



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/09457/2014

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Tribunal
On 3 July 2019**

**Decision & Reasons
Promulgated
On 10 July 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DLR

(anonymity direction made)

Respondent

Representation:

For the Appellant: Mr C Howells Senior Home Office Presenting Officer.

For the Respondent: Mrs M Chaggar instructed by Central England Law Centre

ERROR OF LAW DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Butler who on 15 February 2018 allowed DLR's appeal on human rights grounds.

Background

2. DLR is a citizen of Iraq born on 1 February 1986.
3. The Judge notes at [2] of the decision under challenge that DLR entered the UK illegally on 28 September 2003 and claimed asylum which was refused. On or around 26 September 2005 DLR was convicted of robbery and sentenced to 20 months imprisonment in a Young Offenders Institution. An order for DLR's deportation was made in 2008 after which removal directions were set for 29 November 2010 which was aborted. This matter has a long procedural history which need not be repeated in full for the purpose of this decision.
4. In early 2017 DLR claimed he will face a real risk on return to Iraq as a result of having converted to Christianity which was considered as a fresh claim by the Secretary of State. The Judge dismissed that aspect of the claim on the basis it was not found that any conversion was genuine or that the appellant had established a real risk on return entitling him to a grant of international protection.
5. The Judge thereafter considered submissions regarding the appellant's psychiatric condition but did not find there would be a breach of article 3 ECHR. Neither the dismissal of the protection claims or rejection of the claim on medical grounds has been successfully challenged by DLR.
6. In relation to article 8 the Judge found DLR was unable to succeed under the Immigration Rules for although it is accepted he is in a genuine and subsisting relationship with his wife, who is a British citizen and in the UK, the relationship was not formed at a time when DLR was in the UK lawfully - paragraph 399(b) of the Immigration Rules refers.
7. In relation to article 8 ECHR, the Judge sets out relevant findings from [39 - 50] of the decision under challenge. Based upon such analysis and findings the Judge allowed the appeal on human rights grounds at [51].
8. The Secretary of State sought permission to appeal which was granted on a renewed application by Upper Tribunal Judge Smith who also dismissed DLR's renewed application for permission to appeal the protection findings. The operative part of the grant of permission is in the following terms:
 - “2. The Respondent's grounds are in essence that the Judge has failed properly to apply the test of whether it is unduly harsh for the Appellant's wife to remain in the UK without him. There is no challenge the Judge's finding that she could not return with him to Iraq. It is accepted that the Judge refers to it being “very harsh” for her to remain without him but it is submitted that this does not disclose a proper assessment of the Article 8 rights versus the public interest having particular regard to section 117C of the 2002 Act.

3. To have regard to the period since the Appellants offending. It is also the case that the Appellant's wife has medical issues (although as the Respondent notes in his grounds, the Judge accepted that she has other family members who can assist the and there was limited evidence about the extent to which the Appellant is involved in her care).
4. The Judge does mention section 117C and the case of Hesham Ali in the section leading up to his assessment ([38] - [39]). However, when it comes to making the assessment in particular at [49] of the Decision, the Judge expressly leaves section 117C entirely out of account because he considers that the Appellant is no longer a threat to public order. That ignores that the Appellant is a "foreign criminal" for the purposes of section 117D, that the Judge is directed by section 117A to take into account section 117C where that applies and that section 117C(1) provides that deportation of a foreign criminal is in the public interest. Whilst it may be open to a Judge to find that the public interest in deportation is diminished by the passage of time and the threat of level posed, it is arguably not open to the Judge to disregard that section completely as he has done. What is said at [49] of the decision in particular, therefore, discloses an arguable error of law."

