Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08838/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 January 2019	**On 13 February 2019**

Before

LORD BECKETT
SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE SMITH

Between

VMPZ
[Anonymity direction made]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal Judge. Although the appeal no longer involves a protection claim, we continue the anonymity direction because the case involves minor children. 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.

Representation:
For the Appellant: Miss S Iqbal, Counsel instructed by Chris Raja solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge C H Bennett promulgated on 24 May 2017 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 1 July 2016 refusing his protection and human rights claims which decision was made in the context of an automatic deportation order.

2. The Appellant is a national of Colombia. He came to the UK in 1999 and claimed asylum which claim was refused. He married his wife on 18 December 2004. His wife is originally from Colombia but is a recognised refugee from that country. She is now a British citizen. The Appellant returned to Colombia on 16 November 2005 and returned with a visa to join his wife. Although initially refused indefinite leave to remain, he was granted ILR on 29 March 2008. He was however refused citizenship because he had a criminal conviction.

3. The couple have three children, [DC] who was born in April 2004, [JC] who was born in February 2007 and [CC] who was born in January 2010. All the children are British citizens.

4. The Appellant's first criminal conviction was on 16 April 2007 when he was convicted of driving with excess alcohol, fined and disqualified from driving for eighteen months. A further driving offence followed in September 2009. The index offence in this case is one of possessing Class A drugs (cocaine) with intention to supply for which he received a sentence of five years' imprisonment on 15 October 2010.

5. The Appellant was served with a notice of liability to deportation on 22 November 2010. He responded on 3 December 2010 with an asylum and Article 8 claim. That was followed up with further submissions in support of a protection and human rights claim in July 2012. On 6 April 2013, the Appellant's criminal sentence ended. His asylum screening interview took place on 20 August 2013. In response to a further notice of liability to deportation, the Appellant claimed to have been trafficked but withdrew that claim on 25 March 2014. On 8 January 2015 and 13 April 2015, the Appellant made further submissions about why he should not be deported following which, on 28 September 2015, he was served with an automatic deportation order. He responded making further submissions about why he should not be deported on 30 October 2015. A further asylum interview took place on 4 March 2016 leading to the Respondent's decision under appeal.

6. The appeal against the Decision is on human rights grounds only; there is no appeal against the Judge's decision dismissing the Appellant's protection claim.

7. Judge Bennett accepted that it would be unduly harsh for the Appellant's wife and children to return to Colombia with him ([61] and [62] of the Decision). However, he concluded that it would not be unduly harsh for them to remain in the UK without him ([78(b)] of the Decision).

8. In relation to the private life exception provided for by the Immigration Rules ("the Rules") and Section 117C of the Nationality, Immigration and Asylum Act 2002 ("Section 117C"), the Judge did not accept that the Appellant could meet those provisions because he had not lived in the UK lawfully for over half his life, he was not socially and culturally integrated and there were not very significant obstacles to the Appellant's integration in Colombia ([65] to [67] of the Decision).

9. Crucially, since the Appellant was sentenced to a term of imprisonment of five years, the Appellant could not succeed on the basis that he meets the exceptions even if those were satisfied. He would need to show that there are very compelling circumstances over and above the exceptions. Judge Bennett was not satisfied that such circumstances exist in this case ([78(a)] of the Decision).

10. Taking his conclusions together, the Judge concluded that the Appellant's human rights claim should fail.

11. The Appellant raises five grounds of challenge to the Decision. We deal with those in more detail below. Permission to appeal was refused by First-tier Tribunal Judge Grant-Hutchison on 20 June 2017 and by Upper Tribunal Judge Craig on 20 September 2017. Thereafter, the Appellant applied to the Administrative Court for judicial review of Judge Craig's refusal of permission to appeal. Mr Justice Nicklin was persuaded to grant permission for that judicial review on 30 November 2017 in the following terms so far as relevant:

> "…
>
> [3] The FTTJ made a large number of positive factual findings (set out in §§ 12-24 Statement of Grounds) including: the Appellant no longer constituted a danger to the community of the UK and the presumption that he did under s7(2) [sic] had been rebutted; there was a genuine and subsisting relationship between the Appellant and his wife and children: 7 ½ , 10 and 13 (all born in the UK and British Citizens); the Appellant's wife had been granted asylum in the UK from Colombia and the FTTJ was satisfied that she was afraid to return there (the children had never been to Colombia and did not speak Spanish); the wife had lived in the UK for 15 years and made a life for herself and the children were settled in schools in the UK; it would be 'unduly harsh' to expect the Appellant's wife to return to Colombia and live there; and it would be 'unduly harsh' to expect the children to settle in Colombia without their mother and, if they did, their wider family relationships in the UK would be 'substantially disrupted'.
>
> [4] Nevertheless, despite those findings, the FTTJ found ([78]) that he was not satisfied (1) that "it would be unduly harsh for all or any of [the Appellant's wife and children] to remain in the UK without the Appellant",

> and (2) that the Appellant's removal would involve a "disproportionate interference with his right to private and family life and/or the corresponding rights of all or any of [the Appellant's wife and children]".
>
> [5] It appears to me arguable the findings in (4) are irrational in light of the findings in (3) above (§ 32 Statement of Facts and Grounds) or that they could only have been produced by an error in application of the relevant law or (as argued in § 40 Statement of Grounds) the failure of the FTTJ to conduct a [words missing from copy of order] the Immigration Rules.
>
> [6] The FTTJ correctly identified that the interests of the children were a (not the) primary consideration [56], but his assessment of their interests was arguably too narrowly restricted. It is arguable that, stepping back, the effect of deporting the Appellant would be, effectively, to terminate these three children's relationship with their father; the FTTJ found that the family could not practically go with him to Colombia. That represents a very serious interference with the children's Article 8 rights, which would require a countervailing commensurate justification…"

12. Permission to appeal to the Tribunal was granted by the Vice President of the Tribunal on 5 November 2018 based on the High Court's grant of permission. The matter comes before us to decide whether the Decision contains a material error of law.

13. Under cover of a letter dated 21 January 2019, the Appellant's solicitors filed additional evidence which was not before the First-tier Tribunal. That was not supported by an application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as it should have been. We indicated that, if the Appellant wished to have that evidence considered in the event that we set aside the Decision, his solicitors should make the appropriate application. An application was made under cover of a letter dated 30 January 2019, but Miss Iqbal accepted that this is not evidence to which we should have regard at the error of law stage as it was not before Judge Bennett.

Discussion and Conclusions

14. We begin by observing that the Decision is extremely lengthy and detailed. It runs to seventy-three pages of close typeface and eighty-four paragraphs. Of course, that does not mean that it does not contain an error of law if the Judge has indeed misdirected himself or reached findings which were not open to him on the evidence but is an indication of the attention which the Judge gave to the case.

15. We were addressed by Miss Iqbal on all the grounds raised in the initial grounds of appeal. Judge Nicklin's Order indicates that the grounds which found favour with him are the Appellant's ground five coupled with the assertion in ground one that the Judge's conclusion is perverse in light of his positive findings on certain factors. As that is the basis of the grant and the main focus of the grounds before us, we have concentrated most of our attention on that ground. Before we turn to deal with that

ground, however, we deal with the other grounds raised as our conclusions about those grounds may impact on the more general issue.

Ground Two

16. The Appellant asserts that the Judge erred in rejecting the expert evidence of Mr Peter Horrocks, a social worker who provided a report dealing with the effect of deportation of the Appellant on his children. The complaint raised in ground two concerns Mr Horrocks' opinion about the separation anxiety disorder which [DC] suffered when the Appellant was in prison and the likelihood of reoccurrence if the Appellant is deported.

17. The Judge deals with Mr Horrocks' report at [11(c)] and [11(d)] of the Decision before reaching his findings about that report and the weight to be attributed to it at [69] of the Decision.

18. We deal first with Miss Iqbal's submission that the Judge was not entitled to give that report no weight based on Mr Horrocks' qualifications. Although, as Miss Iqbal rightly pointed out, the Judge did not have Mr Horrocks' CV which was said to be annexed to the report but was not, and the Judge could have asked for that during or after the hearing, that can make no difference. We were shown the CV which confirms the point made by the Judge at [69(a)] that Mr Horrocks does not have any medical qualifications and therefore does not have the requisite expertise to make a reliable prediction of the likely consequences of the Appellant's deportation on the mental health of the Appellant's wife and children. The Judge was entitled to take account of the other family support on which the Appellant's wife could call and the difference in the age of [DC] between the time his father was in prison and the present. Neither of those factors was considered by Mr Horrocks ([69(c)] and [69(d)]).

