



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

Appeal Number: HU/19397/2016

**THE IMMIGRATION ACTS**

**Heard at : UT(IAC) Birmingham  
On : 31 August 2017**

**Decision Promulgated  
On: 05 September 2017**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**MA  
(ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr R de Mello, instructed by Ash Immigration Services  
For the Respondent: Ms Aboni, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Pakistan, born on 29 August 1975. He has been given permission to appeal against the decision of First-tier Tribunal Judge Gribble dismissing his appeal against the respondent's decision of 9 August

2016 to refuse his human rights claim further to an earlier decision to make a deportation order against him under section 3(5)(a) of the Immigration Act 1971.

## **Background to the Appeal**

2. The background to this case can be summarised as follows. The appellant entered the United Kingdom on 23 February 1998 with entry clearance as the spouse of a British citizen and was granted indefinite leave to remain on 27 February 1999. On 29 September 2005 he applied for naturalisation whilst subject to a police prosecution and his application was refused on 19 December 2005 owing to his failure to inform the Home Office of the ongoing interest of the police.

3. The appellant was charged with murder following an incident on 26 September 2005 whereby he fought with another man, QZ, in a local park, and subsequently resumed the fight armed with a screwdriver resulting in the death of QZ. On 10 April 2006, at Birmingham Crown Court, he was convicted of manslaughter as it was accepted that he had not intended to stab QZ. He was sentenced to four years' imprisonment.

4. Following his conviction the respondent served the appellant with a notice of intention to deport him on 8 October 2007. The appellant appealed against the decision but his appeal was dismissed on 7 February 2008 and he became appeal rights exhausted on 20 May 2008. On 8 July 2008 a Deportation Order was signed against the appellant. Following judicial review proceedings seeking to challenge the Tribunal's dismissal of the appeal, the respondent made a decision, on 15 February 2010, to refuse to revoke the deportation order. Following further judicial review proceedings and various written representations the respondent issued a further decision to refuse to revoke the deportation order on 12 September 2011 and the appellant lodged an appeal against that decision.

5. The appellant's appeal was heard in the First-tier Tribunal on 9 December 2011 and was allowed on Article 8 human rights grounds in a decision promulgated on 29 December 2011. The Tribunal found that the respondent ought to have exercised discretion differently under paragraph 390 of the immigration rules and that the appellant's family life with his wife and five children (14 year old twin daughters, a 12 year old daughter, a seven month old daughter and an eight year old son) outweighed the public interest in his deportation.

6. Permission to appeal that decision was granted to the Secretary of State but the decision was ultimately upheld by the Upper Tribunal on 21 June 2012. The respondent then revoked the Deportation Order on 9 November 2012 and granted successive six-month periods of Discretionary Leave to Remain to the appellant, on 27 October 2012 and then 27 April 2013, followed by a further period of Discretionary Leave from 19 September 2013 until 19 March 2014.

7. On 19 March 2014 the appellant applied for further leave to remain in the UK. On that occasion the respondent refused to grant further leave. In a decision of 2 March 2015 the respondent made a decision to deport the appellant pursuant to section 3(5)(a) of the Immigration Act 1971 on the basis that his deportation remained conducive to the public good, with reference to paragraph 399C of the immigration rules. The appellant was invited to make representations by way of a section 120 notice in relation to his human rights and in response to the presumption under section 72(2) of the Nationality, Immigration Act 2002 that he constituted a danger to the community of the UK.

8. Written representations were made on behalf of the appellant on 24 March 2015. It was asserted that the respondent's letter of 27 October 2012, confirming the decision not to take deportation action against him unless he came to adverse notice, created a legitimate expectation that he would not be deported. It was asserted further that the issuing of a deportation notice in contravention of that assurance was an abuse of process and that the Secretary of State had no power to issue a deportation notice following the appellant's successful appeal before the Upper Tribunal on the same facts. It was also asserted that the deportation decision was incompatible with the appellant's Article 8 rights and with EU and ECHR law.

9. On 9 August 2016 the respondent made a decision refusing the appellant's human rights claim and responding to his representations. The respondent considered that the appellant's deportation continued to be conducive to the public good despite the fact that he had previously been granted a period of limited leave to remain in the UK. The respondent considered that in accordance with Chapter 13 of the Immigration Directorate Instructions (IDIs) Article 8 guidance section 7.4 any further application for leave to remain submitted on Article 8 grounds fell for consideration under the provisions of paragraph 398 to 399A of the immigration rules. The respondent noted that the appellant, by that time, had five children, twin daughters MA and KA born in August 1997, a daughter LA born in May 1999, a son HA born in March 2005 and a daughter IA born in March 2011. With regard to the representations referring to EU law, the respondent considered that the appellant did not benefit from the Zambrano principles entitling him to a derivative right of residence, as his children could continue to reside in the UK with their mother. With regard to Article 8, the respondent considered that the appellant had failed to demonstrate very compelling circumstances for the purposes of paragraph 398 of the immigration rules. The respondent refused the appellant's application for leave to remain under paragraph 322(5) and refused his human rights claim.

