



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00839/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 2nd December 2013

Determination Promulgated
On 15th January 2013

Before

UPPER TRIBUNAL JUDGE J FREEMAN
DEPUTY UPPER TRIBUNAL JUDGE WILSON

Between

MR EMIDIO DOS SANTOS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss B Smith, Counsel
For the Respondent: Mr Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant appeals with leave, granted in the First-tier, against a decision of a panel of the First-tier Tribunal consisting of the First-tier Tribunal Judge O'Garro and Mr P Bompas non legal member (the second panel). The date of immigration

appealed against was 14th March 2013. The Second panel's decision as set out in their determination was to dismiss the Appellant's appeal on all grounds against the immigration decision of the Respondent to make a deportation order under the provisions of Section 32(5) of the UK Borders Act 2007.

2. The four grounds that were argued were firstly a failure to consider private life or family life of all the family members and in particular his partner Linette Borges and the impact of the Appellant's deportation, not only upon her but also her daughter Tatiana – the Appellant's step daughter. The second ground was that the second panel had come to conclusions regarding the Appellant's risk of reoffending that they were not entitled to do on the evidence, as there was no OASYS Report provided by the Respondent. The third ground was that the panel had come to unsubstantiated conclusions with no rational basis when considering whether it was proportionate to deport the Appellant. This assertion was made having regard to the fact there was family life between the Appellant and another step child Patrick. The fourth ground related to the general assertion that the Second panel had failed to consider the relevant factors which impacted on the assessment of proportionality, including the fact that the Appellant originally had a period of leave in the United Kingdom during which period all the three children had been born. It was also asserted that the second panel had not put the seriousness of the sentencing remarks in its proper context, namely an assertion that the Appellant was "a small cog in a machine".
3. The Respondent had filed a short Rule 24 response arguing that the second panel had directed themselves appropriately.
4. After hearing detailed oral submissions from both advocates we reserved our decision which we now give with our reasons.

Discussion:

5. Before considering the grounds in detail it is appropriate to set out some general background as to this Appellant and his partner and children. It is an agreed fact that the Appellant entered the United Kingdom in 1999 using a different identity, he claimed asylum, he was refused and removed to Lisbon in August 1999. The Appellant then re-entered the United Kingdom using this identity with a false Angolan passport in June 2001. Again, he claimed asylum, this was refused, and an appeal was lodged; but he abandoned his appeal and the Respondent decided to grant him exceptional leave to remain on 12th August 2002 until 12th August 2006. During this period of leave it is correct as is contended that the Appellant had three children. The first being born on 7th February 2003, Suemidia with his partner Suzi Sebastiao. On 29th September the Appellant's second daughter Faith was born to the same partner. On 24th April 2006 the Appellant's third daughter Brianna was born with his current partner Linette Borges.
6. During the period of exceptional leave the Appellant was convicted in April 2005 of resisting a police constable, driving whilst disqualified, and using a vehicle whilst uninsured, and received a community rehabilitation order. Later in the same year he was also convicted of two counts of using a false instrument and received a fourteen

month sentence. The Appellant's application for indefinite leave to remain, lodged towards the end of his extant leave, was refused with the Respondent deciding to make a deportation order on 28th August 2007.

7. That appeal came before a panel of the then Asylum and Immigration Tribunal, Immigration Judge Higgins and Dr J O de Barros, (the first panel) who in a determination promulgated on 12th December 2007, following a hearing a week earlier, dismissed the appeal both under Immigration Rules and Human Rights (having regard to Article 8).
8. The pre-sentence report referred to in Grounds of Appeal before us related back to the appellant's relevant conviction, considered by the first panel, of using a false instrument, and the terms of imprisonment to which he had been sentenced. At that time the Appellant was assessed of having a risk of reoffending as medium, although it was noted that his offending appeared to becoming more devious and fraudulent.
9. The Appellants position before the first panel in 2007 was that the Appellant and Ms Sebastiao had been estranged during his period prior to his remand in custody. They were however living in the same household with their two daughters and the Appellant was regularly visiting Linette and his child Brianna in Leeds. Whilst accepting his evidence as to Ms Sebastiao, the first panel was not satisfied the Appellant enjoyed family life with Brianna and Ms Borges in Leeds. The first panel set out the reasons for that, including the lack of availability of funds to make regular visits from London to Leeds. The first panel's conclusions in paragraph 35 of that decision was that his removal would not be an unreasonable interference as they considered that Ms Sebastiao and their two daughters could have accompanied him to Angola. Their principal reasons for this were that Ms Sebastiao, also from Angola, had no current status in the United Kingdom, and the two children were then only aged 2 and 4. Their conclusion as to his relationship with Brianna and Linette Borges was this:

"Had we been satisfied, which we are not, that the Appellant's relationship with Brianna constituted family life, rather than being just an element of the private life he has established in this country we would have judged the interference with it proportionate for all the reasons we have given."

10. The Respondent did not act on the deportation decision because the Home Office were notified that he had an impending prosecution against him. On 18th February 2011 the Appellant was convicted in absentia on two counts of possession of a controlled/false/improperly obtained instrument and one of entering into an arrangement to facilitate acquisition/retention/use/control of criminal property. The sentencing judge, His Honour Judge Matheson QC, noted that before his trial the Appellant had last been seen in May 2010. His co-defendant, who was present in court, was his partner Linette Borges. In September 2011 he was arrested, and sentenced to a term of 21 months' imprisonment concurrently on all three counts. As between the Appellant and Lynette, the judge described him as "very much more active, a prime mover": she received a short suspended sentence, with an unpaid work requirement. Meanwhile the Appellant commenced his term of imprisonment, at the conclusion of which he was placed in immigration detention.

11. It was the Appellant's position before the panel, against whose decision this appeal lies that he was in a relationship with Linette but his relationship with Suzi had "*completely disintegrated and he was no longer seeing his two children Suemidia and Faith*". He contended that in November 2007 he had moved in with Linette's house in London. He also set out that he has three brothers in the United Kingdom, that he wished to remain in the United Kingdom, where all his family are, and that he had close relationships with the children and step children. His declared wish was to marry his partner Linette.
12. Having set out the general background we now turn to our consideration of the detailed submissions expanding on the Grounds of Appeal and our conclusions thereon.
13. The primary submission of Counsel was that the first ground (the failure to consider the impact of his removal on Linette and her two children, Patrick and Brianna), the third ground (the second panel's conclusions on the best interests of his own three children Suemidia, Faith and Brianna) and the fourth ground (the failure to consider the fact that they had all been born while he had leave to be here, and the sentencing judge's remarks about the Appellant being "a small cog in a large machine") all impacted on the second panel's determination on proportionality, and all had to be considered together, as the effect of the second panel's asserted errors was a cumulative one.
14. We made clear during the course of submissions our provisional view that the second ground, relating to the Appellant's risk of reoffending, was not sustainable having regard to his previous convictions, one of which had led to the previous deportation order. Miss Smith did not seek to challenge that view.
15. We note that the panel's determination carefully sets out the position of the Appellant's three children and clearly had regard to the Respondent's duty to consider Section 55 of the Borders, Citizenship and Immigration Act 2009, namely to consider the best interests of the children. The first Panel recognised that the children were innocent victims. They noted that the child Brianna was a British citizen. She was living with her mother and concluded that her health and development would not be affected by her father's removal.
16. The Second panel did consider the position of Linette's step child Patrick, her oldest child Tatiana was however over 18 and did not receive detailed consideration. We are satisfied, given her age, that her best interests did not require specific consideration; nor was there anything to show that her general article 8 rights warranted further consideration.
17. Criticism was made in submissions that the judge had not set out the substance of Linette's evidence. That was not a specific Ground of Appeal and no request had been made for a transcript of the second panel's notes. However the handwriting being moderately clear the relevant passage was read out by us.

Notes of Evidence taken from my Record of proceedings:

Witness- Lynette Burges

She adopted her witness statement .

