



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/14139/2018

THE IMMIGRATION ACTS

Heard remotely at Field House
On 30 April 2021 *via Skype for Business*

Decision & Reasons Promulgated
On 8 June 2021

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

FN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H. Wilson, BL, instructed by Bigger & Strahan Solicitors

For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were primarily the appellant's bundle from before the First-tier Tribunal, a supplementary bundle submitted on 29 April 2021, and the respondent's bundle, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content the proceedings had been conducted fairly in their remote form.

1. The appellant is a citizen of Zimbabwe born on 7 August 1973. He appeals against a decision of the respondent dated 18 December 2018 to refuse his human rights and protection claim, made on 14 January 2016 in the context of a request to revoke a deportation order dated 24 July 2013. The appellant's appeal against the refusal of this human rights and protection claim was originally heard by First-tier Tribunal Judge Gillespie who, in a decision and reasons promulgated on 29 October 2019, dismissed the appeal. By a decision dated 20 August 2020, Upper Tribunal Judge Canavan found that the decision of Judge Gillespie involved the making of an error of law and set it aside in its entirety, with no findings of fact preserved. Judge Canavan directed that the matter be reheard in this tribunal. It was in those circumstances that the appeal came before me. Judge Canavan's decision may be found in the **Annex** to this judgment.
2. I should add that the delay between the appellant's protection claim and the hearing before Judge Gillespie on 25 July 2019 appears to be attributable to the Secretary of State originally refusing the protection claim on 15 November 2017 in circumstances which initially did not attract a right of appeal. The appellant brought proceedings for judicial review challenging the certification of the claim under section 96 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). Permission was granted by McCloskey J, as he then was, on 26 February 2018 sitting in the High Court of Justice in Northern Ireland. The respondent issued a further decision on 8 August 2018 which still did not attract a right of appeal, which was later withdrawn by the decision presently under challenge, which does attract a right of appeal.

Factual background

3. There has been no challenge to the respondent's decision to refuse the appellant's protection claim. The focus of the appeal before Judge Gillespie, and the focus of the proceedings before me, related to the appellant's rights under Article 8 of the European Convention on Human Rights ("the ECHR"), in particular as they related to his son, SC, an Irish citizen born in September 2003, and his best interests as a child.
4. The appellant was admitted to the UK as a visitor in 2000. He later applied, unsuccessfully, for leave to remain as a student, and an appeal against a decision refusing him leave in that capacity was dismissed in 2001. In October 2007, the appellant was fined for driving without insurance. In January 2008, he was fined for driving without due care and attention. In December 2012, he was sentenced to four months' imprisonment, suspended for two years, for making off without paying, the possession of articles used in fraud and the possession of a class B drug. Further motoring convictions followed in February 2013 for driving without insurance and without a licence. On 18 May 2013 at Laganside Crown Court, Belfast, the appellant was sentenced to 18 months' imprisonment for three offences of false representation, entering the UK lawfully but remaining without leave, using a false instrument,

possession of a false identity document with intent, and two counts of obtaining property by deception. The appellant had used false ID papers to assume the identity of another in order to work illegally. Those offences triggered the automatic deportation regime in the UK Borders Act 2007 ('the 2007 Act') leading to the Secretary of State making a deportation order against him on, as I have set out, 23 July 2013.

5. The appellant originally appealed against the deportation order to the First-tier Tribunal. In a decision and reasons promulgated on 10 February 2014, a different constitution of the First-tier Tribunal dismissed his appeal.
6. It is common ground that the appellant meets the criteria for deportation: he has been sentenced to a single period of imprisonment greater than 12 months. The focus of the appellant's case is that he is the sole carer for his son, SC. He has a *Statement of Special Educational Needs* that has recently been updated. The appellant contends that it would be 'unduly harsh' for SC to remain in the United Kingdom without him, and that it would be unduly harsh for SC to be expected to accompany him to Zimbabwe. SC lives with the appellant because SC's mother JJ, who lives in England, was unable to meet his needs when he lived with her previously. That is why SC moved to Northern Ireland to live with the appellant. SC has thrived under the appellant's leadership and support since living with him Belfast. SC last lived with his mother until December 2015 when he went to live with the appellant. SC's best interests are for the appellant to remain with him in the UK.
7. On behalf of the Secretary of State, Mr Tufan focussed his submissions on whether it would be unduly harsh for SC to remain here without the appellant. He is not far from his 18th birthday, submitted Mr Tufan. His mother can look after him for the remaining few months in which he will need her support as a minor. He will be able to relocate to live with her in England, and access equivalent educational support to that he enjoys in Belfast, as he did previously when living in with her in England.

