



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

Appeal Number: HU/14512/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 18th August 2017**

**Decision & Reasons Promulgated
On 5th September 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

**MRS H T N
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Record, Counsel, instructed by Chambers of Celia Record

For the Respondent: Mr P Armstrong, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Vietnam born in December 1988 and appealed against a decision of the Secretary of State to refuse her human rights claim dated 13th June 2016 maintaining a decision to deport the appellant from the United Kingdom. On 14th March 2009 the appellant was notified of the decision to make a deportation order against her and directing her removal to Vietnam following her conviction at Isleworth

Crown Court for producing a class C controlled drug, for which she was sentenced to thirteen months' imprisonment. The respondent made a deportation order against the appellant under Section 32(4) of the UK Borders Act 2007 and Section 3(5)(a) of the Immigration Act 1971 on 17th December 2009.

2. First-tier Tribunal Judge Herlihy dismissed the appellant's human rights appeal and the appellant lodged her grounds of appeal on the basis that the appellant was in a relationship with a British partner and had a British child. She was convicted and sentenced to thirteen months' custodial sentence in 2008 but was 20 years old at the time of the offence and since that time had not reoffended. She had entered into a relationship with a refugee from Vietnam who was naturalised as a British citizen and the couple had a child together born on 15th April 2013 who was a British national.
3. Since her application the appellant had repeatedly contacted the Home Office and asked for consideration of her position in the UK and instructed the solicitors to make enquiries and eventually a judicial review application was settled by consent on 30th June 2015. It was submitted that the Home Office did not respond with a decision until a formal complaint was lodged by the appellant's solicitors. During this three year period the appellant signed and reported to the Home Office.
4. It was submitted that the judge erred in approach to the public interest and applied **AJ (Zimbabwe) [2016] EWCA Civ 1012** but that case did not involve delay on the part of the Home Office and accordingly it was submitted that the judge erred in applying the case.
5. During the period when the appellant signed on she had bonded with her child and strengthened her family unit. The significant delay militated against deportation in the case. The husband would not relocate as he was a recognised refugee and the family would be separated if the deportation were to proceed.
6. The appeal engaged the Immigration Rules paragraphs 398 and 399 but did not meet the exceptions as set out in the Rules, namely that the appellant's partner could take care of her child. The appellant had not lived in the UK for fifteen years with leave to remain. Accordingly there needed to be an 'exceptional' case as set out in **MF Nigeria [2013] EWCA Civ 1192.**
7. It was submitted that the judge erred in her approach to the public interest by failing to consider the evidence of delays. The appellant had actively pursued her application and signed on at the Home Office. The delays were significant and should have been considered, particularly in relation to the appellant's child. The refusal letter was silent about the issue of delay. Given there was a family with a very young child the judge erred in failing to consider the effect of the delay on the family unit.

8. Permission was granted on one ground only and that was in relation to the issue of delay in the assessment of Article 8. It is clear that this point was raised in the grounds of appeal and also raised in respect of the submissions made by Ms Record to the First-tier Tribunal Judge.
9. At the hearing before me Ms Record submitted that the respondent had accepted that there was family life between the appellant and the child but that is not in issue. She confirmed that the application against the Deportation Order was made in 2013 and the delay goes to the issues of the Rules and in respect of Article 8. I specifically requested that Ms Record outline how precisely the delay was to affect the appellant's claim and she stated that it was the impact on the appellant and her child.
10. Mr Armstrong submitted that any error was not material. The judge was aware of the chronology. The appellant came to the UK illegally and entered on 25th October 2008. She was convicted on 18th February 2009 and sentenced to thirteen months' imprisonment. She neither appealed the conviction nor the sentence and was served with a Notice of Liability to Automatic Deportation on 14th March 2009, prior to having her child. Mr Armstrong pointed out that the appellant was convicted of cultivating and producing cannabis and that she absconded in 2010, giving birth to a daughter on 15th April 2013. The issue of delay was not material and did not raise the countervailing compelling factor. The appellant had been put on notice that she was liable to removal and had absconded. She recontacted the Home Office when she wanted to regularise her stay and had a child after a deportation notice was served.

Conclusions

11. Guidance is given at Paragraph 38 of **Hesham Ali v SSHD [2016] UKSC 60** in relation to the approach to be taken in deportation cases:

“38. The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in SS (Nigeria). The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and rules

399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with Huang [2007] 2 AC 167, para 20), but they can be said to involve ‘exceptional circumstances’ in the sense that they involve a departure from the general rule.”

