



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00788/2012

THE IMMIGRATION ACTS

Heard at Field House
On 9 April 2014

Determination Promulgated
On 25th July 2014

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

J.L.
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Avery
For the Respondent: Mr Jesurum

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were identified at the First-tier hearing, namely, the Secretary of State will from herein be referred to as the Respondent and Mr J.L. as the Appellant.

2. The Appellant is a citizen of Algeria born in 1972. He appealed against a decision of the Respondent made on 8 October 2012 to deport him pursuant to the automatic deportation provisions in Section 32 of the UK Borders Act 2007.
3. The history appears not to be in dispute. He entered the United Kingdom on 11 December 2003, with the help of an agent, claiming asylum the next day giving a false name and date of birth. His claim was refused on 10 February 2004. He appealed, that appeal being dismissed on 26 April 2004. Permission to appeal the dismissal was rejected on 24 August 2004, and his appeal rights were exhausted.
4. On 6 September 2010 the Appellant was convicted at Brent Magistrates' Court of driving a motor vehicle with excess alcohol, and was disqualified for twelve months. He was fined £200.
5. On 17 January 2012 he was convicted at Wolverhampton Crown Court of threatening to damage or destroy own property so as to endanger life, for which he was sentenced on 20 March 2012 to fifteen months' imprisonment. On 20 March 2012 a notice of liability to automatic deportation and questionnaire were faxed to the Appellant. He returned the completed questionnaire on 12 April 2012.
6. The Respondent in the refusal letter noted that the case fell to be considered under paragraph 398(b) of the Immigration Rules and that consideration had to be given to whether paragraph 399 or 399A applied.
7. In considering paragraph 399(a) it was noted that the Appellant has two daughters, Miss A, aged 7, and Miss D, aged 5, both British citizens. It was accepted that it would be unreasonable to expect the children to leave the UK. However, it was considered that there is another family member who is able to care for them, their mother Ms I.S., who is their primary carer and with whom they currently reside.
8. The Respondent noted letters from the representatives from amongst others the mother in support of the Appellant and acknowledged that he resided with the children prior to his imprisonment and 'may have played a significant part in their daily lives' but that since being imprisoned he had been apart from them.
9. The Respondent noted claims that the deportation would have a 'strong negative impact on the children' but considered that there was no evidence that the children's separation from their father would have a detrimental effect on them other than would be expected following his imprisonment for 'threatening to damage or destroy own property so as to endanger life'. Further, that his crime was committed against his partner and children and as a result the children were made the subject of a Child Protection Plan in May 2012 by Wolverhampton Social Services which remains in place. The department's comment on 18 May 2012 that they believed that he was 'a risk to children based on the recent events that led to (his) arrest' was noted.
10. The Respondent noted that were he to be released Social Services had concerns in July 2012 about him returning to the family address. That view was reiterated later that month following an application for immigration bail.

11. The Respondent concluded that the children's best interests were that they should remain in the UK with their mother.
12. The Respondent also considered paragraph 399(b). It was accepted that he was in a genuine and subsisting relationship with Ms I.S., a naturalised British citizen of Angolan descent. However, it was not accepted that the Appellant had been living in the UK with valid leave continuously for at least the fifteen years immediately preceding the date of the immigration decision or that there were insurmountable obstacles to family life with that partner being able to continue outside the UK. Ms I.S. could accompany the Appellant or if she wished to remain in the UK contact could be maintained by modern electronic means and visits.
13. The Respondent also considered paragraph 399A in respect of the Appellant's private life but noted that he had not lived in the UK for at least twenty years immediately preceding the date of the immigration decision. Also that he had spent his youth and formative years in Angola and would be able successfully to reintegrate into Angolan society.
14. The Respondent did not consider that there were any exceptional circumstances under paragraph 397 such as to outweigh the public interest in deportation.
15. He appealed, essentially, on the basis that his removal would breach Article 8 on the basis of his relationship with his partner and daughters.
16. Following a hearing at Hatton Cross on 27 November 2013 before Judge of the First-tier Tribunal Onoufriou and Mrs Jordan (Non Legal Member) the Tribunal allowed the appeal to a limited extent.
17. They noted the Appellant's counsel's request for an application to grant discretionary leave following the guidance of the Upper Tribunal in **RS (India) [2012] UKUT 00218** and heard submissions in that regard.
18. The Tribunal's findings are at paragraphs [16] to [18]. They noted the sentencing judge's comments regarding the offence:

'I do not consider that there was at any time any intention on your part to set fire to this house, or to hurt your partner in that way or for that matter any children that were in the house.

The whole thing got completely out of control. It is quite clear from the statements that (his partner) has now made that she regrets calling the police, although she was right to do so. What she says in her letter is that you have spent long enough in prison and I agree with that.

...

You have been punished enough and I do not think further supervision is going to help you. What will help you is trying to get on the rails with your family and your children and I know that you are determined to do that.

You made a very serious mistake but you are not a danger to the public and you are not a fire raiser.'

19. The Tribunal concluded (at [17]) that the situation was not one where the Appellant had merely contrived a relationship with his children in order to avoid deportation. There was evidence of the family living together before his imprisonment and of the children visiting him in prison although these ceased as it was deemed inappropriate. He had tried to resume contact with his family but had been prevented from doing so by Social Services who needed to produce an assessment of the relationship and any risk if there was unsupervised contact.
20. It was also accepted that he had made a 'genuine application' to the Family Court for contact with his children and clearly had the intention of resubmitting the application (an application already made having been rejected due to lack of court fees).
21. The Tribunal concluded that they were entirely satisfied that there was family life between the Appellant and his daughters and his partner. Further, that the Family Court was best placed to determine what contact he should have with his children, and that following such decision '*a more reasoned assessment can be made regarding the merits or otherwise of deporting the Appellant*'.
22. Their decision (at [18]) states:

'We find that the Appellant does have an Article 8 right to remain in the UK until the conclusion of the intended family proceedings and we accordingly allow the appeal to a limited extent and direct that the Appellant should be granted discretionary leave for a period of three months to enable him to bring contact proceedings before the Family Court. We do not consider it would be in the interests of justice and certainly not in the best interests of his children applying Section 55 of the 2009 Act, to deny the Appellant the opportunity to resume more meaningful contact with his children.'

23. The Respondent sought permission to appeal. This was refused on 31 December 2013, a judge stating:

...

*'the second strand of the Respondent's grounds is that Social Services "will not allow" the Appellant to contact his children because they consider that he poses a risk to them and, therefore, "any application for contact may in fact be futile and unlikely to succeed". Whilst that strand of argument is true to a certain degree, it begs the question of what the outcome of the family proceedings is likely to be if the Appellant is in a position to pursue these proceedings. It begs what, in paragraph 3 of the headlines to **RS (India)**, was referred to as the "core decision" in the family proceedings, and does not undermine the reasoning of the Tribunal in the determination under consideration.*

*That leaves the Respondent's case for permission dependent on the assertion that, in effect, the ratio in **RS (India)** can only help Appellants where there are currently ongoing proceedings in the family courts. In my assessment, that assertion is contrary*

*both to the rationale and the wording of **RS (India)**. On my reading, what was said in **RS (India)** can apply in a case, such as this one, where no actual family proceedings are yet in process but are clearly intended to be put in process in short order (as the Tribunal here found). I refer, for example, to the references to contemplated family proceedings in both paragraph 43 and the headnote of **RS (India)**.'*

24. The Respondent reapplied on identical grounds to the Upper Tribunal. Giving permission to appeal an Upper Tribunal Judge stated:

...

'Given the countervailing public interest in removing those who enter the United Kingdom without leave, who have no substantive right to remain under the Immigration Rules, whose asylum claims have failed and who have committed criminal offences, it is arguably for the claimant to demonstrate that there is a realistic prospect of proceedings in the Family Division/Court being launched and, if launched, being successful thereby requiring the applicant's participation in them.'