Legal framework

8. Section 32 of the 2007 Act defines those, such as this appellant, who have been sentenced to a period of imprisonment of at least 12 months as a 'foreign criminal'. Pursuant to subsection (5), the Secretary of State must make a deportation order in respect of such a foreign criminal. There are a number of exceptions contained in section 33, of which the only relevant exception is 'Exception 1', namely that 'removal of the foreign criminal in pursuance of the deportation order would breach – (a) a person's [ECHR] rights...' (see section 33(2)(a)).
9. The essential issue for my consideration is, therefore, whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellant to be deported to Zimbabwe. This issue is to be addressed primarily through the lens of public interest considerations contained in Part 5A of the Nationality, Immigration and Asylum Act 2002, in particular section 117C (additional considerations in cases involving foreign criminals): see section 117A(2). The Immigration Rules also set out the Secretary of State's views as to where the public interest balance lies in relation to matters relating to Article 8.

10. While, as is her practice, the Secretary of State addressed the appellant's human rights application as an application to revoke a deportation pursuant to paragraphs 390 to 392 of the Immigration Rules, it was common ground at the hearing that my assessment must be pursuant to the considerations in Part 5A of the 2002 Act. When deciding whether to revoke a deportation order, paragraph 390A requires the factors contained in paragraphs 398, 399 and 399A of the Immigration Rules to be considered. Those paragraphs replicate the statutory framework contained in section 117C of the 2002 Act which, pursuant to CI (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 2027 at [21] meant that it is, 'generally unnecessary for a tribunal or court in a case in which a decision to deport a "foreign criminal" is challenged on article 8 grounds to refer to paragraphs 398-399A of the Immigration Rules, as they have no additional part to play in the analysis.'
11. It is for the appellant to establish that his deportation would interfere with his protected rights under Article 8(2) of the ECHR. It is for the Secretary of State to demonstrate that any interference with the Article 8 rights of the appellant or his family would be justified.
12. It is settled law that the best interests of the child are a primary consideration when considering whether the removal of an appellant under Article 8 would be proportionate, see ZH (Tanzania) [2011] UKSC 4 and Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 at [10] per Lord Hodge.

The hearing

13. Due to the need to guard against the spread of Covid-19, the parties appeared before me remotely. I sat in public at Field House. At the conclusion of the hearing, the parties confirmed that no fairness concerns had arisen from the proceedings having been conducted remotely. Despite the modalities of the hearing, this appeal was at all times a Northern Ireland case, as stated by the Vice-President in his case management directions dated
14. On 29 April 2021, the appellant provided a supplementary bundle. That was in breach of earlier directions I had issued following a case management hearing conducted on 8 March 2021 requiring him to make an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on new evidence by 5 April 2021. I was told that the delay was attributable to seeking an updated *Statement of Special Educational Needs*. There was no objection from Mr Tufan to the materials being admitted at that stage.
15. The appellant adopted his witness statement dated 16 April 2021 and was cross-examined. I will outline the salient aspects of his evidence to the extent necessary to give reasons for my findings.

Discussion – Article 8 ECHR

16. Ms Wilson provided a skeleton argument on behalf of the appellant, and Mr D. Clarke, Senior Home Office Presenting Officer, had previously submitted a skeleton argument on behalf of the Secretary of State. I agreed with the parties at the outset of the hearing that the focus of the appeal would be Article 8 alone.

