



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00847/2012

THE IMMIGRATION ACTS

Heard at Belfast-Laganside
On 1 July 2013

Determination Promulgated
On 10 September 2013
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Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ZM
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. McGowan, Counsel instructed by McHugh Lynam Solicitors
For the Respondent: Mr A. Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 18 July 1971. He is a citizen of Tunisia. He came to the UK in 1997 with leave to enter as a spouse. A decision to make a deportation order against him was taken by the Secretary of State on 5 October 2012. That

decision was taken on the basis of the appellant's convictions on 18 April 2005 for grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861 involving two separate victims, and possession of an offensive weapon, being a keyring containing a blade. For those offences he received a total sentence of three years and three months' imprisonment. He has other convictions which are set out in detail below.

2. On 6 December 2012 his appeal against the decision to make a deportation order came before a Panel of the First-tier Tribunal consisting of First-tier judge S. Gillespie and non-legal member Mr B Yates whereby they dismissed the appeal. Permission to appeal against that decision having been granted, the appeal came before me.

Submissions

3. Mr McGowan relied on the grounds of appeal to the Upper Tribunal as well as the skeleton argument. He indicated that there were no ongoing contact proceedings in respect of the appellant's children, although it was initially suggested that there was documentary evidence before the First-tier Tribunal to the effect that contact proceedings were ongoing at that time. In fact, the relevant letter is dated 24 January 2013 and relates to proceedings in February 2013 which Mr McGowan accepted was correct and which could not therefore have been evidence before the First-tier Tribunal which sat in December 2012. I was informed that the family proceedings had been withdrawn on the advice of counsel. There was nevertheless evidence in the form C1 before the First-tier Tribunal of an application to the family court but there was no return date.
4. It was submitted that it was irrational of the Secretary of State to take into account the sentencing remarks given the delay between the offences and the decision to make a deportation order. The sentencing judge had stated that nothing would be served by sending him back to prison. The decision letter did not refer to other aspects of the sentencing remarks.
5. The Secretary of State had only considered the Immigration Rules not Article 8 proper. I was referred to an academic article from Westlaw UK entitled "Outcomes aren't all: defending process-based review of public authority decisions under the Human Rights Act" by David Mead relating to the suggestion that there was a failure on the part of the Secretary of State in terms of process in relation to Article 8.
6. The First-tier Tribunal's determination did not deal with the question of whether the appellant's deportation was conducive to the public good and does not refer to case law on the public interest issue, the issue of delay and whether there was sufficient evidence for a decision to be taken under section 3(5) of the Immigration Act 1971.
7. Mr Mullen submitted that the decision to make a deportation order followed the appellant's convictions in 2010. By the time of the deportation decision he had

four convictions. The Secretary of State was entitled to have regard to all those considerations and the delay did not render the decision unlawful, albeit that delay may have an affect on the proportionality assessment. I was referred to various factual matters which it was submitted supported the decision of the Secretary of State and the conclusion of the First-tier Tribunal.

8. It was conceded that the appeal before the First-tier Tribunal was not an 'automatic deportation'. However, that error by the First-tier Tribunal did not require the decision to be set aside.
9. Even if the 'new' Article 8 Rules did not apply, the Tribunal went on to consider Article 8 in any event. Through whatever prism the First-tier Tribunal had looked at the decision they would have come to the same conclusion.
10. It was implicit that the family proceedings had only been initiated for the purposes of the deportation proceedings. He had not undertaken those proceedings until 2012. The First-tier Tribunal had considered the question of the family proceedings. In any event, now the family proceedings had ground to a halt.

