



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00463/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 3 February 2015**

**Decision & Reasons
Promulgated
On 4 February 2015**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GSNG

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

For the Respondent: Ms K McCarthy, instructed by Quality Solicitors

DECISION AND REASONS

1. This is an appeal against the decision promulgated on 24 November 2014 of First-tier Tribunal Judge J McMahon which allowed the respondent's appeal against automatic deportation.
2. For the purposes of this decision, I refer to the Secretary of State as the respondent and to GSNG as the appellant, reflecting their positions before the First-tier Tribunal.

3. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant's child, a minor, from the substance of this appeal.
4. The undisputed facts before me were that the appellant has been in the UK for seventeen and a half years. His wife has been in the UK for sixteen years. The couple have a child [E] born in the UK on 9 October 1999 and he has lived here ever since then. On 2 February 2005 the appellant, his wife and his son were granted settlement by the respondent. On 8 April 2005 E was granted British citizenship.
5. It is also undisputed that on 7 March 2008 the appellant was sentenced to seventeen months' imprisonment for assault occasioning actual bodily harm (ABH) and criminal damage at Croydon Crown Court. The respondent made an automatic deportation order on 27 February 2014 on the basis of that index offence.
6. The respondent's first ground of appeal is that it was not open to the First-tier Tribunal to find at [51] that the appellant's deportation would be "unduly harsh" for his son under the provisions of paragraph 399(a)(ii)(b) of the Immigration Rules.
7. Judge McMahon considers whether it would be "unduly harsh" for the appellant to be deported and his son remain in the UK with his mother from paragraph 41 to the conclusion at paragraph 51.
8. The respondent's written grounds at paragraphs 1.a) to 1.c) argue that assessing the quality of the relationship between the appellant and E and the life that E would live were he to be deported were matters relevant to establishing their genuine and subsisting relationship rather than the assessment of undue hardship. I do not agree. There is nothing limiting the assessment of whether the appellant's deportation would have an unduly harsh impact on the child in this manner in the legislation or anywhere else. Consideration of the nature of the relationship is an essential aspect of assessing how the child would be affected by the deportation of the appellant and whether the impact on the child would be unduly harsh.
9. Paragraph 1.d) maintains that the correct approach to the "unduly harsh" assessment required by 399(a)(ii)(b) is "to consider to what extent the [appellant's] absence would impact on the consideration of family life...". That also did not appear to me to be an assertion in line with any statute or case law before me. It might be an aspect of the "unduly harsh" assessment but not the only aspect. As conceded by Mr Jarvis, the respondent's recently enacted provisions of paragraph 117A-C of the

Nationality, Immigration and Asylum Act 2002, for example, require other considerations to be taken into account as part of the “unduly harsh” assessment.

10. Paragraph 1.d) goes on to argue that the appellant’s wife could be expected to adapt her life in order to accommodate for the appellant’s absence, the implication being that where this was reasonable the appellant’s deportation could not have an “unduly harsh” impact on the child.
11. That submission is really only a disagreement with the clear finding at paragraph 42 that the appellant’s wife being able to offer the level of parenting the child has had for almost all of his life with both parents present being “highly unlikely”. Judge McMahon accepts at paragraph 42 that it is not always going to be “unduly harsh” for a single mother to successfully parent children but found that for this child it would be so. That was a conclusion reasonably open to him where he had evidence of a strong relationship between the appellant and his son in the social work report, which he relied on “particularly”; see paragraph 41. His placing particular weight on the social work report was not challenged and it spoke of a strong relationship and emotional damage and mental health difficulties arising for the child in the short and long term were the appellant to be deported because of the particular nature and strength of their relationship.
12. Before me, Mr Jarvis put the respondent’s case as regards this ground somewhat differently, maintaining that, as in paragraph 2.5.2, the respondent’s Immigration directorate instructions “*Chapter 13: criminality guidance in Article 8 ECHR cases*” “unduly harsh” had to be given its ordinary meaning of “excessively” and “severe, cruel” treatment. It was argued that the facts of this case could not meet that threshold where it would merely be difficult or even very difficult but not “unduly harsh” for the child in the absence of the appellant.
13. Firstly, as above, the judge here did not seek to argue that all children being left to the case of a single parent would be excessively affected thereby. He found that this child would be so given the family history, the appellants’ strong relationship with the child and factors raised in the social work report. Also, as pointed out by Ms McCarthy, the same guidance document required the judge to weigh the seriousness of the offence, whether there is repeat offending, whether the relationship with the child was formed whilst the appellant’s status was unlawful or precarious, whether he can speak English and whether he was a burden on the taxpayer as part of the “unduly harsh” assessment. Judge McMahon did assess those factors, his assessment of them is not challenged here (other than as to the seriousness of the offence; see below) and they were factors that were properly weighed for the appellant and his child in the “unduly harsh” assessment.

14. The decision that there would be an “unduly harsh” impact on the child such that 399(a)(ii)(b) was met was a finding within the range of reasonable responses open to the First-tier Tribunal Judge on the evidence before him and no error arises from it.
15. Turning to the second ground of appeal, the respondent objects to the First-tier Tribunal Judge finding at paragraph 46 that the period of time that has elapsed since the offence and conviction was a relevant factor to the assessment of the appellant’s deportation.
16. It will be clear from the summary set out above that by the time that the matter came before the Tribunal seven years had elapsed during which the appellant had not re-offended. It is not my view that Judge McMahon erred in any way at [46] in placing weight in the appellant’s favour in that regard and finding the risk of reoffending to be “extremely low”. It can only be a relevant matter that he has not re-offended in seven years. That much was conceded by Mr Jarvis before me.
17. It is also not the case that the consideration at paragraph 46 of the period of inaction between 2008 and service of the deportation order in 2014 can be read as an impermissible reduction in the weight to be afforded to the public interest by the judge, as suggested by Mr Jarvis before me, and to the extent that it offended the ratio of Onur v UK [2009] ECHR 289. Nothing in the wording of paragraph 46 indicates that the judge was reducing (or even assessing) the weight to be afforded to the public interest, considered appropriately elsewhere, specifically at paragraph 43 which correctly takes into account “the very great weight that is to be afforded to the public interest in deportation.”
18. The third ground of appeal suggests that the judge took an improper approach in finding at paragraph 47 that the conviction of ABH was different from the more serious types of offending such as drugs, grievous bodily harm or sexual assaults. The judge does not conclude, however, as suggested by the grounds, that an offence of ABH does not merit deportation. Rather, he correctly directed himself at paragraph 45 to the need to take into account the seriousness of the offence and went on to do so in that paragraph and at paragraphs 47 and 48, having taken account of the sentencing remarks at paragraph 33. The assessment of the appellant’s offending by Judge McMahon in these paragraphs does not depart the respondent’s guidance, relied on before me, and case law on deportation which has stated consistently that the more serious the offence, the greater the public interest in deportation.
19. Where I have found that the First-tier Tribunal did not err in allowing the appeal under the Immigration Rules, the respondent’s fourth challenge to the second stage Article 8 assessment cannot be material.
20. For the reasons set out above the grounds of appeal do not disclose a material error on a point of law.

Decision

21. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed 

Date: 4 February 2015

Upper Tribunal Judge Pitt