17. It is common ground that the automatic deportation provisions are engaged in relation to the appellant. He can only resist deportation by demonstrating that his deportation would breach his ECHR rights (see section 33(2)(a) of the 2007 Act). In turn, that requires consideration of Part 5A to the 2002 Act.
18. The relevant exception to deportation may be found in section 117C of the 2002 Act is *Exception 2*. It provides:
- ‘(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C’s deportation on the partner or child would be unduly harsh.’
19. It is common ground that SC is a ‘qualifying child’ on the basis that he has lived in the UK for a continuous period of at least seven years. The essential question is whether it would be ‘unduly harsh’ for him to be expected to remain in the absence of SC. While not formally conceding that it would be unduly harsh for him to accompany the appellant to Zimbabwe, Mr Tufan did not argue that that would be a realistic prospect. The focus of the proceedings was whether it would be ‘unduly harsh’ for SC to remain in this country without the appellant.
20. There has been extensive judicial consideration of what is meant by the term ‘unduly harsh’. Both parties took me to KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, and HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176. In KO Nigeria, the Supreme Court held that the notion of ‘due’ harshness is objectively set, by reference to the public interest in the deportation of foreign criminals. It is not a moveable quality, such that some children are expected to tolerate greater levels of harshness from a deported parent, depending on the severity of the underlying offending. In HA (Iraq), the Court of Appeal held that where Lord Carnwath held at [23] of (KO (Nigeria)) that ‘[o]ne is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent,’ he was not purporting to establish a baseline threshold of ‘ordinariness’ applicable in the lives of all children, by reference to which all assessments of ‘unduly harsh’ must be assessed. Ms Wilson highlights the following passage from [55] of HA (Iraq):
- ‘There is no reason in principle why cases of "undue" harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining

a relationship with the deported parent; and of course by all the individual characteristics of the child.'

21. In addition, I drew the attention of the parties to TD (Albania) v Secretary of State for the Home Department [2021] EWCA Civ 619, which had been handed down the day before the hearing. At [22], Peter Jackson LJ summarised the import of HA (Iraq) in these terms:

'The decision in HA (Iraq) does no more than explain that what is required is a case-specific approach in which the decision-maker addresses the reality of the child's situation and fairly balances the justification for deportation and its consequences. It warns of the danger of substituting for the statutory test a generalised comparison between the child's situation and a baseline of notional ordinariness. It affirms that this is not what KO (Nigeria), properly understood, requires.'
22. What is 'unduly harsh' for SC is, therefore, a highly individualised assessment. However, I must emphasise that a degree of harshness is to be regarded as 'acceptable or justifiable'. My task is to determine, by reference to the evidence in this case and SC's best interests, whether the inevitable harshness that would follow from the appellant's deportation would stray beyond that 'acceptable' (for want of a better term) level.
23. By way of a preliminary observation, there can be no suggestion that it would be anything other than unduly harsh for SC, an Irish child, to relocate to Zimbabwe. I have not been taken to any evidence that would suggest otherwise. While Mr Tufan did not formally concede the point, equally he advanced no submissions that this would be an appropriate course. The appellant's case that it would be unduly harsh for SC to relocate to Zimbabwe was effectively unchallenged. For my own part, I see no basis independently of the appellant's position and the respondent's acquiescence to conclude that it would be anything other than unduly harsh SC to relocate to Zimbabwe. The focus of these proceedings is, therefore, whether it would be 'unduly harsh' for SC to remain here in the absence of the appellant.
24. Ms Wilson highlights how SC is wholly reliant for his educational and all other life needs on the appellant. SC lives with the appellant. SC is supported at school by the appellant, who attends all parent-teacher meetings, including those needed pursuant to SC's special educational needs. The *Statement* indicates that SC's cognitive ability is in the broad average range, that his working memory is in the low average range, and that his processing speed is in the high average range. A previous assessment in his nursery year indicated that SC had moderate learning difficulties. He has difficulties with organisation and is forgetful regarding school equipment. An autism referral has been made. I have been provided with the Appendices to the original version of the document in the original FTT trial bundle.
25. In his witness statement dated 16 April 2021, the appellant outlines the depression, loneliness and low self-esteem experienced by SC. He has not coped well due to the pandemic, and had to be permitted to attend school to use the internet there. The family has very little money. The appellant writes at paragraph 10 that JJ would not be emotionally or mentally equipped to deal with SC's needs. JJ's brother spent ten

years in a secure psychiatric hospital, and JJ fears that SC 'might end up like her brother'. In cross-examination, Mr Tufan challenged the appellant as to why there was no statement from JJ; he explained there had not been time to obtain one. His solicitors were more concerned with the welfare of SC, he explained. JJ is fragile mentally and had a breakdown when she cared for SC previously, when the appellant was in prison. He considers that she is not in a state mentally. The family have had social workers involved previously.