My assessment

11. In order to put my conclusions into context it is necessary to set out some further background to the appeal. On 18 April 2005 the appellant was convicted, after pleas of guilty, of two offences of causing grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861, against two individuals. He was also convicted of having an offensive weapon, namely a keyring containing a blade. The offences took place on 24 April 2003. He received sentences totalling three years and three months imprisonment.
12. According to the Secretary of State's summary in her appeal bundle, he was convicted in the Magistrates Court on 3 November 2008 of breach of a non-molestation order and sentenced to six months' imprisonment suspended for two years. On 2 March 2009 he was convicted of disorderly behaviour and fined £350. On 22 February 2010 he was convicted of two offences of breach of a non-molestation order, assault on police and "resisting police". For all offences he received a sentence of six months' imprisonment suspended for two years, all to run concurrently. Seemingly also on 22 February 2010 he was convicted of breach of a non-molestation order and sentenced to three months imprisonment, although there may be some confusion in relation to the offences in February 2010 since the outcomes referred to appear inconsistent. On 15 August 2011 he was convicted in the Magistrates Court of disorderly behaviour, attempted criminal damage and resisting police. He received concurrent sentences of five months' imprisonment.
13. He has two children, CM born on 12 May 2005 and SJM born on 13 November 1997. It is accepted that he has not had contact with SJM since 2003, although there had been contact proceedings going on until 2008 at which point there was a

court order preventing him from bringing further contact proceedings without leave of the court and he had been denied legal aid to challenge that ruling.

14. The decision to make a deportation order expressly states that it is made pursuant to section 3(5)(a) of the Immigration Act 1971 ("the 171 Act"). It is not stated to be a decision under the automatic deportation provisions of the UK Borders Act 2007 ("the 2007 Act").
15. The First-tier Tribunal at [18] purported to consider the appeal with reference to the 2007 Act, stating that "It is in the public interest to deport where the Secretary of State must make a Deportation Order in accordance with Section 32 of the UK Border[s] Act 2007". In the respondent's 'Rule 24' response to the grounds of appeal to the Upper Tribunal it was accepted that the First-tier Tribunal misdirected itself in considering the decision as an automatic deportation, albeit contending that this error was not material to the outcome.
16. It is clear that there is an error of law in the decision of the First-tier Tribunal which erroneously considered the appeal as an automatic deportation decision under section 32(5) of the 2007 Act. The question is, does this require the decision to be set aside.
17. Related to this issue are other aspects of the grounds of appeal whereby at various points it is contended that the Tribunal erred in law by failing to require the Secretary of State to establish lawful grounds for deportation (C), failing to allow the appeal as being not in accordance with the law, and failing to find that no lawful grounds for deportation had been established.
18. It is not suggested that paragraphs 396 and 398 are inapplicable by reason of the date of the immigration decision as against the date of the introduction of those Rules. Paragraph 398 refers to deportations that are conducive to the public good. In the case of this appellant his convictions in 2005, resulting in a term of three years and three months' imprisonment are relied on.
19. I do not accept that the Secretary of State has not established any basis for the decision to make a deportation order, or no valid ground under which the appellant is liable to deportation ([14c.] of the grounds of appeal). It is expressly stated in the immigration decision itself that his deportation is conducive to the public good.
20. At [14d.] of the grounds it is said that the Secretary of State erred in law by applying paragraph 398 because it was irrational and otherwise contrary to administrative law to take into account the sentence of 39 months, given the delay of five and a half years before taking the immigration decision. However, those administrative law principles are not applicable in the circumstances of this appeal where there was an immigration decision which generated a right of appeal before the Tribunal whereby the Tribunal would be required to consider proportionality as part of its consideration of the Article 8 ground of appeal.

