



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

Appeal Number: DA/01372/2014

THE IMMIGRATION ACTS

**Heard at Newport
On 6 October 2015**

**Decision & Reasons Promulgated
On 20 October 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JULIAN PALMER-RHODES

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer

For the Respondent: Ms L Dickinson of Fursdon Knapper Solicitors

REMITTAL AND REASONS

Introduction

1. In this appeal, the Secretary of State appeals against a decision of the First-tier Tribunal (Judge Britton) allowing the appeal of Julian Palmer-Rhodes (hereafter “the claimant”) against a decision to make a deportation order under s.3(5)(a) of the Immigration Act 1971 on the basis that the claimant’s deportation to the United States of America is conducive to the public good.
2. The claimant is a citizen of the USA who was born on 9 June 1983. He entered the United Kingdom on 19 September 1990 with twelve months’

leave as a student. He was at that date aged 7 years. He subsequently obtained extensions of leave as a student until 31 December 2003 when his leave expired and he overstayed. On 15 December 2009, he applied for indefinite leave to remain on long residence grounds based on fourteen years' residence in the UK. That leave was granted to the claimant on 18 March 2010.

3. On 12 April 2012, the claimant was convicted at the Bristol Crown Court of three offences: possession with intent to supply a Class B controlled drug, namely cannabis; supplying a Class B controlled drug namely cannabis; and possession of a Class A controlled drug, namely MDMA. In respect of the first two offences the claimant was sentenced to four months' and eight months' imprisonment respectively to run consecutively making a total of twelve months' imprisonment. In respect of the third offence, the claimant was sentenced to fourteen days to run concurrently.
4. On 29 May 2012, the claimant was served with notice of his liability to deportation. That notice appears to have been erroneously based on the premise that the claimant was subject to the automatic deportation provisions in the UK Borders Act 2007. That was in fact not the case since the claimant was not a "foreign criminal" as he had not been sentenced to at least twelve months without aggregating consecutive sentences (see s.32(2) read with s.38(1)(b)). That error was subsequently corrected by the Secretary of State who in her decision of 9 July 2014 recognised that the power to deport the appellant fell within the conducive deportation provisions in s.3(5)(a) of the Immigration Act 1971. As a result, on 9 July 2014, the Secretary of State made a decision to deport the claimant to the USA under s.3(5)(a).

The Appeal to the First-tier Tribunal

5. The claimant appealed to the First-tier Tribunal. Judge Britton, following a hearing on 4 December 2014, allowed the claimant's appeal on the basis that s.117C of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") applied such that the claimant's deportation was not in the public interest.
6. Sections 117C(3) and (4) of the NIA Act 2002 state that:
 - '(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
 - (4) Exception 1 applies where -
 - (a) C has been lawfully resident in the United Kingdom for most of C's life,
 - (b) C is socially and culturally integrated into the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.'

7. Judge Britton appears to have accepted that the claimant had been lawfully resident in the UK for most of his life. Indeed, that was accepted before me by both representatives. Further, Judge Britton found that as a result of having lived in the UK for over twenty years the claimant was "socially and culturally integrated into the United Kingdom."
8. Finally, the judge found that there were "very significant obstacles" to the claimant's "integration" into the USA if he were deported there.
9. As a result, Judge Britton allowed the appeal on the basis that the claimant's deportation breached Art 8 of the ECHR.

The Appeal to the Upper Tribunal

10. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the judge's finding under s.117C(4) was unsustainable in law. In essence, the judge's finding was irrational and he had failed to take into account that the claimant was a US citizen, an independent adult and could settle, work and live in the country of which he was a national.
11. On 25 March 2015, the First-tier Tribunal (Judge Simpson) granted the Secretary of State permission to appeal. Thus, the appeal came before me.

Discussion

12. At the hearing, it became clear that there were a number of difficulties with Judge Britton's approach to the appellant's case: in particular, the structural approach he had adopted.
13. First, the judge was required to apply first the relevant Rules dealing with deportation, in particular paras 398, 399 and 399A of the Immigration Rules. Secondly, if the claimant could not succeed under those Rules dealing with Art 8, then the judge should have gone on to consider Art 8 outside the Rules and, in the language of para 398:

'The public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.'

(See, e.g. MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and Singh and Khalid v SSHD [2015] EWCA Civ 74.)
14. The first issue for the judge was, therefore, to apply para 398 which is in the following terms:

'398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
- (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.'