26. The appellant said that he has a brother who also lives in Belfast. He has three children; SC's cousins. There will be no room for SC to stay with them; the family live in a two bedroomed house. His brother's wife does not work. The family would not be able to afford to look after SC.
27. There was a statement from SC dated 16 April 2021, which supplemented a statement he prepared for the proceedings before Judge Gillespie, dated 18 July 2019. SC did not attend the hearing because, I was told, he was sitting an exam. At the case management hearing on 8 March 2021, I canvassed the issue of whether SC would need to attend to be cross-examined, and explained that 'ground rules' could be established in order to ensure reasonable adjustments could be made to accommodate his vulnerabilities, in line with the Joint Presidential Guidance Note No. 2 of 2010 and the Equal Treatment Bench Book. Ms Wilson did not apply for an adjournment for SC to attend in person.

SC's best interests

28. SC's best interests are to remain in Northern Ireland with the appellant. In Belfast he enjoys a supportive educational environment. His *Statement of Special Educational Needs* has enabled him to receive additional support, including during the restrictions occasioned by Covid-19. In his statement dated 18 July 2019, SC writes about his negative experience of living with his mother until December 2015. JJ did not spend time with him. Her younger children were a distraction. He, SC, was rebellious and not productive. He spent time in a gang. He left the gang and they hurt his brothers. He wants to finish school and go onto university. The *Statement of Special Educational Needs* states that, 'when in Mum's care she was not always in a position to see his needs' (see page 71, Supplementary Appeal Bundle).
29. By contrast, time spent with the appellant in Belfast has been beneficial for SC. Under the appellant's guidance, he lost weight through exercising. He has cousins and friends in Belfast. He has known stability since December 2015. Through the *Statement of Special Educational Needs*, he receives the additional support necessary to complete his studies, including through repeating his current year.
30. I find that it is in SC's best interests for the appellant to remain with him in Northern Ireland. Although SC has cousins nearby, I accept the appellant's evidence that the two bedroomed home which already houses his uncle's family of five would be unable to provide accommodation commensurate to that he currently enjoys with his father.
31. While SC's best interests are a primary consideration, they are not the sole consideration; the cumulative force of other factors may outweigh his best interests.

There are certain features of this case which contextualise the assessment of SC's best interests.

32. First, he is seventeen and a half years old; at the time of the hearing, he was around five months from attaining the age of majority. The difficulties he would have experienced as a twelve year old living with his mother will necessarily not present in the same way now. There is no evidence that those difficulties will continue to be present. At page 91 of the respondent's bundle is a letter from JJ dated 13 January 2016 describing how she previously suffered from alcoholism and struggled to handle SC. The letter represents the position over five years ago when SC was twelve years old. No contemporary evidence has been provided in relation to JJ.
33. Secondly, there was no recent statement from JJ addressing the matters which are said to characterise her care for SC. There is nothing to suggest that SC cannot live with his mother at this time.
34. Thirdly, there was no report from an independent social worker or other similar authority addressing the matters asserted on behalf of the appellant in relation to SC. Again, there is nothing to suggest that SC cannot live with his mother at the present time, with the benefit of the mentoring and support he has received from his father over the course of the last five years.
35. Fourthly, aspects of the *Statement of Special Educational Needs* are plainly out of date, and have clearly been carried over from earlier versions of the document. For example, the current version, at page 71 of the Supplementary Bundle, states:

'Psychological advice (Appendix D) indicates that SC has *recently returned* to Northern Ireland from England where he held a statement of special educational needs of the speech, language and communication difficulties.' (Emphasis added)

It plainly cannot be right to describe SC as having 'recently returned' to Northern Ireland from England. The evidence before me suggests that that took place in December 2015 or January 2016: see the original Appendix D at page 41 of the FTT bundle. It appears that the above narrative was lifted from the original *Statement*, at page 21 of the original FTT bundle. In the absence of separate updating evidence of the sort outlined above, the weight to be attached to this document's impact on the present assessment does need to be calibrated accordingly.

