



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

Appeal Number: HU/00494/2017

THE IMMIGRATION ACTS

**Heard at Field House, London
On 13 September 2017**

**Decision & Reasons Promulgated
On 19th September 2017**

Before

The Hon. Mr Justice McCloskey, President

Between

**MOHAMMAD MUBEEN AGHA ASLAM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellant: Mr E Wilford, of counsel, instructed by G K Associates
Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION

1. The Appellant is a national of Kenya, aged 50 years. The underlying decision in this appeal is that of the Respondent, the Secretary of State for the Home Department (the "Secretary of State") refusing the Appellant's Article 8 ECHR claim advanced in response to a formal "minded to deport" notification prompted by his convictions in respect of sundry offences spanning the period 1983 to 2003. The stand out convictions were those made on 13 October 1988 when the Appellant was sentenced to 19 years imprisonment, reduced to 17 years on appeal, in respect of four counts of abducting a woman by force, three counts of rape, robbery and theft.

2. The Secretary of State's decision maker stated:

"Your deportation is conducive to the public good and in the public interest because you have been convicted of an offence for which you have been sentenced to a period of imprisonment of at least four years. Therefore, in accordance with paragraph 398 of the Immigration Rules, the public interest requires your deportation unless there are very compelling circumstances over and above those described in the exceptions to deportation set out at paragraphs 399 and 399A of the Immigration Rules.

This was followed by a relatively detailed consideration of the Appellant's relationships with his spouse and his daughter aged 14 years. The omnibus conclusion made was that the aforementioned test had not been satisfied.

3. Permission to appeal was granted in the following terms:

- (a) The proportionality balancing exercise conducted by the First-Tier Tribunal ("FtT") was arguably unlawful on account of failing to take into account the length and lawfulness of the Appellant's presence in the United Kingdom.
- (b) While the elapse of time between the Appellant's last conviction and the initiation of the deportation action may have been the strongest factor in the balancing equation, the FtT:

"... appears to have dealt with delay as something of an afterthought without explicitly considering that delay can reduce the weight of the public interest considerations in deterrence and expressing society's revulsion for the crimes committed (see MN-T (Columbia) - v - SSHD [2016] EWCA Civ 893)."

4. Bearing in mind the terms of the grant of permission to appeal, it is appropriate to highlight the following passages in the decision of the FtT:

- (a) The Appellant's criminal record was noted in [6].
- (b) In the Appellant's oral evidence the issues which featured included the length of his sojourn in the United Kingdom and the date of his last conviction (2003): [15].
- (c) The length of his sojourn was noted again in [29].

- (d) The main landmarks in the Appellant's criminal record were rehearsed in [30].
- (e) At [41] the Judge stated "*I accept that most of the Appellant's criminality occurred many years ago*".
- (f) At [42] the Judge explicitly acknowledged the factor of the Secretary of State's delay in activating the deportation process and, once again, rehearsed some of the landmark dates in the Appellant's criminal history.

The FtT expressed its omnibus conclusion in these terms:

"Having carefully considered all the evidence I do not accept that the Appellant's circumstances are exceptional or compelling. The scales are heavily weighted in favour of deportation and I find that there are no compelling or exceptional circumstances which are necessary to outweigh the public interest in removal."

- 5. It is appropriate to emphasise that the function of this Tribunal is not to decide whether this appeal should be allowed or dismissed. Rather this Tribunal is required to decide whether within the terms of the grant of permission to appeal the decision of the FtT is infected by a material error of law. I have already drawn attention to the terms of the grant of permission to appeal. These are accurately condensed in the skeleton argument of Mr Wilford on behalf of the Appellant. The central issue of law is whether the FtT correctly prepared the scales in conducting the Article 8 proportionality balancing exercise.
- 6. The first ground of appeal complains that the judge failed to include in the balancing exercise a series of material factors. First of all, the length of the Appellant's sojourn in the United Kingdom which dates from 1980. Second, his age at the outset of that period (12) and, third, the lawful nature of his residence. The second limb of this ground complains that the judge confined his consideration of the factors which could combine to outweigh the public interest in deportation to the Appellant's family circumstances and he particularised those of the children, the spouse, the Appellant's mother and also the Appellant's ability to relocate to Kenya.
- 7. It must be said that the key passages in the decision of the FtT are extremely brief. I do not overlook all that precedes them but the crucial exercise is confined to two compact paragraphs which simply did not do justice to the depth, reach and reality of the case before the Tribunal.
- 8. It is trite law that when any tribunal embarks upon an Article 8 proportionality balancing this must entail identification of all of the material facts and factors, engagement with the evidence pertaining to

them and an attribution of the weight which they do or do not attract. I accept the criticism that the Article 8 balancing exercise in the present case was inadequate. The material factors already noted were not identified and weighed. This undermines the exercise critically. The key passages in the decision are conclusionary in nature. They are singularly devoid of the necessary detail and analysis which the factual matrix of this case demanded.

9. The second ground of appeal is linked closely to the first. The balancing exercise required of the FtT clear and careful engagement with the facts pertaining to what was on any showing a standout feature of the factual matrix, namely the Secretary of State's delay in initiating deportation action against the Appellant. This delay was of extraordinary, egregious dimensions. It is common case that it was of twenty years' duration. The brief sentence at the beginning of paragraph 42 of the determination falls manifestly short of what was required in the factual matrix of the present case. There was a clear failure to properly consider this key factor.
10. The question ultimately arising is not what the outcome of this appeal might be in the context of the Tribunal omitting these clear errors of law. The materiality of the errors is beyond any plausible argument. Had they been avoided the outcome could have been different.
11. I say finally that there is no dispute in this appeal about the governing legal principles. Thus while there has been some emphasis on the part of the Secretary of State in the submissions of Mr Wilding on the correct approach in law to the question of delay that is rather beside the point for the reasons which I have endeavoured to explain. In the abstract, protracted delay on the part of the Secretary of State **in** initiating deportation or removal action can in principle outweigh the potent public interest in deportation. For the reasons explained by the Court of Appeal in the case MN-T (Columbia) and in particular at paragraphs 41 and 42, with the adjustment to be inserted in wake of the decision of the Supreme Court in the case of Hesham Ali that is not in dispute. The capacity of delay of a protracted nature on the part of the Secretary of State to outweigh this potent public interest is enhanced and strengthened where it is accompanied by other counterbalancing factors. Again that is an uncontroversial proposition. There is a further uncontentious principle namely that every case is unavoidably fact sensitive. Thus factual comparisons between the instant case and other decided cases will normally entail a relatively arid exercise. Ultimately the question for the Tribunal properly directing itself will be whether the Appellant's criminality, which is of an undeniably grave nature, should be determinative in a properly structured and conducted proportionality balancing exercise. It is the defects in structure which have given rise to my conclusion that the two grounds of appeal in this case are made out.
12. In reconsidering the appeal the FtT will be alert to the explanation proffered on behalf of the Secretary of State for this extraordinary period

of delay. This is found in paragraph 37 of the decision letter. I confine myself to the observation that it is rather bare and unparticularised and is unlikely to qualify as an adequate or acceptable explanation. That per se will not be determinative either. However the reason why one explores the explanation of delay in a case of this nature is that it is a factor which may be material in the proportionality balancing exercise.

13. For the reasons I have given this appeal succeeds to the limited extent that errors of law having been demonstrated quite clearly in my judgment the decision of the FtT must be set aside. This means the following:
- (i) The appeal is remitted to the FtT and will be reheard by a differently constituted panel.
 - (ii) I am not minded to give any further case management directions.
 - (iii) No question of preserving findings of fact arises.

Amans McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 13 September 2017