Error of law

9. It is important to consider the actual findings made by the Judge relevant to the issues in hand. At [39] the Judge writes:
 - "39. A deportation order has been made against the appellant and section 117C(1) provides that the deportation of foreign criminals is in the public interest. Section 117C(3) provides that in the case of a foreign criminal who has not been sentenced to a period of imprisonment of more than four years, the public interest requires his deportation unless, inter alia, he has a genuine and subsisting relationship with a qualifying partner and the effect of his deportation on that partner would be unduly harsh."
10. The Judge was clearly aware of the specific provision of section 117C(1) and the weight to be given to the public interest when considering the deportation of foreign criminals. It is not established that having recorded an awareness of such provision the Judge then completely ignored it when undertaking the necessary proportionality assessment.
11. The Judge finds at [43], when considering the medical evidence, that *"it would be totally unrealistic to assume that the appellant does not assist his wife greatly with her various problems. She confirmed in evidence that she is dependent upon him and panics if she wakes in the night and he is not by her side. There is also evidence that she is considered to be disabled for benefit purposes."* At [49] the Judge finds DLR's wife's evidence to be genuine and sincere.

12. The Judge finds this is a family splitting case which is a sustainable finding on the evidence. The Judge also deals with the issue of delay noting that as a result of the respondent's delay in removing DLR his relationship with his wife became more established [49].
13. The Judge notes that whilst the number of factors fall in DLR's favour it was born in mind he never has had leave to remain in the United Kingdom and has frustrated attempts to remove him [48].
14. At [49] the Judge writes:

“49. The legitimate aim in this appeal is the maintenance of effective immigration controls and the need to act in the economic interests of the country. I do not consider the appellant to be a threat to public order of any kind. The appellant's wife's evidence was genuine and sincere. I consider she would suffer very harsh consequences if the appellant was deported.”
15. Mr Howells refers to the decision of the Supreme Court in KO (Nigeria) [2018] UKSC 53 and the decision of the Upper Tribunal in RA (s. 117C: “unduly harsh”; offence: seriousness) Iraq [2019] UKUT 00123 in support of his submission that the “unduly harsh” test has a threshold and that when assessing whether this had been crossed it was necessary that the guidance provided in the case law must be followed.
16. Mr Howells submitted that at [49] of the decision under challenge the Judge specifically states that removal of DLR will result in very harsh consequences which is said not to be the correct test.
17. The Supreme Court found that “unduly harsh” introduces a higher hurdle than one of “reasonableness” found in section 117B and that “unduly” goes beyond the level of “harshness” that may be acceptable or justifiable in the relevant context.
18. The seriousness of DLR's offending is recognised by the sentence passed upon him in 2005 of 20 months at a Young Offenders Institute. The Judge accepts the offence was serious but recognised it was committed when DLR was much younger [47]. The Judge notes that DLR has not reoffended and that there was no evidence that he was likely to offend again in the future. The Upper Tribunal in RA specifically comment upon the issue of rehabilitation at [33] in the following terms:

“33. As a more general point, the fact an individual has not committed further offences, since release from prison, it is highly unlikely to have a material bearing, given that everyone is expected not to commit crime. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everybody else) to be. There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance (see SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256, paragraphs 48 to 56).

Nevertheless, as so often in the field of human rights, one cannot categorically say that rehabilitation will *never* be capable of playing a significant role (see *LG (Colombia) v Secretary of State for the Home Department* [2018] EWCA Civ 1225). Any judicial departure from the norm would, however, need to be fully reasoned.”

19. Although RA was not handed down until after the decision under challenge the authorities relied upon in support of the above proposition are those that would have been available to the Judge at the date of promulgating the decision under challenge.
20. I do not find the Judge has materially erred in relation to this matter for although clearly taking into account the appellant’s history the Judge’s observation there was no evidence that the appellant had reoffended or was likely to offend in the future is a statement which, based on the material made available, is factually correct. The Judge may have erred at [48] when indicating that the lack of offending and other matters set out our matters which fall in the appellant’s favour but it is not made out that disproportionate weight was given to the same such sufficient to have an adverse impact upon the lawfulness of the decision under challenge.
21. As noted above, the Judge refers to section 117C(1) of the 2002 Act and I do not find it made out in the submissions that the Judge placed inappropriate weight upon the same as part of the balancing exercise. Whilst the Judge’s statement at [49] that the legitimate aim was the maintenance of effective immigration control or need to act in the economic interests of the country, which is factually correct in relation to straightforward article 8 assessment, may be too simplistic as there are additional factors in a deportation appeal reflected in section 117C(1) and in some circumstances the deterrent factor, it is not made out those additional factors were not properly considered.
22. Mr Howells further submitted the Judge erred in law as greater weight should have been given to the fact DLR’s wife has family members in the United Kingdom to whom she would be able to turn for help if required.
23. The Judge noted the issue of family and is important to consider the nature of DLR’s wife’s medical condition and the specific findings regarding the family set out at [41 - 43] in the following terms:
 - “41. When the previous the first-Tier Tribunal decision was set aside, Upper Tribunal Judge Kebede noted that there was no evidence that the appellant’s life was dependent upon him for her care. The appellant has produced at page 36 of his latest bundle a medical report from his wife’s GP dated 9 June 2017. This report was written by reference to electronic records from 2008. It records that she suffers from anxiety and depression for which she is prescribed antidepressant medication. Whilst the symptoms were initially related to her first partner is