36. The references in the *Statement of Special Educational Needs* to SC being referred for an autism assessment featured equally in the updated version as they do in the earlier version. I have no evidence that such an assessment has actually taken place, still less that there is been an autism diagnosis. As Mr Tufan submits, aspects of the *Statement* are of limited import.
37. It follows that, while I accept that the appellant's deportation would entail a degree of harshness for SC, whether such harshness would enter the territory of undue harshness is a different question. There is a paucity of evidence concerning the situation with SC's mother. She has housed SC in the past. There were difficulties in that she was unable to 'see' his needs, it seems due to the pressures of being a single mother to three other small children, as outlined in the *Statement*. However, SC is

much older now. He had the benefit of a Statement of Educational Needs when he lived with his mother previously, issued by the English education authorities, and there is no suggestion that he could not revert to the oversight of the relevant educational authority in England, upon his return. The system has demonstrated a degree of flexibility, enabling SC's needs to be tracked from England to Northern Ireland. I have not been informed that SC's current school is a special school, or otherwise providing educational provision of the sort that would not be available to SC in England. I find that there would be a sufficient degree of continuity of educational provision in the event that SC returned to England to live with his mother.

38. I accept that it would be a significant blow to SC for his father to be deported and to have to move to England to resume living with his mother. He is dependent upon his father. But the evidence concerning the full scope and breadth of the impact is limited. SC is only a few months away from the age of majority; he will be old enough to pay return visits to his father without being accompanied. While it was stressful living with JJ when he was 12 years old, there is nothing before me to suggest that she would not be able to provide the appellant with at least some assistance now. SC's cousins and uncle live in the UK. He will not be without any family in the UK in the event of his father's deportation. SC and his father would be able to remain in contact on social media.
39. While there is not a baseline notional level of ordinary harshness against which to measure what amounts to being 'unduly harsh', it is nevertheless an elevated threshold. I do not consider that the evidence in the present matter meets that threshold. The hardship will not be undue. I find that Exception 2 is not met out.
40. The remaining task is to determine whether there are 'very compelling circumstances' over and above the exceptions in section 117C, for the purposes of section 117C(6). That subsection enables account to be taken of other factors, not addressed by the exceptions, in order to ensure an overall result that is compliant with the Convention. Pursuant to NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, although section 117C(6) is expressly addressed only to offenders with sentences of at least four years, those with lower sentences are still entitled to benefit from the potential protection of this subsection. As recently held by the Strasbourg Court in Unuane v The United Kingdom (Application no. 80343/17), it is necessary to take into account all factors telling for and against deportation (see, for example, [72]). In Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, the Supreme Court encouraged the use of a so-called 'balance sheet' approach in order to perform this assessment, having noted the weight which the Secretary of State's view of the public interest in the deportation of foreign criminals attracts (see [53]). I will conduct a balance-sheet assessment to determine the proportionality of the appellant's prospective removal.
41. Factors in favour of the appellant's deportation are as follows:
 - a. The deportation of foreign criminals is in the public interest (section 117C(1) of the 2002 Act);

- b. The appellant is a foreign criminal, having offended persistently, committing offences which exploited his unlawful residence in the country;
- c. The appellant does not meet either of the statutory exceptions to deportation, a factor to which weight should be attached;
- d. The maintenance of effective immigration controls is in the public interest, and there is no basis under the rules or Part 5A of the 2002 Act (save for this assessment of 'very compelling circumstances') for the appellant to remain in the UK;
- e. The appellant has been under an obligation to leave the UK since the conclusion of his earlier appeal proceedings before the First-tier Tribunal, in 2014, but did not.

