



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/03148/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 6th February 2018

**Decision & Reasons
Promulgated**

On 12th February 2018

Before

**RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
DEPUTY UPPER TRIBUNAL JUDGE MANDALIA**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AC

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr. Bramble, Home Office Presenting Officer

For the Respondent: Mr. Sellwood, instructed by Fadiga & Co

DECISION AND REASONS

1. This is an appeal against a decision and reasons by First-tier Tribunal Judge Andonian promulgated on 28th November 2017 in which he allowed the appeal against the decision served by the Secretary of State on 13th February 2017, to refuse a human rights claim made by AC.
2. The appellant in the appeal before us is the Secretary of State for the Home Department and the respondent to this appeal is AC. However for ease of reference, in the course of this determination we shall adopt the

parties' status as it was before the FtT. We shall in this determination, refer to AC as the appellant, and the Secretary of State as the respondent.

3. The First-tier Tribunal ("FtT") has made an anonymity order and for the avoidance of any doubt, that order continues. We emphasise at the outset that no report of these proceedings shall directly or indirectly identify the appellant and his daughter.
4. At the conclusion of the hearing before us, we announced that in our judgement, the decision of the FtT is infected by a material error of law and the decision of the FtT Judge is set aside. We directed that the matter is to be remitted to the FtT for hearing *de novo* with no findings preserved. We said that we would give the reasons for our decision in writing. This we now do.
5. It is useful to begin by setting out a summary of the relevant factual background. The appellant is a citizen of Trinidad and Tobago. He first arrived in the United Kingdom with entry clearance as a visitor in January 2002. He then joined the British Army, and was granted leave to remain outside the immigration rules until 12th March 2011 or when his army service finished. He was discharged from the army in May 2008, and following an application made in May 2011, he was granted discretionary leave to remain in the United Kingdom until 20th June 2014.
6. In January 2014, the appellant was convicted at Snaresbrook Crown Court of inflicting grievous bodily harm. On 1st August 2014, he was sentenced to an 18-month sentence of imprisonment. The respondent seeks to deport the appellant and to that end, applying paragraph A 362 and paragraphs A398 to 399D of the immigration rules, concluded that the appellant is unable to meet the family and private life exception to deportation. The respondent concluded that there are no compelling circumstances which outweigh the public interest in seeing the appellant deported, either on Article 8 or Article 3 ECHR grounds.

7. The appellant relies upon the family life that he has with his three children in the UK, a son (“KC”) born on 1st October 2000, a son (“ACC”), and a daughter (“JC”) born on 26th January 2014. All three children are British citizens. The focus before the FtT and before us was the family life between the appellant and his daughter JC.
8. The decision of the FtT Judge spans some 117 paragraphs over 25 pages. Before us, Mr Sellwood candidly accepts, rightly in our judgement, that the decision of the FtT Judge could have been more structured and clearer. There is no clear structure to the decision and even from a careful reading of the decision, it is difficult to discern the evidence that the Judge was considering, the findings that he made, and the conclusions that he reached.
9. At paragraph [92], the Judge notes that there was one key issue in the appeal. That is, whether the appellant’s deportation breaches section 6 of the Human Rights Act 1998. At paragraph [94], the Judge records that the only matter in issue is whether it would be unduly harsh for the appellant’s daughter to remain in the UK without the appellant.
10. At paragraph [104] of his decision, the Judge concludes that the appellant plays a crucial role in the upbringing of his daughter JC. The Judge states *“.It is also clear to me that it would be unduly harsh to expect [JC] to remain in the care of her mother without the substantial input that the appellant makes in her life as her father.... He sees JC regularly, daily takes her to and from nursery, teaches her to read, bring structure and routine to her life, plays with her, manages her health and general welfare, and makes decisions about her upbringing, exclusively and/or with her mother.”.*
11. At paragraph [105] of his decision, the Judge refers to the report of the independent social worker that was relied upon by the appellant which noted, that there is a very close and loving relationship between the appellant and JC, and that the appellant, JC, and her mother, are a complex and very untypical family unit, with a high risk that JC’s

mother would have major difficulties in providing a consistent level of care for JC if the appellant is deported.

12. The Judge's overall conclusion is to be found at paragraph [117];

"The burden of proof is on the SSHD to show on the civil balance of probabilities that deportation in this matter is conducive to the public good. For all the reasons that I have set out above, in this particular case I do not believe she has discharged the burden of proof incumbent upon her on the civil standard. I do believe that this appellant deserves one more chance. He was hugely remorseful before me, accepted his offence and he told me that the stability found in his life is improving his mental health, and he is concentrating on bringing up his daughter and that is what he wants to do.