10. The appellant appealed against that decision on grounds reflecting the written representations made on 24 March 2015. His appeal was heard by First-tier Tribunal Judge Gribble on 3 May 2017. By that time the appellant's twin daughters MA and KA were 19 years of age, his daughter LA was almost 18, his son HA was 12 and his daughter IA was 6 years old. The appellant had another daughter, I, by that time, who had been born very prematurely on 9 November 2016, and medical evidence had been produced about her medical condition.

She remained in intensive care in hospital. The judge also had before her a statement from the appellant stating, *inter alia*, that he had not reoffended since being released from prison and he had resumed his life with his wife and children. He was actively involved in his children's lives and the family relied on him for support. He provided various certificates of qualifications obtained whilst in prison and confirmation that he was employed from 2014 to 2016, when his permission to work was withdrawn, and would be re-hired if permitted to work again. The judge also had before her various certificates relating to his children's education and studies. She also heard oral evidence from the appellant, his wife and three of their children.

11. The judge rejected Mr de Mello's argument that paragraph 399C was a free-standing provision, finding that it was meant to be read together with the other provisions in Part 13. As regards his submission that the appellant had a legitimate expectation that he would not be deported if he did not re-offend, the judge found that there was no legitimate expectation that leave would continue to be granted. As regards the arguments made on the appellant's rights under EU law, the judge found that the appellant could not succeed under the Zambrano principles as his children would remain in the UK with his wife. The judge also rejected Mr de Mello's submission on the 'ne bis in idem' principle and the lawfulness of being punished twice. The judge went on to consider section 117C. She found that the appellant could not benefit from the exception in section 117C(4) in relation to private life. As for family life and section 117C(5), she found that the appellant had a genuine and subsisting relationship with his wife and children, that it was in the best interests of the children to be cared for by both parents and that the effect of the appellant's deportation would be unduly harsh. However, on the basis that the appellant's sentence was such that section 117C(6) applied, she did not accept that there were very compelling circumstances over and above those in section 117C(4) and (5). She accordingly dismissed the appeal.

12. Permission to appeal to the Upper Tribunal was sought by the appellant on nine grounds. The first was that the judge had erred in law by finding that she had no jurisdiction to strike down the power to make a deportation order when she ought to have found that the issuing of a fresh deportation decision and the refusal of further leave was an abuse of power and that the interference under Article 8 was not in accordance with the law. The second ground was that the judge was wrong to find that no legitimate explanation had been created as a result of the respondent's letter of 27 October 2012. The third ground was that the judge had erred by finding that paragraph 399C of the immigration rules was not free-standing. The fourth ground was that the judge had erred by finding that the appeal did not fall within the scope of EU law and by finding that the principle of 'ne bis in idem' did not apply to the appellant. The fifth was that the judge had erred by applying sections 117A-117C to the appellant. The sixth was that the judge had erred by finding no very compelling circumstances and had failed to give proper weight to the youngest child's medical condition. The seventh was that the judge had erred by failing to consider the best interests of the children, in particular the youngest child. The eighth ground was that the judge had failed properly to determine the

appellant's Article 8 claim and the ninth was that the judge had failed to give adequate reasons for her decision.

13. Permission was granted on 20 June 2017 on all grounds other than four and five, the latter because Mr de Mello had conceded at the hearing that section 117C applied to the appellant.

