



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

Appeal Number: DA/01443/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 15 August 2017**

**Decision & Reasons Promulgated
On 28 September 2017**

Before

**THE HONOURABLE LORD BURNS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE FROM**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**PDC
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

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

For the Respondent: Ms K Tobin, Counsel, instructed by Pride Solicitors

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we 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 (the present respondent). This direction applies to among others all parties, any failure to comply with this direction could give rise to contempt of court proceedings. We make this order because the case turns on the welfare of the respondent's minor children who are entitled to privacy.

2. This is an appeal by the Secretary of State (whom we will refer to as the appellant) against a decision of the First-tier Tribunal promulgated on 26 January 2015 allowing the appeal of the respondent (whom we will refer to as the “claimant”) against the decision of the appellant on 10 July 2014.
3. The claimant is a citizen of Grenada born in March 1971 and has lived in the United Kingdom since July 2007. He and his wife were married on 3 May 2007. He entered the United Kingdom with entry clearance as a husband and his leave was extended by stages. His discretionary leave to remain was due to expire in November 2014.
4. He has three children with his wife all of whom are British citizens. The eldest was born on 16 August 2008, the second child was born on 6 May 2010 and the third child was born on 3 April 2013. It is accepted that after the marriage the claimant and his wife lived together until the claimant was convicted at the Crown Court of an offence of violent disorder. He was sentenced on 17 July 2013 to eighteen months imprisonment.
5. That offence involved the claimant joining a group of men who burst into the house of a neighbour who had protested against noise made at an informal party. One of these men wielded a machete and was found guilty of wounding with intent to cause grievous bodily harm and was sentenced to seven years’ imprisonment. We have seen the sentencing remarks of the judge who passed sentence. It appears that the claimant had armed himself with a chair and formed part of a group of up to six people who threatened the neighbouring family and who were part of the group that were “standing four square behind the man with a machete. The claimant was not sentenced as being a party to the offence of wounding with intent to cause grievous bodily harm. However, the judge pointed out that he could not ignore the fact that the claimant had been cautioned for violence in the past, namely an assault occasioning actual bodily harm and common assault.
6. On 16 April 2014 the claimant was detained under immigration powers having presumably been released from his sentence by that date. He was released on bail on 12 June 2014. The appellant’s decision is dated 10 July 2014 in which she set out her reasons for finding that the claimant should be deported.
7. The appellant considered the claimant’s right to family life with his three children under paragraph 399 of the Immigration Rules. Regard was had to the serious nature of the offence, the strength of the claimant’s relationship with his children and his wife and the nature of the contact he had with them. It was considered that the claimant’s removal would have an impact on the children’s emotional welfare but the view was taken that this would be “minimal”. Reference was made to an absence of evidence to indicate that there were any concerns over the children’s behaviour or psychological wellbeing since his imprisonment. The appellant considered

each child in turn but concluded that contact could be maintained by the claimant with all of them through modern means of communication and family visits. It was not suggested that the children should accompany the claimant to Grenada.

8. In relation to the family life with his wife, it was accepted that the claimant had lived together with his wife and his children before his imprisonment. However, at the date of the decision the appellant was not living with them. There had been no contact between the claimant and his family while the claimant was imprisoned. The claimant returned to live in family on 3 December 2014, following an assessment by a probation officer that it was suitable for him to do so.
9. The appellant noted that the Probation Service had assessed the claimant as a "MAPPA level 1 offender who poses a medium risk of harm to the public with risk factors being 'physical harm and intimidation'". However, in the probation officer's opinion, his risk of reoffending was low. It was not considered that the claimant had advanced any exceptional circumstances which could outweigh the public interest in deportation.
10. Before the First-tier Tribunal the claimant and his wife gave evidence. They were found to be honest witnesses. The claimant expressed his remorse for his offending behaviour. He had completed courses in prison and he had become a "red band" owing to his good behaviour there. He had attended all his appointments with the probation officer upon release. He had not reoffended and there were no concerns about his conduct or attitude.
11. At the time of the hearing the claimant was again living in family. It was accepted that, while his wife had not visited the claimant in prison, she had spoken to him on an almost daily basis, sometimes three or four times in one day. The Tribunal found that he was in a genuine and subsisting parental relationship with his children. The Tribunal also found that, after his release and prior to him resuming his place in the family home, he saw his wife and children frequently.
12. The claimant's wife worked as a nurse. During his imprisonment she continued to work but had to rearrange her shifts so that she could manage childcare. She had started to work three twelve hour shifts per week but her income reduced as a result. She ran into financial difficulties during this period and was now paying off debts.
13. The Tribunal found that the claimant was the main carer of the children at the time of the hearing (on 13 January 2015) and looked after them while his wife was at work. There was some evidence that the youngest child was sleeping better than she had done when the claimant was not living in family. The Tribunal found that the children would be deprived of this care were the claimant to be deported. Although that would place his wife in the same position as when he was imprisoned, the situation would become

permanent. She would have to reduce her working hours causing financial problems which in turn would impact negatively upon the children. She did not currently rely on public funds but the Tribunal found that it would be likely that she would be forced to rely on public funds as a single mother of three children. Understandably, the Tribunal found that the imprisonment of the claimant had had a negative effect on the wife and the children, both financially and psychologically.

