



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01810/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 20th October 2015

Decision and Reasons Promulgated
On: 27th November 2015

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

IMK

(anonymity direction made)

Respondent

Representation:

For the Appellant: Mr Melvin, Senior Home Office Presenting Officer

For the Respondent: -

DETERMINATION AND REASONS

1. The Respondent is a national of Zambia born in 1982. On the 6th February 2015 the First-tier Tribunal (Judge Gibb) allowed his appeal against the Secretary of State's decision to deport him pursuant to section 32(5) of the Borders Act 2007. The Secretary of State now has permission¹ to appeal against that decision.

¹ Permission granted on the 4th March 2015 by First-tier Tribunal Judge Osbourne

2. The decision to deport the Respondent was prompted by his conviction, in January 2013, of use of a false instrument. He had claimed approximately £12,500 worth of housing benefit to which he was not entitled. The sentencing judge gave the Respondent credit for his guilty plea but also took a number of aggravating features into account when passing a sentence of 12 months imprisonment. The aggravating features included that the Respondent was, at the time that the fraud was perpetrated, subject to a community order for another fraud, that one involving credit cards and stolen vehicles.
3. It was against this background that the First-tier Tribunal considered the appeal against deportation. The Tribunal correctly directed itself that the Respondent's case fell to be considered under paragraph 398(b) of the Immigration Rules, and that he could therefore succeed by showing one or more of the 'exceptions' in paragraphs 399 or 399A applied. The central finding thereafter is that the 'exception' at paragraph 399 applies in this case: the deportation would have 'unduly harsh' consequences for his two British children. Although they had not lived with him as infants and had enjoyed little contact with him then the Tribunal accepted the evidence that the two boys, aged 10 and 12, now saw their father regularly and that it was in their best interests that this continue. It expressly rejected the contention that the test of 'unduly harsh' should focus exclusively on the children [paragraphs 38-40]: the determination weighs in the balance the offending behaviour of the Respondent [41-42]. The determination also considers the position of the Respondent's wife. Having had regard to her British nationality, her private life including her professional employment and her family connections in this country, the determination concludes that it would be unduly harsh to expect her to relocate, or in the circumstances tolerate permanent separation from her husband.
4. The grounds of appeal are lengthy and I mean no disrespect by distilling them, with Mr Melvin's assistance, to the following points:
 - i) The Tribunal has made findings unsupported by the evidence and "failed to provide adequate reasons" for its finding of fact that the Respondent enjoys a genuine and subsisting relationship with children;
 - ii) In the alternative the Tribunal has made findings unsupported by the evidence and "failed to provide adequate reasons" for its finding of fact that it would be unduly harsh for the children to live without any further contact with father in the United Kingdom;
 - iii) The determination contains findings unsupported by the evidence in respect of whether the Respondent's wife could find employment in Zambia; there was "no independent evidence" that she would suffer in his absence.

- iv) In respect of the whole determination the Tribunal failed to have sufficient regard to the public interest: see AD Lee [2011] EWCA Civ 348, SS (Nigeria) [2013] EWCA Civ 550, SSHID v AJ (Angola) [2014] EWCA Civ 1636. The Tribunal has started its reasoning from a “neutral” position rather than beginning by reminding itself that the scales are heavily weighted in favour of deportation;
 - v) The determination fails to take relevant factors into account, namely the fact that the Respondent has other convictions, that the fraud was perpetrated over a long period, and that he has a propensity to re-offend and potentially cause harm.
5. To these matters Mr Melvin sought permission to add a sixth; he submitted that the decision was one that no reasonable decision maker could reach and that the entire determination had to be set aside for irrationality.