42. Factors mitigating against the appellant's removal include:

- a. The strength and breadth of his relationship with SC, and the likely adverse impact upon SC of the appellant's deportation (albeit that it would not be 'unduly harsh' within the meaning of section 117C(2)). SC's interests are a primary consideration;
- b. The appellant has not committed any offences for around eight years, and the longest sentence of imprisonment he served was 18 months which, while still serious, is at the lower end of the spectrum of severity;
- c. The appellant has lived in this country, albeit mostly as an overstayer, for over 20 years.

43. Drawing these factors together, I consider that the public interest in the deportation of foreign criminals outweighs the factors mitigating against his removal. The cumulative weight of the factors in favour of the appellant's removal outweigh those in favour of permitting him to remain, even taking SC's best interests as a primary consideration. SC will remain a child for only a few months. He will be adequately cared for in this country, by his mother, and he will have access to his remaining family members, and sufficient specialised educational provision wherever he lives in the UK. SC's residence is secure here, as an Irish citizen. While the appellant has lived here for over 20 years, save for his initial visitor's visa, the currency of his residence has been unlawful and he has had no basis to remain here. On the basis of the evidence before me, the impact on SC will be harsh, but not *unduly* so. The appellant's deportation will be proportionate.

44. The appellant cannot demonstrate that there are very compelling circumstances over and above the exceptions. His deportation would be proportionate. This appeal is dismissed.

45. The appeal is dismissed on human rights grounds.

Postscript (i) - Zambrano

46. There had been a suggestion that the appellant's deportation would be inconsistent with the principle enunciated in the *Zambrano* Case C-34/09 line of authorities. Ms Wilson confirmed that she did not pursue those arguments. For completeness, I add

that nothing in the *Zambrano* line of authorities would have led to a different conclusion. On my findings, the SC will not have to leave the UK, and his relationship with the appellant does not demonstrate such dependency so as to compel him to leave the territory of the EU in the event of his father's deportation (assuming, which is by no means clear, that the *Zambrano* doctrine applies in the same way now that the UK is no longer a member State of the European Union).

Postscript (ii) – protection appeal

47. There has been no challenge to the Secretary of State's refusal of the appellant's protection claim. For completeness, I record formally that, to the extent his notice of appeal amounted to an appeal against that aspect of the Secretary of State's decision, the appeal is dismissed on protection grounds also.

Anonymity

48. As SC is a child, I maintain the anonymity direction already in force.

Notice of Decision

The appeal is dismissed on human rights grounds.

The appeal is dismissed on asylum 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 *Stephen H Smith*

Date 4 May 2021

Upper Tribunal Judge Stephen Smith



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/14139/2018

THE IMMIGRATION ACTS

Decided without a hearing
under rule 34 (P)

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

FN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. 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.

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 18 December 2018 to refuse a protection and human rights claim in the context of a decision to refuse to revoke a deportation order.
2. First-tier Tribunal Judge S. Gillespie ("the judge") dismissed the appeal in a decision promulgated on 29 October 2019. The judge concluded that it would not be 'unduly harsh' on the appellant's son to relocate to Zimbabwe with his father or to remain in the UK with his mother if the appellant is deported.
3. The appellant appealed the First-tier Tribunal decision on the following grounds:
 - (i) The judge failed to apply the relevant statutory framework and failed to make any findings relating to the weight to be given to public interest considerations.
 - (ii) The judge failed to consider relevant evidence relating to the special needs of the child, failed to give adequate reasons for rejecting the credibility of the witnesses' evidence relating to the best interests of the child and failed to give adequate consideration to the child's evidence.
 - (iii) The judge failed to make any clear findings as to what was in the best interests of the child.
4. First-tier Tribunal Judge Bulpitt granted permission to appeal to the Upper Tribunal in an order sent on 07 January 2020 on the ground that it was arguable that the judge failed to give adequate reasons for his decision, failed to take into account relevant evidence or to structure the decision within the relevant legal framework.
5. In the light of the need to take precautions against the spread of Covid-19 the Upper Tribunal reviewed the file and sent directions to the parties on 02 April 2020. The Vice-President expressed the preliminary view that the question of whether the First-tier Tribunal decision involved the making of an error of law could be determined on the papers.
6. The appellant filed written submissions on 16 April 2020 and the respondent on 22 April 2020. However, it was clear from the respondent's response that she had not had sight of the appellant's written arguments. In an order sent on 28 May 2020, Upper Tribunal Judge Owens directed the appellant to serve another copy of his written arguments on the relevant Home Office Presenting Officer and to the usual Home Office address. She directed the respondent to respond with any further submissions within 14 days of the date of the order.
7. At the date this decision is prepared, the Upper Tribunal has no record of a further response from the respondent. I am informed by the court administration that currently there is no significant delay in processing emails filing written submissions. Even considering the pressures of work arising from the Covid-19 pandemic, I am satisfied that the respondent has had more than enough time to make any further submissions with sight of the appellant's arguments. Neither party objected to the appeal being determined without a hearing. Bearing in mind the overriding objective