## **Appeal Hearing**

14. At the hearing Mr de Mello expanded upon the grounds of appeal. With regard to the first ground, he relied on the decisions in Rexha (S.117C - earlier offences : Albania) [2016] UKUT 335 and George, R (on the application of) v The Secretary of State for the Home Department [2014] UKSC 28 in submitting that there had to have been not only a change in the law, but also a change in circumstances, such as a further conviction, to justify the application of section 117C(6) and (7) where a deportation order arising from the same conviction had previously been revoked. He submitted that since there had been no change in the appellant's circumstances since the previous deportation order was revoked, the respondent could not now apply section 117C(6) and (7). It was an abuse of power for the Secretary of State to make a fresh deportation decision under section 3(5)(a) of the 1971 Act on the same factual circumstances upon which the Tribunal had previously allowed his appeal, as the Tribunal's findings were binding on the Secretary of State. With regard to the second ground he submitted that the respondent's letter of 27 October 2012 created a legitimate expectation that the appellant would not be deported unless he committed a further offence. Mr de Mello submitted, with respect to the third ground, that paragraph 399C had to be read as a free-standing provision, otherwise it would create an absurd position that someone could be subjected to an indefinite period of uncertainty as to whether he would be deported, with the clock starting afresh on the relevant ten year period. Mr de Mello submitted that his fourth ground was not pursuing the Zambrano point but the principles of "res judicata". He submitted, with respect to the remaining grounds, that the appellant's circumstances were compelling, given his youngest child's condition, and also considering the point that a second deportation decision had been instituted when he had done nothing wrong.

15. Ms Aboni submitted that the judge had considered the law properly and directed herself appropriately. There was no abuse of power and the deportation decision was a lawful one. It was not open to the judge to find that it was not. The judge gave adequate reasons for her decision on paragraph 399C. There was no legitimate expectation as claimed by the appellant as he had been warned with each grant of leave that he was only permitted to stay in the UK on a temporary basis. The judge had properly found there to be no compelling circumstances.

16. Mr de Mello, in response, reiterated the points previously made and also sought to withdraw the concession Judge Gribble had recorded him having made, namely that section 117C applied to the appellant.

### **Consideration and findings**

17. The first observation I make is that the grounds pursued before me by Mr de Mello were in essence the same as those argued before Judge Gribble and it seemed to me that Mr de Mello was simply seeking an opportunity to re-argue the same matters in the hope of achieving a different outcome. In a detailed and carefully written decision Judge Gribble analysed each ground raised by Mr de Mello in the context of the relevant statutory and legal provisions and provided full and proper reasons for rejecting his arguments.

18. Mr de Mello submitted that he did not recall making a concession that section 117C did not apply in the terms set out in the judge's decision and he seeks to withdraw such a concession. However the terms of the concession are clear, in particular at [36], and I see no reason to depart from that. In any event I find no merit in an argument that that section did not apply to the appellant, who, as the judge properly found at [31] is, and remains, a foreign criminal as defined at section 117D(2). There is nothing in section 117C or D to suggest that a person ceases to be a foreign criminal within the terms of those provisions following the revocation of a deportation order or the grant of subsequent periods of leave to remain.

19. Judge Gribble considered Mr de Mello's submission that paragraph 339C was nevertheless a free-standing provision, at [57] to [61] of her decision, and provided cogent reasons for rejecting that argument. She set out the terms of that paragraph at [60], as follows:

“399C. Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave”.

20. As Judge Gribble found, it is clear that that paragraph has to be read together with the other paragraphs in Part 13, as indeed is indicated by the words “under this Part”. Accordingly the judge properly found that the deportation of the appellant was to be considered as remaining conducive to the public good and, as she said at [64], the introduction of such a provision enabling a deportation order to be ‘revived’ was a matter for parliament.

21. It was Mr de Mello's submission that the reviving of a deportation order, in a situation where the appellant had committed no further offences and there was no change in circumstances since a previous deportation order had been revoked, was an abuse of power, and that the judge accordingly had jurisdiction to find the deportation decision to be “not in accordance with the law” for the purposes of Article 8 on that basis. However that was a matter fully and properly dealt with by the judge at [62] and [69] to [70] where she referred

to the changes in the law which had taken place since the revocation of the previous deportation order and to the more restrictive approach introduced through the changes in the legislation and immigration rules.

22. Mr de Mello acknowledged that he was not assisted by the decision in Rexha, which involved similar circumstances whereby a fresh deportation decision had been made relying on an earlier conviction despite the revocation of a previous deportation order relating to that conviction and the subsequent grant of leave to the appellant. In that case, Dove J, sitting in the Upper Tribunal, rejected the argument made before him, which relied on the decision in Secretary of State for the Home Department v TB (Jamaica) [2008] EWCA Civ 977, that the Secretary of State was fixed with the conclusion of a previous Tribunal that the offence giving rise to a previous deportation order did not justify deportation and thus could not make a fresh deportation decision on the basis of the same conviction. At [18] Dove J said:

“Not only have the factual circumstances of the appellant's case moved on considerably since the point in time when that determination was reached in excess of ten years prior to this decision, but also there had been a change in the law through the introduction of the provisions in the Immigration Act 2014 which are at the heart of this appeal. Whilst in our view it was necessary for the respondent to give consideration to which of the offences within the appellant's criminal past were relied upon as reasons for the decision to deport him, the respondent was not, in the circumstances, precluded by Mr Bailey's findings from relying upon the 2002 conviction as part of the overall appraisal of the appropriateness of deportation in his case.”