That paragraph specifically states that cases not covered by the Rules 399 and 399A will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders but that it can be outweighed, applying a proportionality test, by very compelling circumstances. The case emphasises the fact that the countervailing considerations must be “very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State”. There was also a reference to the fact that cases outweighing the public interest in deportation are likely to be in a very small minority, particularly in non-settled cases, of which this is one. This appellant came to the UK illegally and has, as Mr Armstrong pointed out, proceeded to establish her family life having entered the UK illegally, remained unlawfully, having been convicted and imprisoned and having a deportation Order signed against her. The judge took those facts into consideration together with the fact that she had not re-offended since her conviction. The only factor, it was asserted, that the judge had not had regard was delay.

12. I specifically address the issue of delay and the guidance **EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41:**

“14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant’s claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

15. *Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very*

*precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in R (Ajoh) v Secretary of State for the Home Department [2007] EWCA Civ 655, para 11, it was noted that 'It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status'. This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: 'whether the spouse knew about the offence at the time when he or she entered into a family relationship' see *Boultif v Switzerland* (2001) 33 EHRR 50, para 48; *Mokrani v France* (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.*

16. *Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of JL (Sierra Leone), heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be 'predictable, consistent and fair as between one applicant and another' or as yielding 'consistency of treatment between one aspiring immigrant and another'. To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an*

applicant to apply from out of country. As Carnwath LJ observed in Akaeke v Secretary of State for the Home Department [2005] EWCA Civ 947, [2005] INLR 575, para 25:

'Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the Tribunal'',

13. It is clear that delay may be relevant. That said, **EB (Kosovo)** was decided in a non-deportation case and even in that case the relevance and strength of such a factor depends on the facts. First, I am not persuaded that there was specific delay in this particular case which would have prejudiced the appellant. She was well aware of the Deportation Order, absconded between 2010 and 2013 and having had her deportation decision then proceeded to have a child and submitted an application for leave to remain in July 2013. The fact that she submitted a judicial review on 31st October 2014 does not assist her case as that application was refused. She then appeared to submit a further judicial review on 3rd December 2015 which was subject to a consent order to make a decision. That, to my mind, does not specifically accept delay on the part of the Secretary of State, merely an acceptance that a decision should be made promptly. There is no doubt that the Secretary of State has a wealth of decisions to make and decisions relating to those subject to a Deportation Order engage serious and weighty matters. In the scheme of the administrative responsibilities, two and half years is not such an extensive delay as to be a countervailing factor. Despite the complaint letter by the solicitors I am not persuaded that there was delay on the part of the Secretary of State such that it was a requirement to take delay into account in the proportionality assessment.
14. The judge was fully aware of the chronology and the background and the strength of ties between the appellant, her husband and the child at the point of the hearing and, even if there was delay, I am not persuaded, further, that it would be a sufficiently countervailing factor to constitute a compelling circumstance.
15. It was argued in **EB (Kosovo)** that delay may be relevant in a second, less obvious, way in that it was reasonable to expect that the applicant and her husband would be aware of her precarious immigration status and that a relationship so entered into may be imbued with a sense of impermanence but if months and years pass without a decision to remove being made, and months become years, and year succeeds year it is to be expected that the impermanence would fade and the expectation would grow that the authorities had decided not to remove the applicant.
16. That is clearly not the case in this instance. The decision had been made to deport the applicant and she can have been under no illusion that this was anything other than the case. As I have identified above, the representations by the solicitors are not an acknowledgement one way or

the other by the Secretary of State that there was indeed delay, particularly when they are dealing with a great number of applications.

17. Nonetheless the judge was aware of the circumstances of the appellant and the circumstances of her child at the date of the hearing, and as she was bound to do, made a full assessment of her human rights and the best interests of the child. I am not persuaded that the application of **AJ (Zimbabwe)**, with which the judge noted that the facts were very similar, was misguided.
18. As set out in paragraph 17 of **AJ (Zimbabwe)**, Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. Clearly the father is in the UK.
19. As such I am not persuaded that the delay in this instance, which in fact I do not find a delay, is an additional feature affecting the nature and quality of the relationship which take the case out of the ordinary. The judge recorded that although the father was a refugee from Vietnam, he had in fact returned there in 2015 to visit his family there [18] and the family spoke Vietnamese and were culturally familiar with Vietnamese life. The judge addressed the relevant factors in relation to Section 117, recorded that the husband was aware from the outset (they met at the end of 2011) that she was in the UK illegally. At paragraph 28 the judge concluded, after analysis, and at the date of the hearing, that there would not be any significant hardship if the partner and daughter decided to accompany her to Vietnam. Moreover, at paragraph 29 having explored the relevant factors, as at the date of the hearing and having considered the relationship of the appellant with her daughter, the judge concluded, that it would not be unduly harsh for her daughter to remain in the UK without her. In my view it cannot be said that delay was a material factor in this matter and the error of law has not been made out.

Notice of Decision

20. As such I find there is no error of law and the decision shall stand.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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. I make this direction as the decision involves a minor child.

Signed Helen Rimington
2017

Date 31st August

Upper Tribunal Judge Rimington