



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/10849/2014

THE IMMIGRATION ACTS

Heard at: Field House
On 20th June 2016

Decision and Reasons Promulgated
On 27th July 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

AD

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S. Walker, Senior Home Office Presenting Officer
For the Respondent: Mr C. Yeo, Counsel instructed by Elder Rahimi Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Zimbabwe born in 1982. He is subject to a Deportation Order and as such would not ordinarily benefit from an order for anonymity. This case does however involve minor children and 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 consider it appropriate to make an order in the following terms:

“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 his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Background and Matters in Issue

2. The Respondent came to the United Kingdom in 2002 with valid leave to enter as a visitor. He was subsequently granted leave to remain as a student until the 30th August 2004. He has had not had any leave to remain since then. On the 5th January 2004 he was convicted of driving a motor vehicle without insurance, of drink-driving and a minor road traffic offence. In the four years which followed the Respondent was convicted, in a further six court appearances, of at least 11 other offences, almost all of which arose from his apparent inability to stay away from cars. He was successively and repeatedly convicted of driving whilst uninsured, drunk and disqualified. Over a period of five years he received an aggregate sentence of over 15 months imprisonment. This behaviour prompted the Secretary of State to issue, on the 11th June 2008, a notice informing the Respondent of his liability for deportation. The Respondent claimed asylum but by the 30th April 2009 this claim had been refused, he had lost his appeal and the deportation order had been signed.
3. The Respondent was not deported. On the 10th August 2010 he was granted permission to work. He made a series of representations during the course of 2011 and 2012; these were not addressed until the 20th November 2014 when the Secretary of State decided to treat the representations as a fresh claim and an application to revoke the Deportation Order. Both applications were refused and the decision was appealed to the First-tier Tribunal.
4. The Respondent’s case before the First-tier Tribunal was that the Deportation Order should be revoked. He put forward two alternative cases as to why. First, he relied upon the Immigration (European Economic Area) Regulations 2006 (‘the Regs’). He submitted that he was in a durable relationship with an EEA national and that the decision to remove him had therefore to be considered under Regulations 19 and 21 of the Regs. In the alternative he submitted that his appeal should be allowed with reference to Article 8 ECHR; in this regard he relied primarily on his relationship with his three minor children in the United Kingdom.
5. The First-tier Tribunal allowed the appeal on both grounds. The Secretary of State now has permission to appeal. In a grant of permission dated 28th April 2016 First-tier Tribunal Judge Davidge considered it arguable that the decision of the First-tier Tribunal contains the following errors of law:
 - i) It was not open to the Tribunal to allow the appeal ‘outright’ under the Regs. If the Tribunal was satisfied that AD was in a

durable relationship with an EEA national the proper course should have been for the matter to be remitted to the Secretary of State so that she could consider how to exercise her discretion under Regulation 17(4). Reliance is placed on Ihemedu (OFMs – meaning) Nigeria [2011] UKUT 340.

- ii) The findings on Regulation 21 are inadequately reasoned. It is alleged that the Tribunal improperly narrowed its assessment to whether there was a risk of reoffending.
- iii) In respect of Article 8 the determination contains two discrete errors. First it is submitted that the Tribunal was wrong in law to have found that AD was not a “persistent offender” and therefore a foreign criminal. Second, the Tribunal erred in applying section 117B(6) of the Nationality, Immigration and Asylum Act 2002 since that section did not apply to person subject to deportation.

My Findings

The EEA grounds

6. Mr Yeo for the Respondent accepted that the broad point made in Ground (i) was a good one. The finding that AD was an extended family member under the terms of Regulation 8 could only have led to the matter being ‘remitted’ to the Secretary of State in order that she exercise her discretion under Regulation 17(4). He did not believe however that there was any error in the determination concluding simply with the words “this appeal is allowed”. It was plain from the foregoing text what that meant. It was up to the Secretary of State what she wanted to do upon receipt of the determination. For the sake of clarity I am satisfied that Ground 1 is made out. The clear findings that AD is an extended family member are preserved and the appeal is allowed as the decision was “not in accordance with the law”.
7. In respect of ground (ii) Mr Yeo argued that there was nothing wrong with the reasoning on Regulation 21. He submitted that the decision to maintain the Deportation Order could not be sustained under the Regulations.
8. The legal framework for the deportation of EEA nationals and their family members is set out at Regulation 19(3)(b) of the Regs. A person who has acquired a right to reside in the United Kingdom may be removed if the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with Regulation 21. The relevant parts of Regulation 21 read:

Decisions taken on public policy, public security and public health grounds

21. – (1) In this regulation a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

....