suicide, they are now reported as relating to fears that the appellant will be deported and persistent stress from the uncertainty of his immigration status. His deportation would be likely to have a significant negative impact on her mental health. She also suffers from hypertension which is stable on the medication she currently takes for it. She also suffers from haemorrhoids, anal fissure and previous anal fistula for which she had surgery in 2014. She remains under the care of a colon rectal surgeon and reports ongoing difficulties with anal pain and faecal urge. The final medical issue noted in the GPs report is alpha trait thalassaemia.

42. Commenting on the appellant's wife's various medical conditions, the GP states that the hypertension, alpha trait thalassaemia and fistula are major problems and the rest are described as minor problems.
 43. But the report is completely silent on the extent to which the appellant gives personal care to his wife. This was an issue before the Upper Tribunal which has not been addressed in the appeal before me. Indeed, in his submissions, Mr Vokes makes reference to her close family members in the UK (which excludes the appellant) and upon whom she relies. Having acknowledged that, it is clear that the appellant's wife suffers from debilitating and embarrassing medical problems. There is evidence in the bundle of a special toilet facility being installed in their home and it would be totally unrealistic to assume that the appellant does not assist his wife greatly with the various problems. She confirmed in evidence that she is dependent upon him and panics if she wakes in the night and he is not by her side. There is also evidence that she is considered to be disabled for benefit purposes."
24. The Judge was clearly aware of the existence of family members in the United Kingdom and the evidential shortfalls in relation to the specific issue of the extent upon which the appellant gives personal care to his wife. The finding of the Judge is, however, that he found DLR's wife's evidence genuine and sincere [49] in which she stated she was dependent upon her husband. It is not arguably necessary for the Judge to do more in light of accepting the evidence of dependency especially in light of the specific nature of DLR's medical issues and the type of personal assistance she will require.
 25. I find any error in relation to the determination under challenge relates to the issue of format. It would have assisted if the decision had set out a clearer analysis of the manner in which the Judge weighed up the competing factors and had stated at [49] the weight given to the Secretary of State's argument by reference to the relevant statutory provision. The advocates were asked during the hearing whether if this was the case whether it was material to the decision to dismiss the appeal. Understandably Mr Howells submission is that it is whilst Mrs Chaggar submitted that it was not and that had the matter been

assessed in the manner suggested by Mr Howells the outcome would have been the same.

26. Returning to KO (Nigeria), the threshold set out by the Supreme Court related to the significance of “unduly” going beyond the level of harshness that may be acceptable or justifiable in the relevant context. It is necessary to show that the consequences of a person’s deportation for the relevant family member will therefore be over and above those one ordinarily would expect as a result of the foreign criminals removal. The use by the Judge of the words “very harsh” are clearly not the same as “unduly harsh” but I find when the determination is read as a whole, which it is important to do in this matter, that the Judge was finding that the harshness of the consequences to DLR’s wife as result of his deportation from the United Kingdom would not be acceptable or justifiable in the relevant context of the facts as found, including the nature of the offending and section 117C(1) of the 2002 Act. I find it not made out that the decision to allow the appeal falls outside the range of findings reasonably available to the Judge on the evidence. As such, any error identified in the structure of the determination has not been shown to be material to the decision to allow the appeal on human rights grounds.

Decision

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

Anonymity.

28. 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 3 July 2019