The appeal to the Upper Tribunal

13. The respondent advances three grounds of appeal. First, the Judge has misdirected himself in law by reversing the burden of proof. The respondent refers to paragraphs [39] and [117] of the decision in which the Judge proceeds upon the premise that it was for the respondent to establish, on a balance of probabilities, that the deportation of the appellant is conducive to the public good. Second, in reaching the conclusion that it would be unduly harsh for the appellant's daughter to remain in the UK without the appellant, the Judge failed to identify anything that is exceptional that would outweigh the compelling interest in the appellant's removal. It is said that the Judge has not considered whether the best interests of the child may nevertheless be outweighed by the public interest in the deportation of offenders. Finally, the Judge erred in his assessment of the relevance of the diagnosis of post-traumatic stress disorder.
14. Permission to appeal was granted on 14th December 2017 by First-tier Tribunal Judge Saffer. The matter comes before us to determine whether the decision of the FtT contains a material error of law.

15. Mr Bramble adopted the grounds of appeal and submitted that the Judge's error as to the burden of proof goes to the heart of the decision, and has infected the Judge's consideration of the evidence throughout. He submits that in determining whether it is unduly harsh for the appellant's daughter to remain in the UK, the Judge failed to consider the seriousness of the offence for which the appellant has been convicted, and the public interest in the deportation of those convicted of offences that attract a sentence of between 12 months and 4 years, unless it can be established that it would be unduly harsh for a child to remain in the UK without the person who is to be deported.

16. The appellant has filed a rule 24 response dated 1st February 2018. As we have already noted, Mr Sellwood accepts that the decision of the Judge could have been clearer but he submits that read as a whole, it is possible to discern the reasons why the Judge came to the conclusion that it would be unduly harsh for JC to remain in the UK without the appellant. Mr Sellwood accepts that at paragraphs [39] and [117] of his decision, the Judge suggests that the burden is upon the respondent to establish that the deportation of the appellant is conducive to the public good and that on the face of it, the Judge appears to have reversed the burden of proof. He submits that upon a careful reading of paragraphs [23], [27] and [94] of the decision, it is clear that the Judge had the relevant legal principles in mind and it was open to the Judge, at paragraphs [104] to [105] of the decision, to conclude that it would be unduly harsh to expect JC to remain in the care of her mother without the substantial input that the appellant makes in her life, as her father. He submits that the Judge has identified the exceptional circumstances that lead to that conclusion.

Error of Law

17. After retiring to consider our decision, we informed the parties that we find there to be a material error of law in the decision of the Judge capable of affecting the outcome of the appeal. The error of law lies in the approach adopted by the judge as to the burden of proof.

18. At paragraph [39] of his decision, the Judge states:

“I therefore take issue with the Secretary of State’s contention that the appellant cannot benefit from the exception to deportation based on family life with them his daughter. I shall come back to this later on when balancing that relationship with his daughter’s best interests with the appellant’s previous conduct, suffice it to say that the burden of proof is on the SSHD in this case on the civil standard of the balance of probabilities to show that in this particular case deportation is conducive to the public good. I strongly differ with the view of the SSHD that it would not be unduly harsh for the appellant’s daughter to remain in the United Kingdom even though the appellant is to be deported.”

19. At paragraph [101], the FtT Judge concludes:

“The appellant has responded to all the details in the respondent’s contentions in his oral evidence before me and I have also read the witness statements. It is my view having regard to the circumstances that the respondent has not shown to the civil standard that deportation here is conducive to the public good.”

20. At paragraph [117], the Judge concludes:

“The burden of proof is on the SSHD to show on the civil balance of probabilities that deportation in this matter is conducive to the public good...”

21. In fact, in such an appeal the burden of proof is upon the appellant to establish, upon the balance of probability that the exceptions to automatic deportation are met. We reject the submission by Mr Sellwood that any error is immaterial. We are satisfied that the misdirection as to the burden of proof was a material misdirection, that has infected the Judge’s consideration of the relevant factors throughout his decision. In our judgement, the error is material because we cannot be satisfied that there is only one possible outcome.

22. Acknowledging that the burden of proof rested with the appellant, the FtT Judge was required to determine whether or not it could be said that it would be unduly harsh for JC, who is a British citizen, to remain in the United Kingdom without her father. The FtT Judge 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. The Tribunal was faced with the requirements of the immigration rules and public interest considerations enshrined in statute, that the deportation of the appellant is 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.
23. In our judgement, having erroneously misdirected himself that the burden of proof is on the respondent to show that in this particular case, deportation is conducive to the public good, the Judge compounded that error because he did not adequately address the relevant public interest considerations. We are not satisfied that a Tribunal properly directing itself as to the burden of proof would reach the same decision as to whether, taking into account the relevant public interest considerations, the undue harshness test is met.
24. Having carefully read the decision of the FtT Judge we are satisfied that the decision of the FtT discloses a material error of law and should be set aside.
25. As to disposal, we have decided that it is appropriate to remit this appeal back to the FtT for hearing afresh, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In light of the nature of the error of law, none of the findings made by the Judge can be preserved and the nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

26. The appeal is allowed. The decision of FtT Judge Andonian promulgated on 28th November 2017 is set aside, and we remit the matter for a de novo hearing in the First-tier Tribunal.

27. An anonymity direction is made.

Signed

Date 08 February 2018

Lord Boyd of Duncansby

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

There was no fee award by the FtT since no fee had been paid or is payable.

Signed

Date 08 February 2018

Lord Boyd of Duncansby

Deputy Upper Tribunal Judge Mandalia