21. Whilst the decision in MF (Article 8 – new rules) Nigeria [2012] UKUT 00393(IAC) is to the effect that the ‘Article 8’ rules were not a complete analogue of Article 8 proper, it was nevertheless concluded that the Secretary of State was entitled to make those rules which included requirements that were, within UK law, extraneous to Article 8. Thus, the reference in the reasons for decision letter to a requirement of exceptional circumstances does not render the Secretary of State’s decision not in accordance with the law as the grounds appear to suggest. The Tribunal in MF did not itself conclude that the immigration decision in that case was not in accordance with the law.
22. Similarly, whilst it is at least arguable that the decision letter did not deal with Article 8 in its ‘pure’ form, as distinct from under the Article 8 immigration rules, I do not accept that a failure to deal with Article 8 renders the decision unlawful, and that the First-tier Tribunal should have so found. This issue is referred to in the skeleton argument as a “procedural failure” and reliance is placed on the article by David Mead (see paragraph 5 above). However, as was acknowledged on behalf of the appellant, and is recognised in that article, the weight of authority in the three House of Lords decisions identified there is against the proposition contended for on behalf of the appellant. The article by David Mead, however interesting and compelling it may be from an academic perspective, does not have any impact on the issues I have to determine.
23. There is no merit in the contention in the last sentence of [14e.] of the grounds to the effect that the Tribunal erred by conducting its own consideration of Article 8. It was bound to consider Article 8, it having been raised as a ground of appeal to the First-tier Tribunal (see section 86(2) Nationality, Immigration and Asylum Act 2002).
24. The grounds contend that the First-tier Tribunal misstated the burden of proof at [3] where it stated that the burden of proof is on the appellant whereas in a deportation case it is for the Secretary of State to establish the facts relied on in favour of deportation. This apparently standard paragraph used by the Panel is not apt in a deportation case such as this where the Secretary of State does need to establish that the appellant is not a British citizen and that his deportation is conducive to the public good. However, when the determination overall is considered it is apparent that the Panel did assess the evidence in terms of whether his deportation was conducive to the public good. I also bear in mind the presumption in paragraph 396 that where a person is liable to deportation the presumption shall be that the public interest requires deportation.
25. I am not satisfied that there is any merit in the suggestion that the Secretary of State’s decision was unlawful on the basis of a failure to take into account aspects of the sentencing remarks in relation to the grievous bodily harm offences. The passages relied on in support of this argument relate to the sentencing judge having stated that there was no need for the appellant to spend further time in prison. However, the fact is that it was decided that the offences merited a significant custodial term and the seriousness of the offences is reflected in that

part of the sentencing remarks quoted in the decision letter. Naturally, there is bound to be some subjectivity in the selection of passages from the sentencing comments but that in no way makes the Secretary of State's decision unlawful on the basis of irrationality as suggested on behalf of the appellant.

26. It is said that the First-tier Tribunal made a mistake of fact leading to unfairness when it appeared to doubt the existence of the appellant's child CM. At [24] it was said that no birth certificate had been provided. There was however, evidence in the form of proof of an application for an Order (in family proceedings) on a form C1 in relation to CM. The Tribunal itself referred to that document. Whilst therefore there was evidence of the existence of that child and the Tribunal was wrong to state otherwise at [24], it did in fact proceed on the assumption that there is such a child because there was consideration of the contact proceedings.
27. In relation to the contact proceedings, although the Tribunal had before it the C1 application it observed that there was no evidence that it had been filed with the court or that there was any return date. The Tribunal also noted that previous proceedings in 2011 resulted in his application being dismissed. The Panel referred to the decision in RS (immigration and family court proceedings) India [2012] UKUT 00218(IAC) and noted the lack of evidence of actual input by the appellant into the lives of his children.
28. The grounds criticise the Tribunal for the observation at [28] that there is "a pattern to be discerned in the way in which both mothers have apparently responded to whatever contacts he has made", on the basis of irrelevance and lack of supporting evidence for the observation. In fact, it does appear from [15] that the appellant himself said that contact with CM was stopped by his mother. At [14] there is reference to his last contact with SJM having been in 2003 and a court order preventing him from bringing further contact proceedings without leave of the court, and that he had been denied legal aid to challenge that decision. It seems to me that the Tribunal was justified in making the observation that it did. It is not an irrelevant consideration because it was a matter that potentially affected the prospects of future contact.
29. In any event, as indicated at [3] above, I was informed by Mr McGowan that there were now no ongoing contact proceedings and that the application that there was had been withdrawn. Those facts to a great extent supersede some of the matters raised in the grounds of appeal and in the skeleton argument.
30. The grounds at [26] contend that the Panel irrationally concluded at [29] that irrespective of the outcome of any family proceedings or the best interests of the appellant's children his deportation was merited. However, this was a conclusion the Tribunal was entitled to come to on the evidence. It was in any event not a conclusion that affected the outcome of the appeal because there were, and are, no contact proceedings and it is evident from the history of those proceedings that the best interests of the appellant's children are not served by his having contact with them.