19. Miss Iqbal also said that the Judge failed to consider the other medical evidence besides Mr Horrocks' report. The Judge considered that evidence at [11(e)] of the Decision and took it into account when considering Mr Horrocks' report at [69(e)]. Whilst, as Miss Iqbal pointed out, Mr Horrocks' assumptions are based on what happened in the past taken with the fact that the Appellant would be parted permanently from his children by deportation rather than just temporarily as before and this is not mentioned expressly by the Judge, the fact remains, as the Judge points out at [69] of the Decision, that, if the Appellant wanted to make out that case, he needed to provide evidence from an expert with suitable medical qualifications and not from a social worker without that experience.

20. There is no error in the Judge's consideration of Mr Horrocks' report.

Ground Three

21. The focus of this ground is the Judge's conclusions concerning the Respondent's delay, said to be of over four years in dealing with the Appellant's claims before deciding to deport him. It is said that, during that time the Appellant was permitted to develop his family and private life and that the Judge has failed to give weight to this factor when balancing the public interest.

22. We begin by agreeing with Mr Tufan's submission that there is not in fact a delay of four years in this case. We have referred to the chronology of the Appellant's case at [5] above. As that chronology shows, the Appellant was first notified of his liability to deportation in 2010 even before he had completed his criminal sentence. At that stage, there is no requirement for the Respondent to take action given that the Appellant cannot be deported at that stage and it may not be sensible for the Respondent to carry out consideration of deportation whilst that is the position (see [20] of the judgment of Elisabeth Laing QC when sitting as a Deputy Judge in BA v SSHD [2011] EWHC 2748 (Admin)).

23. Following release from prison in April 2013, a screening interview took place and the Appellant was given further opportunity to say why he should not be deported, leading to a claim to have been trafficked, which was later withdrawn in March 2014. Further submissions were made in early 2015 to which the Respondent reacted in September 2015 by making the automatic deportation decision and again inviting submissions why the Appellant should not be deported. That was responded to on 30 October 2015 and the Respondent's decision under appeal followed less than six months later following a further asylum interview. There was little or no period of inaction between April 2013 when the Appellant was released from detention and March 2016 when the Respondent's decision was taken.

24. Miss Iqbal submitted that the Judge had failed to take account of the Respondent's policy as contained in his guidance entitled "Criminality: Article 8 ECHR cases" dated 22 February 2017. She drew our attention in particular to what is said in relation to delay as follows:

> "A foreign criminal may claim that where there has been a delay in decision-making (for example between the end of the custodial sentence and the decision to deport, or the date of any representations and the date of decision), the public interest in their deportation is reduced or their private and/or family life has strengthened in the intervening period, such that deportation would be disproportionate. Delay should always be considered and explained in the assessment of very compelling circumstances even if the foreign criminal has not relied on it at this stage. Delay caused by a foreign criminal or those acting on their behalf will be given no weight in the foreign criminal's favour in an Article 8 assessment. Delay caused by the Home Office will be given less weight if the foreign criminal was, at the time of the delay, in the UK unlawfully.

> The consequence of Home Office delay when the foreign criminal was in the UK lawfully is likely to depend on the reasons for and consequences of, the delay on the foreign criminal's family and private life (see, for example, EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41)."

We note that this is guidance intended for Home Office caseworkers and there was no obligation on the Tribunal to refer to it. It does no more than state the legal position emerging from case law in any event.

25. Even if the Appellant is entitled to rely on there being any period of delay, the Judge considered that submission in depth at [70] to [73] of the Decision. He correctly directed himself in accordance with the relevant case law and considered what were undoubtedly the relevant issues. At [72] and [73] of the Decision, the Judge concluded that the Appellant had not developed or established any deeper roots in the period of delay than those developed or established earlier. He pointed out that the evidence did not show that the Appellant and his family had any expectation that the Appellant might be permitted to remain notwithstanding his conviction. Nor did the evidence show that the Appellant and his family had suffered any prejudice or disadvantage by reason of the delay.

