



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/25350/2016

THE IMMIGRATION ACTS

Heard at Field House
On 1st August 2017

Decision & Reasons Promulgated
On 1st August 2017

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

KLODIAN BILO

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Ms F Shaw instructed by Bankfield Heath Solicitors

DETERMINATION AND REASONS

1. First-tier Tribunal Judge Fowell allowed the appellant's appeal on human rights grounds, although he incorrectly described it as an appeal against a decision to deport. Permission to appeal that decision was granted to the Secretary of State.

Background

2. Mr Biló, an Albanian national, entered the UK clandestinely on 17th August 1999. On 18th August 1999, he claimed asylum as a national of Kosovo. His application was refused on 14th August 2002. His appeal against that decision was dismissed on 28th October 2003 and he became appeal rights exhausted on 11 November 2003. He did not leave the UK.

3. In July 2010, a deportation order was signed against him. His appeal against that decision was dismissed and he became appeal rights exhausted on 15 December 2010. Representations made on 19th March 2012 were treated by the SSHD as an application to revoke the deportation order. That application was refused on 31 May 2012. His appeal on that occasion was allowed by the First-tier Tribunal panel in a decision dated 15th August 2012, having looked at his family situation including his marriage and his two children who at that time were aged 28 months and almost 8 months old. The judge in that decision said

“...the appellant should be under no illusion that the balance that we have struck on this occasion may well on any future occasion be tipped against him if there is any repetition of similar criminal offending.”
4. Mr Bilo was then granted limited leave to remain until 30th October 2015.
5. The offences that had led to the signing of the deportation order were as follows:
 - 1 December 2005 convicted, in a false name and identity as an Italian citizen, of driving with excess alcohol, using a vehicle whilst uninsured (fines of £120 and £70);
 - 2 30 June 2008 convicted of battery/common assault on a former girlfriend, again in the false name and identity (200 hours Community Order);
 - 3 13 January 2009 convicted, again in a false name and identity, of possessing false document/improperly obtained identity document (12 months imprisonment);
 - 4 22 January 2010 convicted in his true identity of perverting the course of justice (using a false name and identity) (18 months imprisonment);
6. On 28th January 2016, Mr Bilo applied for further leave to remain. That application was refused and a decision to deport him on conducive grounds was made for reasons set out in a non-appealable decision dated 23rd June 2016. Those reasons include his previous criminal and immigration history and, since 2012, he had committed further criminal offences: on 19th November 2013 he was cautioned for blackmail; on 23rd April 2015 he was convicted of battery and remanded on conditional bail until 1st June 2015 when he was sentenced to a 12 month Community Order, a Restraining Order- protection from harassment until 31st May 2016 and a Rehabilitation Activity requirement. This was varied on 2 July 2015 and the Restraining Order – protection from Harassment order discharged.
7. Mr Bilo, through solicitors, responded to the s120 notice, submitting that deportation would breach his Article 8 rights. On 4th October 2016 the SSHD refused Mr Bilo’s human rights claim, with a right of appeal. It is that appeal that was before the First-tier Tribunal, and allowed, and against which the SSHD has been granted permission to appeal.
8. The SSHD in the decision to deport acknowledges that Mr Bilo was not granted leave to remain under Part 13 of the Immigration Rules but asserts that there continues to be a public interest in the appellant’s deportation and that his deportation remains conducive to the public good.

Error of law

9. The SSHD sought and was granted permission to appeal on the grounds that the First-tier Tribunal judge had failed to have any regard to Mr Bilo's immigration and criminal history when determining that his deportation would have an unduly harsh effect on the his partner and children. In particular the SSHD drew attention to the Court of Appeal decision of *MM (Uganda)* [2016] EWCA Civ 450 which upheld *KMO (s117B - unduly harsh) Nigeria* [2015] UKUT 00543 (IAC). The SSHD submitted the First-tier Tribunal judge failed to understand how to apply the "unduly harsh" test – for example stating

"However the test is interpreted (for which guidance is awaited from a more senior tribunal) whether it is one of 'insurmountable obstacles', 'very serious hardship' or 'very serious difficulties' that test appears to me to be met in the present case"

10. Although the First-tier Tribunal judge sets out extracts from caselaw at great length he has approached the issue of the effect of Mr Bilo's deportation from the perspective the family being split. First of all, he fails to properly consider what "Unduly harsh" means in the context of deportation and Article 8 despite the number of occasions on which the Court of Appeal has pronounced on this, and the detailed exposition in *KMO*. Secondly, having reached the decision (applying an incorrect test) that it would be unduly harsh to separate the children from their father, he then simply states that the public interest is displaced.
11. The failure of the First-tier Tribunal judge to apply the legislative framework to the evidence before him is an error of law such that I set aside the decision to be remade.
12. The nature and extent of fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision

I remit the appeal to the First-tier Tribunal.

Date 1st August 2017



Upper Tribunal Judge Coker