15. The claimant did not fall within para 398(a) as he had not been sentenced to a period of imprisonment of at least four years. Neither did paragraph 398(b) apply because although the appellant had been sentenced to a period of imprisonment of at least twelve months but less than four years it was not as a result of being "convicted of an offence for which" he had received a sentence of at least twelve months. He had been convicted of a number of offences but for no single offence had he been sentenced to a period of at least twelve months.
16. Consequently, the issue was whether para 398(c) applies on the basis that the appellant's offending "has caused serious harm" or he was a "persistent offender who shows a particular disregard for the law". The latter was clearly not applicable since the claimant was of previous good character and these were the only convictions he had. The issue was, therefore, whether his offending "has caused serious harm".
17. In her decision letter (at page 4 of 7) the Secretary of State concluded that the nature of the appellant's offending was such that paragraph 398(c) applied.
18. Judge Britton, however, proceeded on the basis that the claimant fell within para 398(b). At para 12 of his determination he said this:

"The respondent refers to paragraph 398 of the Immigration Rules. The appellant would come under the category of 398 (b) because he was sentenced to a term of imprisonment of 12 months. The respondent referred to the Immigration Rules, that where a person's deportation is conducive to the public good because in the view of the

Secretary of State, he has caused serious harm. In assessing the claim that deportation would be contrary to Article 8, the Secretary of State will consider whether paragraph 399 or 399A applies, and the respondent says that neither applies in this case.”

19. It is unclear why Judge Britton was under the erroneous impression that the Secretary of State considered that the claimant fell within para 398(b). It is clear from the decision letter of 9 July 2014 that the Secretary of State (correctly) did not consider that para 398(b) applied but considered rather that para 398(c) applied. One explanation may be that the only copy of the decision letter that is contained within the Tribunal’s file consists of the odd numbered pages between 1 and 7 and the consideration of para 398(c) is contained on an even numbered page namely page 4 of 7. It is clear from the claimant’s skeleton argument before the First-tier Tribunal that it was contested whether the claimant’s offending given its nature and the punishment imposed fell within the category covered by para 398(c). Judge Britton gave no consideration to that. Consequently, he failed properly to consider whether the claimant came within the terms of the Immigration Rules applicable to deportation.
20. Secondly, if, in fact, the claimant fell within para 398(c) then Judge Britton was required to consider whether he fell within either para 399 or para 399A of the Rules. Paragraph 399 is not relevant but para 399A reflects the terms of s.117C(4). The judge dealt with the issue of whether there were “very significant obstacles” to the claimant’s integration to the US principally in para 28 of his determination as follows:

“However, I find that there are very significant obstacles to his integration into the United States. I accept he will not have any language problems but he came to this country at the age of 7 and has ever returned to the United States. To a great extent, his mother has abandoned him. She would come at Christmas for 3 days but certainly did not want him to return to her life in the United States. The appellant has become part of the Kirkwood family and the witnesses have spoken highly of the appellant. I find that he is part of the Kirkwood family and is treated by both Laura and Edwin as their brother, and when she was alive by Carole as her son. He used to call her ‘Mum’. He has committed a serious offence but since his release from prison has rehabilitated himself. He is at present doing his Master’s degree at Plymouth University that finishes in September 2015. He would not necessarily have the same job opportunities in the United States and would have difficulty raising finance as he no credit rating. His mother may or may not help with any finance but what is clear is that she does not want the appellant as part of her life.”
21. Like para 398, ss.117C(3) and (4) of the NIA Act 2002 only applied if the claimant is a “foreign criminal”. Again a single sentence of at least 12 months was required or, by virtue of s.117D(2)(c)(ii), the individual must be a person who has “been convicted of an offence that caused serious harm”. Without a finding by the Judge in respect of that issue it is impossible to say whether paras 398(c) and 399A or ss.117C(3) and (4) of the NIA Act 2002 applied in principle.

22. Whilst the substance of the Secretary of State's ground focused upon the judge's finding that there were "very significant obstacles" to the claimant's integration in the USA, it was conceded before me that the judge's decision was flawed in law.
23. I agree with that concession on the basis that in the absence of a finding whether the claimant's offending had caused "serious harm", it cannot be said whether the judge approached the issue of whether the claimant's deportation was lawful or not on a proper basis applying the correct legal structure. That, in my judgment, is a significant error in his approach and his decision overall is as a consequence flawed and cannot stand.
24. In saying that, I do not consider that his finding in para 28 can, as a result, stand in isolation either. I accept Mr Richard's submission that, as set out in para 4 of the grounds, the judge has failed to take into account all relevant matters in reaching his finding. In particular, the judge has failed to take into account that the claimant would return to a country of which he is a national, his education and his ability to seek employment as a US citizen despite his absence for a considerable period of time from that country.
25. Although both representatives invited me to remake the decision, in my judgment that is not the appropriate course given that the judge has failed to consider the proper application of para 398 and s.117C including, but perhaps not necessarily restricted to, s.117C(3) and (4). The judge's factual findings are not, in my judgment, sufficiently clear or focused for me to remake the decision. In my judgment, the proper course is that the appeal be remitted to the First-tier Tribunal for a full evidential hearing and in order that the judge on remittal can consider and make appropriate factual findings as to the applicable deportation regime to the claimant.

Decision

26. For these reasons, the decision of the First-tier Tribunal to allow the appellant's appeal involved the making of an error of law and is set aside.
27. The appeal is remitted to the First-tier Tribunal for a *de novo* re-hearing before a judge other than Judge Britton.

Signed

A Grubb
Judge of the Upper Tribunal