Q-Has 3 children

A- yes , Bryanna is 7 , other s are 2, 11 and 18 . Patrick is 11

Q- Do you remember when you started living together with the appellant

A- A-2007/2008- was near Christmas time . Bryanna was born . She was a year. Live din Croydon 113 Curve? Road. Used to live in Leeds . Then moved to London. I meet him in 2004 but moved down to London in 2007 and started living together as husband and wife . We have been in a relationship 9 years . Lived together 6 years . Just me and kids lived in house. He was father to children . He helped me . We worked as a team . Children treat him like a dad and he treat the kids like his children .

I have been a single mom now . Not easy on my own . Son now getting into trouble . Children needs two parents for it to work . Bryanna thinks her dad is on a holiday . She loves her dad . Don't want him to be removed . Not coping well right now . Hope it wont happen. I hope to attend University to do business , then start a small business in food. Get married and educate children. He will live with me. He will not offend again . Not acceptable . he knows what I have been through. He wont engage in anything against the law

Having read the statement of Linette, and after considering that note of evidence, although we would not seek to diminish the difficulty a single mother faces in bringing up children it is clear that the Appellant can only have played a limited part in Brianna's upbringing, given that, as recorded by the sentencing judge that he absconded in May 2010 and was not re-arrested till September 2011, since when he had been in detention to date. Although Counsel referred us to the authorities, including Sanade and others (British Children - Zambrano - Dereci) [2012] UKUT 00048 (IAC) and Omotunde (best interests - Zambrano applied - Razgar) Nigeria [2011] UKUT 00247 (IAC) these were of course decisions prior to the Court of Appeal's decision in MF (Nigeria) [2013] EWCA Civ 1192 .

18. We are satisfied that, bearing in mind that this was for much of the time, and his partner Linette is now effectively a single-parent family, there was nothing out of the ordinary in the position of any of the children, for example a child being regarded as a child in need by the relevant local authority. The second panel did recognise and deal with the Appellant's step child Patrick's ADHD, and took it into account as part of their overall decision.

19. While Lynette spoke in her evidence of her reliance on the Appellant in helping to look after the children, there is nothing to show that she has not been coping, both while he had absconded between May 2010 and September 2011, and since he has been in custody from then on. We are satisfied therefore that there is no *material* error of law on the first ground, that the second panel failed adequately to consider the position of Linette . As requested by counsel we have also considered that as part of an overall evaluation of whether there was an error of law by the second panel, in their cumulative assessment of the evidence.

20. The third ground of appeal is partly made out, it is asserted, as there were no specific grounds for the second panel's conclusion that Patrick's natural father would play an increased role in his life. We are satisfied that the second panel's decision about Patrick on that point: they said no more than that "... it may be his father can be encouraged to play more of a rôle in his life", and took it into account no further than that. We are satisfied there was no error in that approach. Their finding that Patrick would remain living with his mother is not in dispute. Overall, given the history of the Appellant and Linette's family, we are satisfied that this does not demonstrate a material error of law.
21. The second panel's consideration of the welfare and their best interest is one where they clearly recognise the stark reality of the lack of contact if the Appellant were to be deported. They have not sought to minimise that. That is very clear from their wording in paragraph 99, where they describe it as "a consideration of the first importance". We are satisfied the second panel did not take a simplistic view of the impact of the loss of a father on any of the children's upbringing in the United Kingdom.
22. The fourth ground of appeal, taking issue with the general assessment of proportionality, we are also satisfied has no substantial weight, having regard to the underlying realities of this Appellant's position. The sentencing judge made it clear that the conduct for which he had to deal with him involved a pattern of dishonesty (3 counts over a period of time) where the value obtained was more than £20,000 and less than £100,000 in the sentencing decision, leading to an appropriate sentence of 21 months. This is a substantial offence involving a very clear public interest in the prevention of crime, and we are satisfied both that the second panel were required to give this appropriate weight and indeed have done so.
23. On an overall assessment of this appeal, given the background of earlier offences, and the earlier deportation decision, and the dismissal of the first panel of his appeal against that, we are satisfied that the second panel's decision was one properly open to them.
24. We are therefore satisfied there was no material error of law in relation to any of the Grounds of Appeal. We therefore dismiss the appeal.
25. No application for an anonymity order was made.

Andrew Wilson

13th January 2014

Deputy Upper Tribunal Judge Wilson