Error of Law: My Findings

Ground (i)

6. The Secretary of State contends that the determination does not address her submissions in respect of the Respondent’s true feelings towards his children: paragraph 1 of the grounds states that “there is no evidence at all to suggest in any way that his involvement in their lives is genuine”.
7. This ground is, in essence, a disagreement with the findings of fact reached, upon careful analysis, by the Tribunal. It is clear from the determination that the Secretary of State’s submissions in this respect were well understood: the point is recorded at paragraph 27 and again at paragraph 33: “the appellant’s behaviour since his release was not genuine and was only in response to the threat of deportation”. It is further apparent that the Tribunal weighed in its considerations the fact that the Respondent had behaved dishonestly, and had indeed given dishonest evidence in the course of the appeal: see for instance paragraphs 28 & 50. It cannot therefore be said that the Secretary of State’s submissions were overlooked. The Tribunal viewed the Respondent’s own evidence with circumspection, and for that very reason looked to other, more objective, sources of information in order to assess the nature of the relationship with the children: see paragraph 28. Weight was placed on all of the evidence, including that of the Respondent’s ex-wife, in concluding that there is currently a genuine parental relationship with his sons. Mr Melvin pointed to the evidence of that lady in support of the submission that the determination takes a narrow and one-sided view of the evidence. She had previously written a letter to the Home Office in which she had stated that the Respondent had been largely absent when they were younger (this is extensively set out in the refusal letter). I do not agree that this evidence was ignored. It is expressly acknowledged at paragraphs 11, 14, 20, 21 and

22 of the determination. In the latter, the witness's oral evidence is recorded as follows: "in essence the appellant's first wife indicated that she stood by the contents of the first letter, which was correct at the time it was written, but that the situation had changed significantly since the appellant's release from his custodial sentence". The First-tier Tribunal was entitled to consider the current position to be more relevant than the Respondent's behaviour towards his sons when they were younger. I am satisfied that the Tribunal took all of the evidence into account in reaching its decision, including the fact that the boys do not live with him but merely see him on contact visits: see for instance 20, 24, 44.

Ground (ii)

8. The Secretary of State submits that there was a paucity of evidence and reasoning to support the First-tier Tribunal's finding that it would be unduly harsh to expect the boys to live without their father in the UK. Mr Melvin relied on recent authorities, unavailable to the Tribunal at the date of the appeal, which offer guidance as to the meaning of 'unduly harsh'. The first was KMO (section 117 - unduly harsh) Nigeria [2015] UKUT 00543 (IAC) in which the Upper Tribunal held that this assessment had to be made with reference to the criminality in question: in so finding the Tribunal takes an explicitly different view from that taken in MAB (paragraph 399; "unduly harsh") USA [2015] UKUT 00435 (IAC) where it was held that the exclusive focus of enquiry was the impact on the child. In the instant case the First-tier Tribunal gives careful consideration to the meaning of the term, and although neither case is mentioned by name, prefers the approach taken in KMO to that in MAB. The Secretary of State can hardly complain about that, and indeed she does not. It is to the high threshold of harm that Mr Melvin submits the Tribunal should have looked. He relies upon MK (section 55 - Tribunal options) Sierra Leone [2015] UKUT 223 (IAC) in which the Upper Tribunal held that the term 'unduly harsh' should not be equated with "uncomfortable, inconvenient, undesirable or merely difficult". In BM and Others (returnees - criminal and non-criminal) DRC CG [2015] 293 (IAC) it was held to denote "something severe, or bleak, the antithesis of pleasant or comfortable...the addition of the adverb 'unduly' raises an already elevated standard still higher". Mr Melvin submits that whatever test the First-tier Tribunal purports to have applied, it is not this one.
9. As I note above, it cannot be said that in reaching its findings the Tribunal looked at the children's lives in isolation from the offending behaviour. At paragraphs 15-18 the Tribunal sets out the Respondent's criminal convictions, and two matters for which he was never convicted. At paragraphs 42 and 50 the determination expressly weighs in the balance all of the criminal *behaviour* of the Respondent, not just the index offence which led to the deportation order, nor indeed his other convictions. The Tribunal correctly notes, at paragraph 49, that the more serious the

offending, the greater the public interest in deportation will be. On the other side of the scales the Tribunal looks to the actual impact on the children, at paragraph 44 assessing the evidence of the boys' mother, their grandmother and the eldest child himself. All those witnesses agreed that the boys currently enjoy a close relationship with their father. The Respondent's ex-wife, his least enthusiastic supporter, told the Tribunal that her eldest son was "negatively affected by his *fear of separation*" from his father [my emphasis]. Having considered all of the evidence the Tribunal concludes that it would be contrary to the boys' best interest to lose regular contact with their father, that the impact on them would be "profoundly negative" [51]. Having read the determination as a whole I am satisfied that the correct test was applied. The Tribunal did not allow this appeal because the alternative outcome would be uncomfortable or undesirable for these children. The finding that it would be *profoundly* negative indicates that the Tribunal understood that the test requires a high threshold of harm, and this conclusion was balanced against not only the index offence, but all of the matters relied upon by the Secretary of State in respect of the Respondent's character, conduct and convictions.