14. The Tribunal found that the claimant's wife would not be able to afford regular visits to Grenada with the children if the claimant was deported. Although he was a plasterer there was no evidence to show that he would be able to obtain employment immediately on return so as to be able to afford flights for his children to visit him.
15. At paragraph 29 of the determination, the Tribunal gives a summation of the basis for its conclusion that the effect of the claimant's deportation on his wife and children would be "unduly harsh" and that the exception in paragraph 399(a) applied to the claimant.
16. It is stated that contact with the claimant would be restricted to telephone contact and it would not be possible for the children to visit him in Grenada owing to the cost. The children would be deprived of physical contact with their father and would be deprived of the care that they currently receive from him. They would be deprived of their primary carer. They would be affected psychologically by the absence of a father figure who had lived with them all their lives apart from the time he was incarcerated. It was likely that the claimant's wife would be forced to rely on public funds and to split the family unit and cause reliance on public funds in this way was not in the public interest.
17. The Tribunal then went on to consider the public interest in accordance with Section 117C of the 2007 Act and state:

"We find ... taking into account all the circumstances of [the claimant] including his offence, his subsequent behaviour, the strength of the relationships with his children and his wife and the effect on the children of his deportation, that [the claimant] has shown on the balance of probabilities that the decision is a disproportionate breach of his rights under Article 8."
18. The appellant appealed against that decision to the Upper Tribunal. The appeal was heard on 2 November 2015. At that time the claimant was not legally represented. In a decision promulgated on 15 December 2015, the appeal was allowed on the basis that the Tribunal had erred in law in finding it established that the effect of the claimant's deportation on the partner or children would be unduly harsh. A decision dismissing the claimant's appeal against the Secretary of State's decision was substituted. The claimant therefore fell to be deported. It is stated at paragraph 59 that "There is no space for independent consideration on

Article 8 grounds. The First-tier Tribunal should not have allowed the appeal on human rights grounds and to that extent it erred”.

19. That decision was itself appealed to the Court of Appeal by the claimant on grounds that are set out in the grounds of appeal dated 1 January 2016. Permission to appeal was granted by a decision dated 7 October 2016. Reference was made to **MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450** although it was noted that the appeal might not gain anything from that decision. However, it was accepted that the grounds of appeal, which challenged the approach taken by the Upper Tribunal, were arguable. Before the appeal court itself, the appellant accepted that the Upper Tribunal Judge had failed to consider separately:

“the issue of whether the [claimant’s] deportation would breach the family’s rights to family and private life under Article 8 ECHR. Having regard to the subsequent judgment of the Supreme Court in **Hesham Ali**, the Secretary of State accepted that this constitutes an error of law”.

Accordingly, the decision of the Upper Tribunal was quashed and the matter remitted back to this Tribunal. We pause there to observe that the terms of the subsequent decision of the Court of Appeal in **NE-A (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 239** has apparently endorsed the approach of the Upper Tribunal Judge when he said at paragraph 59 that there was no space for independent consideration on Article 8 grounds. Nevertheless, the matter came before us for a hearing on 15 August 2017.

20. Mr Melvin for the appellant attempted to redefine and update the grounds of appeal because of their rather “sprawling nature”. He argued that the First-tier Tribunal had applied a test lower than that expressed in Immigration Rule 399 and Section 117C(5) of the 2007 Act. It did not properly apply the test of undue harshness. He argued that the First-tier Tribunal had materially erred in treating the child’s best interests as paramount and as being decisive of the question of whether deportation would be unduly harsh upon them. In addition it had reversed the burden of proof at paragraph 25 in respect of the question as to whether there was evidence about the claimant being able to find work in a short timeframe on his return to Grenada. It had failed properly to assess the significance of his offending behaviour when they state at paragraph 17 that he expressed his remorse at the hearing and apologised. In fact he had attempted to downplay his actions in the attack.
21. The second broad ground of appeal is that the lack of focus on the nature and detail of the offending behaviour indicates that the First-tier Tribunal judge misdirected himself in relation to the significance and relevance of that behaviour. It failed to consider or apply the manifold nature of the public interest (see **AM v SSHD [2012] EWCA Civ 1634**).

