the appellant plays a major role in caring for E but he had been absent from the children's lives for a period of time whilst he was in detention, in particular seven months in 2014 and there was no evidence to show that this had had any marked impact on E's development or behaviour. The Judge finds, whilst accepting it must have been a difficult time for the appellant's wife to cope with the children, that there was no evidence to show that the children's needs were not met or that their mother could not cope albeit with some support from extended family. The Judge notes the child's mother appears to have had support from social services in terms of respite care. The Judge agrees with the Secretary of State that the children's mother should be able to access such support again if necessary and although being told that E has become more demanding as he gets older there was no evidence to back this up in terms of evidence from the school, GP, social services or third parties. Judge finds that if this was the case such evidence would have been available. The Judge accepts that E requires routine in his life but his routines will remain largely undisturbed safer the absence of his father from his daily life [43].
- j. The Judge accepts the appellant has a loving parental relationship with his son T and regularly spends time with him doing normal things and it is probable the appellant also has a loving relationship with his daughter who was just over one year old [44].
- k. It is not disputed ideally the appellant should be a constant presence in the lives of the children as their resident father and the Judge accepts it is in the best interests of the children that the appellant should remain in the UK and remain living in the family unit but, although a primary consideration, the Judge finds it cannot be an overriding one [45].
- l. The Judge finds two of the children are qualifying children requiring the Judge to consider whether it would be unduly harsh for the children to live in the UK without the appellant [46].
- m. The Judge records concern that at the appeal hearing the appellant blamed the length of his sentence on his representative and poor advice, and finds the appellant has a tendency to lie about his identity when faced with the consequences of his behaviour and a tendency to blame everyone but himself and not to take responsibility for his actions [48].

- n. Although the appellant sought to persuade the Judge his behaviour had changed the Judge was not satisfied that the appellant's attitude had greatly changed noting the appellant appears unable to accept responsibility for his actions in the past and still maintaining that he was a young man blaming his offending on his youth, older individuals leading him astray, his representative, being angry with his mother, or simply panic [49].
- o. The Judge noted the appellant stated when he became a father he realised his behaviour had to change and that he had taken responsibility for his family but this was found to be "blatantly untrue" as the eldest child was born in 2009 and the appellant committed many offences after that and continued to commit offences even after E was diagnosed as autistic [50].
- p. The Judge finds the appellant has shown particular disregard for the law and that his evasive and dishonest behaviour has been repeated over several years and with gaps between offending. The Judge was not satisfied that his attitude to the law or its enforcement has changed or is likely to change [51].
- q. The Judge summarises her findings in relation to the children at [52 - 54] in the following terms

"52. Taking this into account together with the finding that it is in the children's best interests that he be allowed to remain in the UK, this is a finely balanced case. I have looked at the nature and seriousness of his offences, the number of them, the period over which they were committed, the length of time since the last offence and I have looked at the probable impact on the children of the appellants deportation. It will undoubtedly have an impact on them. They have endured previous periods of separation from their father and I have no idea how this was explained to them.

53. There is nothing to suggest that the children's home schooling, social circle, extended family life or daily routine will change in any way significantly apart from the absence of their father. They will still attend the same schools. E will probably take the school bus rather than being taken to school and collected from school by his parents. His mother will probably require additional support from social services and family members including the appellants mother who the appellant told me gave her some support during his last incarceration. The appellant's removal will have an adverse impact on the but this can be minimised with careful handling by the appellant and his wife, which is the least they can expect from their father. I do not accept that the children will suffer by reason of financial support ceasing from the appellant. I heard no account of hardship while the appellant was in prison. The family is supported on benefits and they are housed in housing accommodation property which is not going to change.

54. The appellant can maintain contact with the children and assure them of his love and affection for them even if he is living in Zimbabwe. I am not satisfied on the full circumstances of this case that it is unduly harsh for the children to remain in the UK with their mother and without the appellant."