26. In those circumstances, the Judge was entitled to reach the conclusions he did as summarised at [73(f)] of the Decision as to the effects of the delay which were positive rather than negative for the Appellant and his family.

27. There is no merit in ground three.

Ground Four

28. Ground four is a complaint that the Judge gave too little weight to the lack of offending by the Appellant since his release from custody. That is a matter which goes to the overall balancing of the factors for and against the Appellant and it is therefore more convenient to deal with this ground with ground one which involves a general attack on the Judge's balancing of the Article 8 factors.

Ground Five

29. The fifth ground is that the Judge failed to consider Article 8 ECHR outside the Rules. We accept that the Supreme Court in Hesham Ali v SSHD [2016] UKSC 60 rejected the proposition that the Rules are a "complete code" and concluded that MF (Nigeria) v SSHD [2013] EWCA Civ 1192 was incorrectly decided in that regard. The Tribunal is nonetheless, as the Supreme Court accepted, bound to give weight to the scheme laid down in the Rules. Moreover, the Tribunal is itself now bound to have regard also to Section 117C which sets out the way in which the public interest question is to be considered in deportation cases.

30. In any event, the Judge's evaluation of the Article 8 factors in this appeal did go beyond simply reaching findings on the Rules and applying Section 117C. He was of course required by Section 117C to consider not (or not only) whether the Appellant met the exceptions but also whether there were very compelling circumstances over and above the exceptions. That he did in the manner directed by the Supreme Court in Hesham Ali at [79] of the Decision, by setting out fully the adverse impacts for the Appellant and more importantly his family and balancing those against the public interest.

31. There is no merit in ground five in terms of the Judge's approach. However, as we observe above, this is one of the grounds which appears to have found some favour with Mr Justice Nicklin and therefore we also consider whether the Judge can be said to have erred by failing properly to conduct the assessment when looking at the more general ground that the Decision is irrational.

Ground One

32. We therefore turn finally to the main point which found favour with Mr Justice Nicklin. He concluded that Judge Bennett's conclusions may be irrational taking into account the findings made in the Appellant's favour and, in particular, the adverse effect on the Appellant's children.

33. In reaching our conclusions on this ground, we have regard to what is said by Judge Bennett about the evidence both as to the impact of deportation on the Appellant's family and the risk of reoffending at [9] to [11] of the Decision. We also have regard to the Judge's findings at [23] of the Decision about the risk of reoffending which are made in the context of whether the Appellant continues to represent a danger to the community in consideration of section 72 of the 2002 Act.

34. Miss Iqbal accepted in her submissions to us that the Judge applied the correct legal test when addressing Article 8 ECHR. She was right to do so. The Judge sets out Section 117C and the correct Rules at [49] and [50] of the Decision. At [51], he properly directs himself to the level of interference which the Appellant is required to show in order to succeed in light of his sentence. The Judge also refers to case law which is relevant to the test to be applied.

35. The Appellant obviously does not take issue with the Judge's finding that it would be unduly harsh for his wife and children to return with him to Colombia. Neither does he object to the Judge's conclusions as regards his own private life.

36. The passage with which the Appellant takes issue begins at [68] of the Decision where the Judge considers the effect on the Appellant's wife and children if they remain in the UK whilst he returns to Colombia. The factors taken into account in this regard are that the Appellant's wife has family members in the UK who can assist her with care of the children, that the Appellant's wife did not say that she was unable to cope whilst the Appellant was in prison and that

the evidence does not show that the activities in which the children engage (so far as they do), cannot be catered for with such assistance as is available either from the wider family or other parents.

37. We have already referred to Judge Bennett's findings in relation to Mr Horrocks' evidence. In light of his findings about that report and the other medical evidence, the Judge did not consider that the deportation of the Appellant would have the serious effects on [DC] that Mr Horrocks predicted.

38. We have also dealt above with the Judge's conclusions about delay. If and insofar as there was delay by the Respondent, the Judge's conclusion that this was not a relevant factor when considering the public interest was open to him on the evidence ([73]).