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles –

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person’s previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person’s length of residence in the United Kingdom, the person’s social and cultural integration into the United Kingdom and the extent of the person’s links with his country of origin.

9. The First-tier Tribunal found as fact that this was a man who was in a durable relationship with an EEA national. His partner is exercising treaty rights. They both make “strenuous efforts” to maintain regular contact with AD’s three children who live a short distance away from their home in the south of England. The children see them at least once each week and stay with them on alternate weekends. AD enjoys a good relationship with the children’s mother who gave evidence on his behalf. She was “very emotional” and “genuinely concerned about the impact that his deportation would have on the children. She described AD as a “good father”. One of the children is unwell and requires regular hospital visits. Against these matters was the fact that AD had been convicted of numerous criminal offences, some of which had resulted in custodial sentences. In addition to the motor vehicle related charges he had also been convicted of common assault in 2013 and had been fined £160. As to this offending behaviour the Tribunal found AD to have been “frank and honest in his assessment of his own previous conduct and he admitted that he was young and moving around with the wrong people at the time and this led

him to his convictions". Having weighed those matters in the balance the Tribunal found that it was "not of the view that the appellant's continuing presence in this country constitutes a serious threat to society" and that "there is a low risk of the appellant re-offending in the future on balance and deportation would not be justified". Those findings seem to me to be perfectly clear, and sustainable. The Tribunal did not base its assessment simply on the (uncontested) finding that there was a low risk of re-offending. It conducted a holistic evaluation of all of these relevant factors, all obviously pertinent given the framework in Regulation 21.

10. The Tribunal's reasoning on Regulations 19 and 21 is therefore upheld. It is now for the Secretary of State to consider those findings. The 'EEA' decision is remade to that extent only.

Article 8

11. The question of Article 8 is not so straightforward. Mr Yeo accepts that it was a clear error of law for the Tribunal to invoke, as it does at paragraph 23, section 117B(6) of the 2002 Act, a sub-section that expressly does not apply to persons subject to deportation. The Tribunal can perhaps be forgiven for being led astray by AD's skeleton argument which wrongly relies on that provision and the decision of the President, McCloskey J in Treebhowan v SSHD (section 117B(6)) [2015] UKUT 674 (IAC), but in any event it was a misdirection. Mr Yeo submits however, that any error is not material: that is because, on any analysis, this appeal fell to be allowed. Before I consider materiality, I must first consider the remaining grounds.
12. The Secretary of State contends that the determination is flawed in its analysis of whether the Rules on deportation at paragraphs 398-399 applied at all to this revocation matter.
13. The deportation order was imposed long before the present regime was in place, being made simply on the grounds that AD's removal was "conducive to the public good". The First-tier Tribunal was therefore asked to assess whether that "old" order should be revoked in light of the "new" Rules.
14. As to what those new Rules might be the refusal letter itself only refers to the revocation provisions in paragraphs 390 to 391A:

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of an effective immigration control;

(iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:

(a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or

(b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order

The analysis which follows is not terribly helpful. Having found sufficient change in circumstances to treat AD's representations as a fresh claim the decision maker rejects them on the basis that they cover matters which have already been decided. Rejecting the evidence about this family life in 2014 because it had already been rejected in 2008 was plainly a nonsensical position to take. Furthermore, the letter itself makes no reference to the remaining provisions of Part 13 of the Rules.

15. When the matter came before Judge Abebrese the Respondent appears to have made no submissions about how the "new" Rules might be applied to an "old" conductive deport. The submissions recorded at paragraph 15 are confined to the EEA matter. It was Mr Yeo for AD who gave the Tribunal some direction. He pointed to the conclusions in SSHID v ZP (India) [2015] EWCA Civ 1197 in which the Court of Appeal considered, in a different context, the revocation provisions. Noting the "vexing" language of paragraphs 390-391A the Court held that the reference to the "Human Rights Convention" at the end of 391 must be read, where Article 8 is invoked, as a reference to paragraphs 398-399A of the Rules, which represent a "complete code" for the purpose of the UK's obligations under that Article of the European Convention on Human Rights:

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.