Ground (iii)

10. The third ground of appeal concerns the approach taken to the Respondent's current wife and her potential relocation to Zambia. At paragraphs 52 and 58 the determination notes that she would be compelled to leave behind her responsible professional job, her close family connections, and the benefits accrued to her by virtue of her British nationality. The Secretary of State submits that these are the challenges faced by any émigré and that without more they cannot be found to be 'insurmountable obstacles' or indeed 'unduly harsh'. I would agree. That does not, however, have any impact on the outcome of the appeal, since the First-tier Tribunal makes very clear that the appeal is allowed on the basis of the impact on the children: see for instance paragraph 52.

Ground (iv)

11. There is no merit at all in the ground that the Tribunal gave only "scant consideration" to the public interest in deporting the Respondent. The determination addresses the Respondent's criminality at paragraphs 2, 14, 15, 16, 17, 18, 29, 41, 42, 46, 47, 48, 49 and 50. It cannot therefore seriously be suggested that it failed to have due regard to the fact that the Respondent has committed a series of criminal offences. There is no misdirection when the First-tier Tribunal states, at paragraph 41, that by statute and jurisprudence it is bound to give a "great weight" to the public interest in favour of deportation: "the balance in an Article 8 proportionality assessment starts heavily weighted in favour of deportation". The latter part of paragraph 42 shows the grounds to be

entirely disingenuous in stating [at paragraph 12] that the Tribunal began its assessment from a “neutral” starting point:

“It will therefore be much harder to succeed on an argument about separation from children in a deportation case, in comparison to one with no offending element, and it appears to me that this must be held in mind when approaching the unduly harsh test. In considering the exceptions [in paragraph 399 of the Rules] there is still a need to identify very compelling countervailing factors, if the balance is to return to neutral, since it is tipped heavily in favour of deportation, and then tip in the appellant’s favour”.

Ground (v)

12. I have already found that there is no merit in the suggestion that the Tribunal failed to have regard to all of the Respondent’s criminal behaviour: see paragraph 9 above. Mr Melvin relied on the following passage to submit that the First-tier Tribunal did not recognise this behaviour as serious:

“51. From the perspective of the children, however, they will inevitably not have a balanced understanding of their father’s character. It appears to me that the potential impact upon them of the appellant’s deportation would be considerable, and would be profoundly negative. If the appellant’s offending had been *more serious* it might be that the negative impact on them would have been enough to outweigh the public interest in deportation, but in this case, bearing in mind the nature of the offending, it appears to me that the impact on the children would mean that it would be unduly harsh for them to be separated from their father” [emphasis added]

I am not persuaded that this paragraph contains any misdirection. The First-tier Tribunal was simply pointing out that the *more* serious the offending, the more unlikely it will be that the balance will swing in favour of the foreign criminal. The use of the adverb “more” indicates that the Tribunal already recognised the seriousness of the offending.

Ground (vi)

13. This is not the decision that every Tribunal would have reached. That is not however the *Wednesbury* test of irrationality. This was a detailed and balanced determination in which the public interest was given its full weight and the Secretary of State’s submissions were fully considered. It has not been shown to be perverse.

Decisions

14. The determination of the First-tier Tribunal contains no error of law and it is upheld.

15. The First-tier Tribunal made a direction for anonymity. Before me no party made any application to alter that. The Respondent himself is a criminal who has already been publicly tried and convicted in the criminal courts and should therefore not have the benefit of a grant of anonymity. This case has however turned on the presence in the United Kingdom of his two British sons, who are both minors. I agree with the assessment of the First-tier Tribunal that identifying the Respondent could in turn lead to the identification of the boys. For that reason, having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders, I make the following direction:

“Unless and until a tribunal or court directs otherwise, the Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his 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”.

Upper Tribunal Judge Bruce

20th October 2015