of the Procedure Rules I am satisfied that I can proceed to determine the appeal without a hearing based on the written submissions filed by the parties.

Decision and reasons

8. I have considered the First-tier Tribunal decision, the grounds of appeal and the written submissions made by both parties. I am satisfied that there is merit in the appellant's submissions and that the First-tier Tribunal decision involved the making of an error on a point of law.
9. The appellant is a Zimbabwean national who has lived in the UK since 2000. He overstayed his initial visit visa and remained without leave thereafter. The index offence that gave rise to the deportation order was an offence of fraud, for which the appellant was sentenced to 18 months' imprisonment in 2013. The appellant's appeal against the original decision to make a deportation order was dismissed by the First-tier Tribunal in 2014. At that stage the appellant's relationship with the mother of his children was found to be somewhat unclear. The panel also concluded that there was insufficient evidence to show that he was the father of the children, who lived with their mother.
10. The situation was quite different by July 2019 when the First-tier Tribunal considered the most recent decision. Six years had passed with no further convictions recorded against the appellant, the respondent accepted that he was the father of the oldest child ("SC"), that SC was an Irish citizen, that SC had special educational needs, and that the child had lived with the appellant since 2015. The appellant did not appear to rely on his relationship with his younger son (K). Neither the respondent nor the First-tier Tribunal consider the position relating to the appellant's other child.
11. The judge noted that the 2014 tribunal heard evidence from the appellant and the mother of his children but did not find them to be credible witnesses. The judge found that he could place little reliance on the evidence given by the appellant at the hearing in 2019 because (i) of the "entire history of the appellant's deportation proceedings"; (ii) because the appellant and his former partner were "simply not credible witnesses"; and (iii) because "the appellants' behaviour is characterised by persistent and flagrant dishonesty." [35]. Aside from these generalisations, no specific reasons appear to have been given for rejecting the evidence relating to the appellant's family circumstances given that most of the core issues about his parental relationship with the child were accepted by the respondent.
12. The judge failed to make any clear findings relating to the best interests of SC, which is an essential starting point before turning to consider whether deportation would be 'unduly harsh' on the child. The judge failed to engage with the evidence relating to SC's learning disabilities, which was contained in a comprehensive Statement of Special Educational Needs dated 13 June 2017 including medical and psychological assessments. The assessment outlined behavioural issues that supported the appellant's claim that SC came to live with him after his mother found his behaviour too difficult to deal with. The assessments stated that SC was "socially vulnerable", that he had "difficulty with transitions, new surroundings, new people etc.", and that

Seth's mother was not always able to be "alert to and mindful of [SC's] basic needs". SC, who was 15 years old at the date of the hearing, was old enough to give evidence and for his views to be given weight. He described the difficulties he faced when living with his mother, who was distracted with younger children. He said that he was beginning to hang out with friends in a gang. His mother could not cope and took him to his paternal aunt in Coventry. After that he went to live with his father in Belfast. He made new friends since moving to Belfast. His paternal uncle and cousins live nearby. His father helped him to exercise and to lose weight. SC said that he last spoke to his mother two months before the hearing and last saw her in person about five years ago. When he lived with his mum he was always moving about. He said that having to move again "is really going to mess with me".