399. This paragraph applies where paragraph 398 (b) or (c) applies if -

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

16. The proper approach was therefore to consider where AD's case fell to be determined within that framework. Having led the Tribunal thus far, Counsel invited the Tribunal to find that these provisions did not in fact apply to AD because he was not a "foreign criminal" as defined in s117D(2) of the 2002 Act:

(2) In this Part, "foreign criminal" means a person -

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who -

(i) has been sentenced to a period of imprisonment of at least 12 months,

- (ii) has been convicted of an offence that has caused serious harm, or
- (iii) is a persistent offender.

The First-tier Tribunal accepted, and the Secretary of State now appears to concede, that AD did not fall within either (i) or (ii). Any argument that his aggregate sentence of 15 months could bring him within (i) was scotched not only by common sense but by the fully reasoned decision in OLO & Ors (paragraph 398 - "foreign criminal") [2016] UKUT 00056 (IAC). The obvious inference that might be drawn as to (iii) was dealt with by AD's skeleton argument as follows: "he is not a persistent offender (the present tense applies)". This argument was accepted by the First-tier Tribunal [at 22]. Having found AD not to be a "foreign criminal" the Tribunal appeared to consider that paragraphs 398 to 399A could be ignored in favour of the revocation provisions at 390-391A *simpliciter*.

17. The Secretary of State now submits that to have been an error in approach. Whether or not it was raised in the refusal letter the question as to whether AD was a "persistent offender" was "clearly a live issue before the First-tier Tribunal" which needed to be appraised fully. I am bound to agree. If the term were to be strictly construed in the present tense so as to mean someone who *continued* to be a persistent offender it would arguably only ever apply to persons who carried on offending whilst being subject to the decision and the appeals regime: see Chege v SSHD ("is a persistent offender") [2016] UKUT 00187 (IAC). There had been a clear finding by an earlier tribunal that AD was a 'persistent offender' and applying *Devaseelan* principles the Tribunal was bound to treat that as its starting point. This was a man who had committed at least 12 offences over the period 2004 to 2008 and had received a further conviction as recently as 2013 for assault. There is merit in the Secretary of State's submission that this was a matter which should have been considered more fully by the Tribunal.
18. It is here that I return to Mr Yeo's materiality submission. At paragraph 27 of his First-tier Tribunal skeleton he makes an alternative case: even if AD did fall within 398(c) as a "persistent offender" he could bring himself within the exception at 399(a)(i) because of his genuine and subsisting parental relationship with his children.
19. The evidence accepted by the First-tier Tribunal was, as summarised at paragraph 19 above, that AD and his current partner see his three children regularly. The children were aged 7, 5 and 4 at the date of the appeal and had all grown up with close and regular contact with their Dad. The unchallenged finding of the Tribunal was that AD does enjoy a genuine and subsisting relationship with these children, they are all under 18 and living in the UK, and they are all British. The remaining questions were therefore whether it would be unduly harsh for the children to go with their father and live in Zimbabwe, and whether it would be unduly harsh for them to live without him here.

20. The meaning of the term “unduly harsh” has recently been considered by the Court of Appeal in MM (Uganda) & Anor v SSHD [2016] EWCA Civ 450. The Court favoured the approach taken in KMO v SSHD (section 117 - unduly harsh) [2015] UKUT 00543 (IAC), that is to say that the term “unduly” invites a proportionality balancing exercise into the Rule. The removal of a parent will very often be harsh for a child, whether it is unduly so will depend on a combination of factors, not limited to the impact on the individual. The whole scheme of Part V of the Nationality, Immigration and Asylum Act 2002 invites the decision maker to weigh in the public interest:

22. I turn to the interpretation of the phrase "unduly harsh". Plainly it means the same in section 117C(5) as in Rule 399. "Unduly harsh" is an ordinary English expression. As so often, its meaning is coloured by its context. Authority is hardly needed for such a proposition but is anyway provided, for example by VIA Rail Canada [2000] 193 DLR (4th) 357 at paragraphs 35 to 37.