31. There is however, merit in the further criticism of [29] of the determination. There it is stated that the court that sentenced the appellant to three months' imprisonment in 2010 for breach of a non-molestation order decided, having taken into account a pre-sentence report ("PSR"), that the offence was so serious that the public needed to be protected from harm. The Panel went on to state that "Considerations leading to that outcome clearly went beyond issues affecting Ms Henderson alone." The grounds argue that that conclusion of the First-tier Tribunal has no evidential basis and "the Tribunal erred in making an assumption."
32. It seems to me that this is a valid criticism of that part of the Tribunal's determination. Whilst not expressly stated in the grounds, it does not appear that the Panel had before it the pre-sentence report in respect of that conviction. In fact, when one looks at the summary of the appellant's offending contained in the decision letter, it records different sentencing outcomes for the breach of non-molestation order dealt with on the 22 February 2010, albeit that what the Panel recorded as a sentence of three months' imprisonment has not been disputed on behalf of the appellant.
33. So, not having before it the PSR it is impossible to see how the Panel concluded that the offence was so serious that the public then needed protection from harm. Indeed, logically a breach of non-molestation order would probably not be a basis for concluding that *the public* at large should be protected. Additionally, the reference to a Ms Henderson is puzzling. It may well be that this passage relates to another case entirely.
34. Those aspects of the determination at [29] do betray a want of care on the part of the Panel in drafting the determination. However, when considered in the context of the determination as a whole, in so far as they reveal an error of law for apparently taking into account irrelevant matters, that is not an error of law that requires the determination to be set aside. Even without those errors, the outcome of the appeal would not have been any different on the Panel's assessment of the evidence.
35. So far as delay is concerned, at [32] the Panel took into account that five years had elapsed between the convictions of 2005 for the serious offences of grievous bodily harm and possession of an offensive weapon, and the notification of his liability to deportation. There is reference in the determination to the decision in EB (Kosovo) [2008] UKHL 41 and [13]-[16] of the judgement. It is evident that the Panel took into account the issue of delay, identifying it as a relevant factor but concluding that it did not render disproportionate the decision to remove the appellant for the reasons given.
36. I return now to the question of whether the error of law by the First-tier Tribunal in relation to automatic deportation requires the decision to be set aside. In stating at [18] that it is in the public interest to deport where the Secretary of State must make a deportation under section 32 of the 2007 Act the First-tier Tribunal seems

to have had in mind section 32(4) which provides that the deportation of a “foreign criminal” is conducive to the public good. Nevertheless, it went on to make its own assessment of whether deportation was conducive to the public good, albeit expressing the matter in terms of the public interest, referring to his convictions not only for the most serious offences but those committed subsequently.

37. The appellant plainly is and was someone who is liable to deportation under section 3(5) of the 1971 Act because he is not a British citizen and the Secretary of State deemed his deportation to be conducive to the public good. The First-tier Tribunal correctly stated, with reference to paragraph 396, that where a person is liable to deportation the presumption shall be that the public interest requires deportation.
38. In conclusion, although the First-tier Tribunal did err in law in referring to the deportation decision under appeal as an automatic deportation, that is not an error of law which requires the decision to be set aside. None of the other grounds establish any error of law or any that require the decision to be set aside.

Decision

39. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal however, is not set aside and the decision to dismiss the appeal stands.

Anonymity

Given that these proceedings involve children, I make an order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008). Consequently, this determination identifies the appellant's children, and the appellant, by initials only in order to preserve the anonymity of those children.

Upper Tribunal Judge Kopieczek

10/09/13