23. Mr de Mello, however, sought to distinguish the appellant's case on the basis that, contrary to the position in Rexha, there had been no change in his circumstances, and no further offending, since the determination in his appeal against the previous deportation decision and that if anything his circumstances had become more compelling. He submitted that a change in the law, absent a change in the appellant's circumstances and any further offending, was not sufficient to justify a fresh deportation decision being made on the basis of the previous conviction. However, not only was that nuanced argument not put to Judge Gribble, but it seems to me that the changes in the legislation and immigration rules and the stricter approach to the public interest mentioned by the judge at [70] were sufficient in themselves to constitute the said change in circumstances. There was no indication in paragraph 399C or in the caselaw to which Mr de Mello referred me that there was a requirement for further offending or a significant change in circumstances in order for a fresh deportation decision to be justified and lawful. Accordingly I consider that Judge Gribble properly found that there was nothing unlawful about the decision to make a fresh deportation decision.

24. Mr de Mello's argument on legitimate expectation raised similar concerns and was fully and properly addressed by the judge at [63] and [64]. Judge Gribble had regard to the letter of 27 October 2012 relied upon by the appellant as giving rise to a legitimate expectation that he would not be deported unless he re-offended. She concluded that the only legitimate

expectation arising from the letter was that further periods of leave would be considered on the basis of the law as it stood at any particular time. I find no error in such a conclusion. The letter made it very clear to the appellant that it was on that particular occasion that the Secretary of State had decided not to take deportation action but that he remained liable to deportation. There is nothing in the reference in the final paragraph of the letter to future 'adverse notice' and committing a further offence to suggest that it was only in such circumstances that the Secretary of State was able to seek to deport the appellant in the future. It was made clear to the appellant in the subsequent letters of grant of leave, including the respondent's letter of 13 April 2013, that he was being given only a limited period of discretionary leave based on the circumstances at the time and that he was required to make further applications for leave to remain (and thus meet the requirements of the current immigration rules) if he wished to stay in the UK. Accordingly I find no merit in the second ground of appeal.

25. As Mr de Mello acknowledged, permission had not been granted on the ground raising EU rights under the Zambrano principles, given that the appellant's children would not be required, by his deportation, to leave the UK, but could remain in the UK with their mother, as the judge properly found at [68]. Mr de Mello submitted that the point he had been trying to make was that the principle of "res judicata" or "double jeopardy" applied and that the appellant could not be sanctioned for a second time for his past offending. However, that argument involved the same issues raised in the first ground which have already been addressed above and was also considered and rejected by the judge at [69] for reasons properly given.

26. The remaining grounds assert, essentially, that the judge had erred by finding that the appellant's circumstances were not very compelling, given the medical condition and best interests of the youngest child. Mr de Mello also submitted that the fact that a previous Tribunal had found the appellant's circumstances to be exceptional and that the previous deportation order had been revoked as a result, and further that a second deportation decision had been made despite him having done nothing wrong, was also a matter making his overall circumstances compelling. The judge, however, had full and careful regard to the question of very compelling circumstances under section 117C(6), reminding herself at [71] of the correct approach as set out in recent case law, in NE-A (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 239. She considered the circumstances and best interests of all the children in concluding that the effect of the appellant's deportation would be unduly harsh on them and their mother, and then went on to consider their circumstances again to assess whether they could be considered as very compelling over and above that finding. At [82] and [83] the judge gave particular consideration to the medical condition of the youngest child, I, and how her condition affected the rest of the family and would affect the family if the appellant were to be deported. The judge provided detailed and cogent reasons for concluding that there were no very compelling circumstances over and above those in section 117C(4) and (5). She was perfectly entitled to reach that conclusion and did so upon a full and proper application of the relevant



statutory and legislative principles and in accordance with the most recent and relevant caselaw. The appellant's grounds challenging the judge's findings in that regard are simply a disagreement with the decision and do not disclose any errors of law.


27. For all of these reasons I find no errors of law in the judge's decision and I uphold the decision.

### **DECISION**

28. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

### **Anonymity**

The First-tier Tribunal made an order for anonymity. In view of the involvement of children in these proceedings, I continue the order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed   
Upper Tribunal Judge Kebede  
2017

Dated: 1 September