23. The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in MAB ignores this combination of factors. The first of them, the public interest in the removal of foreign criminals, is expressly vouched by Parliament in section 117C(1). Section 117C(2) then provides (I repeat the provision for convenience):

"The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal."

24. This steers the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the "unduly harsh" provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term "unduly" is mistaken for "excessive" which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history.

21. The matters to be weighed in the balance against AD are set out at paragraphs 4-6 of the determination where the First-tier Tribunal goes into some detail about the repeated nature of his offending behaviour. In what appears to be an extraordinary binge between January 2004 and May 2008 AD found himself in court on no fewer than seven occasions. All of the convictions that arose from these prosecutions related to driving offences and matters arising, such as breaches of consequent community orders. It is little wonder that he was eventually sent to prison. The determination records the submissions of the HOPO to the effect that these were not offences to be trivialised because they involved motor vehicles: AD repeatedly drove over the legal limit of alcohol, without insurance and without a licence. He is very fortunate that no-one was ever physically hurt. In his evidence, apparently accepted by the Tribunal, AD

expressed contrition and attributed his behaviour to being young and stupid, "moving around with the wrong people". He stopped driving after the last offence in 2008 and no longer owns a car. As to the risk of re-offending, the Tribunal concludes it to be low.

22. These matters are to be weighed against the positive findings of fact in AD's favour. His relationship with his children is real and subsisting, and the Tribunal from them to be "benefitting" from it. The determination records the "very emotional" evidence of the children's mother who appeared before the Tribunal. She testified that he is a good father, that he contributes financially towards his children's upkeep, and that she is very concerned about the impact that his removal would have on the children. She also expressed concern about his ability to care for himself should he be removed: I take this to be an oblique reference to the fact that AD is HIV+ (the determination records that the Tribunal took the medical evidence before it into account). Reference is also made to the fact that AD's daughter is unwell and requires regular hospital visits. The little girl suffers from severe asthma and the bundles contains numerous items of medical evidence going to her condition and her frequent admissions to hospital. Her mother gave evidence that this child in particular was badly affected when her parents split up and found difficulty in sleeping. She would come into her mother's room asking for her father. In her mother's assessment it would 'break her heart' if she were to be separated from her father again. He is the one who will always stay with her whilst she is hospital overnight.
23. The Secretary of State made, and makes, no submissions as to limb (a) of the tests in paragraph 399(1)(a). It has never been the case that these children could live in Zimbabwe since to do so would deprive them of their relationships with their mother, their stepfather and their new half-sibling on their mother's side.
24. As to limb (b) I have already found that the Tribunal erred because it placed reliance on paragraph 117B(6) when that provision had no application. I am however satisfied that this error was not material, because on the facts, it would be unduly harsh for these children to be separated from their father. He has committed a number of criminal offences, and as I note above it is simply by luck that he did not injure himself or others when driving drunk, uninsured and without a licence. Even after his spree ended in 2008 he committed a further offence in 2013, for which he received a fine. He has been stupid and at that time showed a flagrant disregard for the law. He has been an overstayer since 2004. All of that weighs heavily against him. His deportation would however likely mean the complete severance of a relationship that has a great deal of significance for these three very young children. Their mother makes it clear in her witness statement [at 8] that she would have no intention of taking them to visit him in a country she regards as unsafe and dangerous for her asthmatic daughter. Their relationship with their father would be reduced to telephone and skype contact which at their age would be difficult to invest with much meaning. His former partner describes him as a "great father" who

continues to play a substantial role in their lives. I place considerable weight on her assessment that his deportation would “devastate” their lives. Having weighed all of these matters in the balance I am satisfied that AD’s removal, some six years after the decision to deport was taken, would be unduly harsh for his children. On the facts the Tribunal was entitled to allow the appeal and the misdirection as to s117B was immaterial.

Decisions

25. The determination of the First-tier Tribunal does not contain an error of law such that it should be set aside. The appeal is dismissed and the decision is upheld.
26. There is a direction for anonymity.

Upper Tribunal Judge Bruce
21st July 2016