13. The judge failed to consider this evidence adequately when assessing the credibility of the appellant's account of his family circumstances or the impact that deportation would have on the child. It was open to the judge to take into account the fact that the appellant was convicted of dishonesty offences, but it does not follow that the appellant's evidence could be rejected so comprehensively solely on that ground. No attempt was made to consider whether his account was consistent with the evidence before the First-tier Tribunal. No findings were made as to whether the judge accepted the evidence given by SC, which was also relevant to a proper assessment of the evidence given by the appellant.
14. The judge failed to conduct an evaluative assessment of the evidence in assessing whether it would be 'unduly harsh' for SC to live with his father in Zimbabwe. No consideration was given, even in the context of an Article 8 assessment, to the fact that the child is an Irish citizen: see *Ruiz Zambrano v Office national de l'emploi* [2011] EUECJ Case C-34/09. No consideration was given to the further disruption that would occur to a child who had already had a lot of upheaval in his life and who finds change difficult because of his learning disability. No consideration was given to the conditions the child might face in Zimbabwe or whether relevant support would be available for a child with his needs.
15. The judge failed to conduct an evaluative assessment of the evidence in assessing whether it would be 'unduly harsh' for SC to be separated from his father and would have to return to his mother. There was no evaluation of SC's evidence. No consideration was given to the child's history, the impact of further disruption to his life or whether there might be welfare concerns relating to his mother's ability to provide adequate care.
16. The judge failed to make any findings to explain why the evidence did not show that deportation would be 'unduly harsh' on the child or to indicate that he was aware of the nature of the relevant test. He failed to go on to conduct an overall balancing exercise to assess whether there were 'very compelling circumstances' that might outweigh the public interest in deportation taking into account all the circumstances including the appellant's length of residence, the best interests of the child and the fact that there had been no further convictions since 2013.

17. In short, the First-tier Tribunal failed to give anxious scrutiny to the evidence given the importance of the human rights issues involved. The reasoning was inadequate and failed to take into account relevant considerations. The findings were not linked clearly to the relevant legal framework, if at all.
18. For these reasons I conclude that the First-tier Tribunal decision involved the making of an error of law and must be set aside. The Upper Tribunal will normally remake the decision even if further fact finding is necessary.
19. Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, the Upper Tribunal is provisionally of the view that the remaking of the decision can and should be held remotely by video conference on a date to be fixed. The Upper Tribunal currently has no capacity to hold face to face hearings in Belfast due to the need to take precautions against the spread of Covid-19. The appellant and his son do not need the assistance of an interpreter and may be able to give evidence by video conference with the assistance of his legal representative.

Directions

20. **No later than 7 days** after these directions are sent by the Upper Tribunal (the date of sending is on the covering letter or covering email). The parties shall file and serve by email any objection to the hearing being a remote hearing at all/by the proposed means; in either case giving reasons.
21. **If there is an objection to a remote hearing**, the Upper Tribunal will consider the submissions and will make any further directions considered necessary.
22. **If there is no objection to a remote hearing**, the following directions supersede any previous case management directions and shall apply.
 - (i) **The parties** shall have regard to the Presidential Guidance Note: No 1 2020: Arrangements During the Covid-19 Pandemic when complying with these directions.
 - (ii) **The appellant** shall notify the Upper Tribunal and the respondent within 14 days of the date this order is sent:
 - (a) what witnesses, if any, will give evidence;
 - (b) whether any witness requires the assistance of an interpreter, and if so, in what language.
 - (iii) **The appellant** shall be responsible for compiling and serving an agreed consolidated bundle of documents which both parties can rely on at the hearing. Permission is given for up to date evidence to be filed, including any welfare assessments relating to the impact on the child if he were to go to Zimbabwe with his father or returned to live with his mother in the UK.

The bundle should be compiled and served in accordance with the Presidential Guidance Note [23-26] at least 14 days before the hearing.

23. The parties are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying.
24. Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB.
25. Service on the Secretary of State may be to [email] and to the original appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision will be remade at a resumed hearing in the Upper Tribunal

Signed *M.Canavan* Date 11 August 2020
Upper Tribunal Judge Canavan