- r. The Judge was satisfied the appellant has a genuine and subsisting relationship with his wife who cannot be expected to return to Zimbabwe [55].
- s. The Judge was not satisfied it would be unduly harsh for the appellant's wife to remain in the UK without the appellant [56 - 59].
- t. The Judge did not accept the appellant's wife could return to Zimbabwe because she is a refugee from that country bringing the case within paragraph 399(b)(ii) of the Immigration Rules. The Judge finds she would still have to be satisfied compelling circumstances over and above those described in paragraph EX2 exist, which the Judge finds presents a very high hurdle [60], and that even taking into account E's autism and the fact the appellant's wife has refugee status in the United Kingdom, the Judge was not satisfied there are compelling circumstances over and above those described [61].
- u. Thereafter the Judge considered private life. By reference to paragraph 399A the Judge did not accept the appellant had been living lawfully resident in the United Kingdom for most of his life and did not accept there would be very significant obstacles to his integration into Zimbabwe [62]. The appellant relied on article 8 only.
- v. The Judge did not find the appellant is socially and culturally integrated into the United Kingdom and found it surprising that given he has lived in the UK for a period of 13 ½ years there was no evidence from friends, work colleagues, family members, neighbours, church communities or any organisation with whom the appellant has been involved within the UK. The Judge did not find the appellant is self-supporting as he and the family are dependent on benefits. The appellant is a healthy adult male who has work experience in the UK. The Judge finds it probable the appellant has family and social contacts in Zimbabwe. The Judge was not satisfied that the height hurdle of 'very significant obstacles' to integration in Zimbabwe is met [63].
- w. The Judge concludes the assessment on human rights grounds at [64] in the following terms:

"64. In a holistic assessment of proportionality is outside the rules, once section 117A to D are applied in the proportionality exercise, the outcome is that the decision is proportionate. It is in accordance with the law and goes no further than is necessary to maintain immigration control and prevent crime and disorder. Despite the fact that the decision is contrary to the children's best interests, the strength of the public interest in the appellants deportation and the absence of any exceptional or compelling circumstances apart from those I have set out above, lead me to conclude that this decision involves a proper balancing of the competing public and private and family life interests. The decision is proportionate and the decision does not breach the protected qualified article 8 rights of the appellant, his wife and/or their children."

- 4. The appellant sought permission to appeal which was initially refused by another judge of the First-tier Tribunal on the basis it was said the grounds in their entirety attempt to reargue the issues already before the Judge for determination and

amount to no more than a disagreement with the findings of the Judge, findings which were properly open to the Judge on the evidence before her.

5. The application was renewed to the Upper Tribunal where permission was granted by a Deputy Upper Tribunal Judge on 18 October 2017, the operative part of the grant being in the following terms:

Is arguable that the Judge, who recognise that this was a finely balanced case, may not have adequately reasoned how that severance could not properly be described as being unduly harsh on an autistic child. The evidence, not disputed by the Judge, was that the appellant plays a major role in the child's care.

There is nothing in the adjournment point. The Judge gave detailed reasons for her decision and the grounds do not explain how the appellant was prejudiced by her decision to proceed.

Error of law

6. The appellant was represented before the Judge and appears to have had the benefit of legal representation until the letter of 20 June 2018 advising the Tribunal his representative was not attending the Upper Tribunal. The appellant therefore attended in person.
7. The appellant brought with him a document said to be a copy email providing a character reference, a letter from the school attended by E, who was born on 5 December 2009, dated 14 June 2018, and a letter from an employee of a local Borough Council again providing a character reference for the appellant. This is, however, post-decision evidence that was not before the Judge and not arguably relevant to assessing the question of whether the Judge made a legal error material to the decision, although it may be relevant if such legal error was found.
8. The appellant was provided a full opportunity to state his case, after it was explained to him the nature of the proceedings were not to enable him to re-argue the case put before the Judge but to establish if material legal error had been made. During the course of discussion, the appellant accepted there was no evidence of the nature of that described by the Judge at [43] and that the only evidence relating to E was a letter from the social worker in the appellants bundle and a letter in the respondent's bundle from a GP written in 2014; clearly not for the purposes of these proceedings but relating to a request from a local authority to allocate a large property to the appellant's family as a result of E's ongoing problems.
9. The appellant did not provide evidence regarding the impact of his removal on any of the children to the Judge and although the appellant claimed he was not sure if his wife was able to care for the children herself, it is clear that the evidence before the Judge showed that the appellant's wife had coped on the occasions that he was in prison or detention with no evidence of any disruption of an established routine or adverse impact.
10. The appellant refers to his private and family life claiming that the children need parental guidance but it was not shown that this could not be provided by the children's mother.
11. The assertion by the appellant, that although the evidence referred to what had happened in the past things are different now, appears to mirror the claim