22. Ms Tobin for the claimant submitted that there had been no error of law in the First-tier Tribunal's determination. Nothing turned in this appeal upon the decision of the Court of Appeal in **MM (Uganda) v SSHD [2016] EWCA Civ 450** although that appeared to have been the basis upon which this appeal went before the Court of Appeal. As to **NE-A (Nigeria)**, that case could be distinguished since it dealt with a case in which the claimant had been sentenced to a period of imprisonment of more than four years and very compelling circumstances over and above the two exceptions in Section 117C were required. When proper regard was had to the terms of the decision and in particular paragraph 29, it could not be said that the Tribunal had applied the wrong test.
23. Neither could it be said that the Tribunal had failed to have proper regard to the seriousness of the offence. There were multiple references to the nature of the offence in the body of the determination (see paragraphs 16, 17 and 18 of the determination). Having regard to the fact that the claimant was assessed as being at low risk of reoffending and to the countervailing considerations in relation to private and family life, the finding that the public interest was outweighed in this case was a conclusion open to the Tribunal. It had the benefit of hearing all the evidence in the case and had taken account of all the relevant considerations. She pointed out that the appellant's sentence was materially below that 4 year threshold.
24. We enquired of Mr Melvin as to what his position was in relation to the determination of the Upper Tribunal Judge of 15 December 2015. He urged us to find the reasoning therein to be persuasive and to follow it. Ms Tobin urged us to reach our conclusions independently of that determination but pointed out that at paragraph 63 the Upper Tribunal judge had recognised that the First-tier Tribunal was concerned about the impact of deportation on the family and that he had understood and shared those concerns. This was a narrow case.
25. The First-tier Tribunal's decision was based on whether or not it could be said that it would be unduly harsh for the children, who were British citizens, to remain in the United Kingdom without their father and, to some extent, whether it would be unduly harsh for his wife to remain in the UK without him. The Tribunal was required to have regard to the considerations set out in Section 117C of the 2002 Act. The public interest required the claimant's deportation unless sub-section (5) of Section 117C could be said to be met.
26. It was not disputed that the claimant had a genuine and subsisting relationship with his wife and three children. Accordingly, the Tribunal was faced with the directive, contained in the Rules and enshrined in statute, that the deportation of the claimant was in the public interest and, since he had been sentenced to a period of eighteen months, it was only if the test of undue harshness was met that the public interest in deportation would be outweighed.

27. In the determination of the First-tier Tribunal, it appears to us that the factors which, in its view, outweighed the public interest in this particular case were these. First that the appellant was the principal carer of his children at the time of the hearing. The children benefit from that care. They would be psychologically affected by his absence, particularly because he had been a father figure to them all of their lives apart from the time that he was incarcerated. Limited contact with him in Grenada would be possible. Deportation would mean that his wife and children would be forced to rely on public funds and that was not in the public interest. It is further plain from the final sentence of paragraph 26 that the Tribunal took the view that to be deprived of their father would not be in the childrens' best interests. However, we, like the Upper Tribunal Judge before us, are unable to identify any factors in the analysis set out by the First-tier Tribunal that justifies the conclusion that the consequences of deportation would be "unduly harsh" upon either the children or the claimant's wife. We do not for a moment suggest that the consequences will not be harsh. Plainly, to sever family ties between father and children through deportation will have profound consequences from a psychological, emotional and economic perspective. But there was nothing in the evidence to demonstrate that the effect on the children would be exceptionally severe or that any child had exceptional needs. It is not clear to us why the considerations set out by the Tribunal at paragraph 29 took this case into the realm of undue harshness in the sense of being inordinately or excessively harsh and the failure to do so constitutes a material error in law. The considerations relied on appear to us to be the inevitable, if bleak, consequences which inevitably will result from the division of a family.
28. Further, we do not accept that the financial consequences to the public purse of deportation can legitimately be considered in the assessment of whether deportation would be unduly harsh as the First-tier Tribunal describe in the last sentence of paragraph 29. Such a factor cannot be said to impact on the consequences of deportation upon a family. If correct, the public interest in the deportation of any partner of a foreign criminal or one himself in employment would be weakened and potentially outweighed if his family would thereby become dependent on public funds. We do not consider that to have been the intention of Parliament standing the presumptions in the Rules and the weight to be attached to the public interest in deportation in accordance with the Rules and sections 117A to 117C of the 2002 Act. Furthermore, the focus must be on the effects of deportation on the children and partner, and whether these amount to undue harshness, rather than on the public purse. Nor do we consider that the public interest in the deportation of a foreign criminal can be said to be diminished by the fact that his removal will cause an additional burden on the public purse. To that extent, we consider that the First-tier Tribunal materially misdirected itself and erred in law.

29. For these reasons we allow this appeal. We set aside the decision of the First-tier Tribunal. In the circumstances, we will remit the case to a differently constituted panel for a re-hearing.

Notice of Decision

30. The appeal is allowed.

Signed

Date

Lord Burns
Sitting as a Judge of the Upper Tribunal