39. The Judge accepted and took into account that the Appellant has not reoffended since his release. As a result of the matters set out at [75] of the Decision, the Judge was entitled to give little weight to that factor. As he observed, factors such as deterrence remain relevant when assessing Article 8 ECHR. As Lord Wilson stated at [70] of the judgment in Hesham Ali, whilst perhaps no longer to be referred to as societal revulsion, public concern about the deportation of foreign criminals is another factor deserving of weight. The Supreme Court made clear at [50] of the judgment in Hesham Ali that the Tribunal is bound to give appropriate weight to Parliament's and the Respondent's view of what the public interest requires when assessing Article 8.

40. As Mr Justice Nicklin noted when granting permission, Judge Bennett has properly directed himself when approaching the best interests of the children ([56]). Judge Bennett in his conclusions at [76] accepted that the best interests of the children are served by having the Appellant in the UK with them. That conclusion is based on his earlier findings as to the impact on those children ([68] and [69] of the Decision). However, he was right to go on to observe that the best interests of the children in deportation cases are unlikely to be a sufficiently compelling circumstance to outweigh what is a strong public interest.

41. The Judge's conclusions in relation to the Article 8 assessment are thereafter summarised at [78] of the Decision. The Judge was not satisfied that there are very compelling circumstances over and above the exceptions which can be said to outweigh the public interest, did not accept that it would be unduly harsh for the Appellant's family to remain in the UK without him and concluded that the interference with the Appellant's private life is not disproportionate.

42. The Judge's conclusions are expanded upon in what follows. He takes into account his earlier findings that the family will cope without the Appellant with assistance from the wider family, that the Appellant's wife and children will be "saddened and seriously upset" by the Appellant's deportation. However, he

concludes on the evidence that their mental and physical health will not be adversely impacted or that, if there are any adverse consequences, those will not be severe or could be treated within a short time.

43. The Judge accepts that deportation of the Appellant will mean that he is separated from his family but points out that this is a consequence of the scheme which has been approved by Parliament. The Judge considers the possible impacts on the family left behind but again directs himself that more than normal consequences are required to outweigh the public interest. For the reasons which he gives at [79(g) and (h)], the Judge concludes that the adverse impact on the Appellant's wife and children does not meet the threshold of being unduly harsh and does not amount to very compelling circumstances over and above that exception.

44. The Judge did not have the benefit of the Supreme Court's judgment in KO (Nigeria) v SSHD [2018] UKSC 53 about the meaning of "unduly harsh" as being an elevated standard of something which is already "severe, or bleak". However, his analysis of the adverse consequences of deportation for the Appellant's wife and family and conclusion that these do not meet the necessary thresholds are consistent with the application of that high standard. In response to the paragraph of the Appellant's grounds which suggests that the Judge should have taken account of the fact that the sentence was at the lower range of an over four years sentence we note that the Judge was plainly aware of the length of the sentence and that he applied the correct test, namely that in section 117C (6). We do not consider that he erred in this respect and we find nothing in the analysis contained in KO (Nigeria) to suggest that he did.

45. The Judge sets out at [79(i) to (l)] his conclusions about the weight to be given to the public interest and other factors which might militate in the Appellant's favour. In so doing, he takes account of the Appellant's lack of offending since the index offence, the low risk of reoffending and his co-operation during the period of his licence. However, the Judge also had regard to the wider effects of the Appellant's offending when considering the public interest. Those impacts are relevant as we have already made clear.

46. The Supreme Court at [50] of the judgment in Hesham Ali advocated what the approach should be for a Tribunal tasked with carrying out an assessment of the proportionality balance in Article 8 ECHR. That is the exercise which the Judge carried out in this case at [79] of the Decision. We discern no error in his approach and, for the reasons which we have already given, we can find no error either in the Judge's evaluation of the evidence or his findings on that evidence. The findings and conclusions are ones which are open to the Judge on the evidence. Whilst there are some findings which are positive and are to be given some weight in the Appellant's favour (such as lack of reoffending and low risk of offending), those are considered and balanced in the equation. The conclusions cannot be said to be irrational.

47. It follows that we are satisfied that the Decision does not contain an error of law. Accordingly, we uphold the Decision.

DECISION

We are satisfied that the Decision does not contain a material error of law. We uphold the decision of First-tier Tribunal Judge C H Bennett promulgated on 24 May 2017 with the consequence that the Appellant's appeal stands dismissed

Signed Dated: 12 February 2019
Upper Tribunal Judge Smith