- considered by the Judge that the appellant had reformed and would not offend in the future. The Judge gives clear reasons why such a claim was doubted.
12. The appellant claims it will be harsh for his son as his son needs him to remain in his life in the United Kingdom and that the issue in the appeal was not about educational needs but about the reality of life and his role in his children's life. Whilst this as a general statement is not disputed, this is precisely the point the Judge was considering.
 13. The Judge does not dispute the fact that it may be harsh upon the children and the appellant's wife if he is removed from the United Kingdom as a result of the order for his deportation but this is not the requisite test. That is whether the decision to remove is unduly harsh. In assessing the question of 'unduly' the Judge clearly considered both sides of the argument including the appellant's conduct, offending, submissions relating to the same, and the composition and impact on the family unit established from the evidence made available.
 14. The appellant argues it is harsh to take a father from his son which is accepted as the effect of deportation within a normal close family unit. The appellant also claimed it was harsh for his wife if he was not there as she would have to do more work if he was not present, but this was a matter properly considered by the Judge.
 15. In a carefully written decision, for which the Judge must have spent a lot of time in both considering the evidence and the decisions flowing therefrom, the Judge takes into account all the competing arguments which were clearly considered with the required degree of anxious scrutiny.
 16. It is not shown the Judge did not understand any aspect of this appeal or that she misdirected herself in relation to applicable legal provisions. The Judge has given adequate reasons in support of the findings made and the weight to be given to the evidence was, therefore, a matter for the Judge.
 17. It might be the case that if better evidence had been provided the Judge may have come to a different conclusion but that, at this stage, is purely speculative. The Judge could only make the decision on the evidence that had been provided to her. Indeed, in his reply to Mr Mills, the appellant accepted the argument that if the solicitors had obtained further and more detailed evidence it could have made a difference. The problem for the appellant is the type of evidence that may have arguably made a difference was not, has still has not, been provided.
 18. If the appellant is able to obtain the type of evidence the Judge refers to and which addresses the issues of concern to the Judge, he may be able to make a fresh claim supported by that material but that is something that might or may happen in the future not what happened before the Judge.
 19. The Judge recognises this is a finely balanced case as a result of the weight that she gave to the impact upon the family and the circumstances of the child E. This demonstrates the care the Judge took in ensuring a fair and balanced decision-making exercise was undertaken. This is a judgment arrived at giving the appellant the most weight the Judge was able to give to the evidence provided. The Judge it was, in particular, aware of the evidence in relation to E and it cannot be said the Judge has missed or failed to consider any material aspect in relation to the same.

- 20. The grant of permission questions whether the Judge adequately reasoned the finding severance could not be properly described as being unduly harsh on an autistic child, but the Judge does deal with this matter and does give adequate reasons which is that there was no evidence to suggest otherwise.
- 21. As the Judge considered all aspects with the required degree of anxious scrutiny and has given adequate reasons before arriving at a properly structured proportionality decision it is arguable the only basis of challenge can be on public law grounds. The appellants submissions are really no more than disagreement with the conclusions reached and desire for a more favourable outcome. That, per se, does not establish arguable legal error. I find the appellant has failed to establish that the Judge’s findings can be said to be arguably perverse or irrational, contrary to the evidence provided, or outside the range of findings reasonably open to the Judge on the evidence. This is, as Mr Mills submitted, a decision of a very thorough and sensible Judge who found that the weight to be given to the public interest outweighed that to be given to the appellant, his wife, or any member of his family.
- 22. No arguable legal error material to the decision to dismiss the appeal has been made out.

Decision

- 23. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

- 24. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 21 June 2018