25. At the error of law hearing before me Mr Avery essentially maintained the grounds. The outcome of any proceedings were speculative. Even if he succeeded in gaining contact rights it would not take his appeal against deportation forward. His conviction had involved direct threats against his children.
26. Mr Jesurum's submission, in summary, was that it was clear that the Appellant intended to issue proceedings in the Family Court to increase contact with his children. His first attempt failed because, being indigent, he did not have the fee. The test was that proceedings were contemplated. Such was clearly the case here. Indeed, proceedings have now been started. Social Services needed to be satisfied that he was not a risk to his children and partner. That was a matter for the Family Court. The Tribunal was entitled to take the view that it would be helped by the court view on that matter and on what would be the best interests of the children. There was no foregone conclusion that proceedings would not avail the Appellant. Indeed, there was significant evidence including from the sentencing judge's remarks, the expert report of Professor Katona, and from his partner that he was no longer a risk to his children. The clear indication was that Family Court proceedings were not a delaying tactic.
27. In considering this matter the Tribunal noted the guidance given in **RS (India)**. There, the Upper Tribunal indicated that the First-tier Tribunal should either adjourn an immigration appeal or grant a period of limited leave where there are Family Court proceedings, the outcome of which was likely to be material to the immigration decision, unless it appears that these proceedings have only been instituted to delay immigration action or removal is otherwise inevitable.
28. I note that the Court of Appeal endorsed this approach in **Mohan v SSHD [2012] EWCA Civ 1363**.

29. In the instant case the Tribunal correctly found that the Appellant had not in fact begun proceedings in the Family Court for contact with his children but that he had made a 'genuine application' which was rejected due to lack of court fees but that it was 'clearly [his] intention to resubmit the application'.
30. The ratio in **RS (India)** (*per* the headnote and paragraph 43) can apply in a case such as this one where no family proceedings are yet in progress but are clearly intended to be put in process in short order as the Tribunal in the instant case found. The Tribunal was entitled on the evidence before it to find that proceedings were contemplated and that there was a realistic prospect of such proceedings being launched.
31. I note that at the hearing before me proof that the application had been made and the fee paid was provided.
32. The Tribunal in addressing the relevant questions raised in **RS (India)** found that it was 'quite clear that this is not a situation where (he) has merely contrived a relationship with his children in order to avoid deportation'.
33. It concluded that the outcome of the contemplated family proceedings are likely to be material to the immigration decision:
- 'We are quite satisfied that there is family life between the Appellant and his daughters and ... his partner ... We consider that the Family Court is best placed to determine what contact the Appellant should have with his children and following the Family Court's decision a more reasoned assessment can be made regarding the merits or otherwise of deporting the Appellant.'*
34. It concluded that there were no compelling public interest reasons to exclude the claimant from the UK irrespective of the outcome of the family proceedings or the best interests of the child:
- 'We do not consider it would be in the interests of justice and certainly not in the best interests of his children in applying Section 55 ... to deny the Appellant the opportunity to resume more meaningful contact with his children.'*
35. The Tribunal also found that the Appellant has had previous interest in, and contact with, his children and that he had tried to resume contact with his family following his release.
36. The Tribunal also took heed of the sentencing judge's remarks:
- 'You have been punished enough and I do not think further supervision is going to help you. What will help you is trying to get on the rails with your family and your children and I know that you are determined to do that ...'*
37. The Tribunal made findings on the evidence that they were entitled to reach.

38. The Tribunal concluded that the Appellant had an Article 8 right to remain in the UK until the conclusion of the intended family proceedings and that it was appropriate to allow the appeal to a limited extent and a discretionary leave be granted.
39. I see no material error of law in the Tribunal's decision.

Decision

The decision of the First-tier Tribunal shows no material error of law and the decision allowing the appeal to the limited extent stated, stands.

Direction Regarding Anonymity - Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

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

Date

Upper Tribunal Judge Conway