



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

Appeal Number: HU/06027/2017

THE IMMIGRATION ACTS

Heard at Field House

On 01 May 2018

**Decision & Reasons
Promulgated
On 08 May 2018**

Before

**MRS JUSTICE O'FARRELL
UPPER TRIBUNAL JUDGE CANAVAN**

Between

**RILDWAN [A]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Waheed (instructed by David & Vine Solicitors)

For the Respondent: Mr T Melvin (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Rildwan [A] against the determination of the First Tier Tribunal Judge Carroll's decision dated 16 February 2018, promulgated on 23 February 2018, dismissing his appeal against the decision of the respondent Secretary of State for the Home Department, on 18 April 2017 to make a deportation order and on 21 April 2017 to refuse the appellant's human rights claim.

Factual background

2. The appellant is a national of Nigeria. He was born on [] 1986 in the United Kingdom but does not have British citizenship and does not have leave to remain in the United Kingdom.
3. The appellant's mother is [FA], who was refused leave to remain in the United Kingdom in 2008 and now lives in Nigeria.
4. On 16 February 2011, the appellant submitted an application to remain in the United Kingdom on the basis of 14 years long residence. This was rejected but the respondent agreed to reconsider the application which was submitted on 2 April 2014. The application was refused with no right of appeal.
5. On 20 November 2012, child A was born to the appellant and his partner, Ms [O].
6. On 8 November 2013 the appellant was convicted of conspiracy to defraud. He was sentenced to 7 years' imprisonment together with a concurrent sentence of 18 months in respect of a further fraud to which he pleaded guilty.
7. In May 2016 the appellant was released from prison on licence.
8. On 1 August 2016 the appellant was served by the respondent with a decision to make a deportation order in accordance with section 32 (5) of the UK Borders Act 2007.
9. On 18 April 2017 the respondent notified the appellant that his human rights claim had been refused and the decision to deport him from the United Kingdom was maintained.
10. The appellant and Ms [O] are expecting child B in June 2018.

FTT Decision

11. On 7 February 2018 the appellant's appeal against the respondent's decision was heard at Hendon Magistrates Court before FTT Judge Carroll. The basis of the appeal was that deportation would be a disproportionate interference with his Article 8 rights. The appellant relied upon the fact that he has lived in the United Kingdom since birth, he has a genuine and subsisting relationship with Ms [O], who is a British Citizen, they are the parents of child A, born in the United Kingdom on 20 November 2012, and Ms [O] is expecting their second child in June 2018.
12. FTT Judge Carroll dismissed the appeal.

Grounds of appeal

13. The appellant appeals to the upper Tribunal on the grounds that:

- i) the FTT Judge erred in law in failing to address adequately or at all the best interests of the appellant's child when considering the Article 8 claim; and
- ii) the FTT Judge failed to carry out a well-rounded assessment of the child's welfare, including the impact of the appellant's deportation on her emotional stability, and weigh that against the other considerations.

Legal Framework

14. The appellant is a 'foreign criminal' is within the meaning of section 32 (1) of the UK Borders act 2007 because he is not a British citizen, he was convicted in the United Kingdom of an offence and was sentenced to a period of imprisonment of at least 12 months.
15. Section 32(4) of the 2007 Act states:

"For the purpose of section 3(5)(a) of the Immigration Act 1971 (c.77), the deportation of a foreign criminal is conducive to the public good."
16. Section 32(5) of the 2007 Act states:

"The secretary of state must make a deportation order in respect of a foreign criminal (subject to section 33)."
17. Section 33, Exception 1 provides that sections 32 (4) and (5) do not apply where the removal of a foreign criminal would result in a breach of Article 8 of the Convention.
18. Article 8 of the Convention provides that:
 - i) Everyone has the right to respect for his private and family life, his home and his correspondence.
 - ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
19. Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") applies wherever a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's rights under article 8 and would be unlawful under section 6 of the Human Rights Act 1998.
20. Section 117C sets out the following considerations in cases involving foreign criminals:
 - (1) The deportation of foreign criminals is in the public interest.

- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of 4 years or more, the public interest requires C's deportation unless exception 1 or exception 2 applies.
- (4) Exception 1 applies where (a) C has been lawfully resident in the United Kingdom for most of C's life, (b) C is socially and culturally integrated into the United Kingdom and (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least 4 years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in exceptions 1 and 2.
- (7) The considerations in subsections 1 to 6 are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

21. Paragraph 398 of the Immigration Rules provide:

Where a person claims that their deportation would be contrary to the U.K.'s obligations under article 8 ... and

- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years...

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

22. Paragraph 399 of the Immigration Rules provides:

This paragraph applies where paragraph 398 (B) or (C) applies if -

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British citizen; ... and ...

- (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
- (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK and
- (i) the relationship was formed as a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and
 - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported....

FTT decision

23. For the purpose of this appeal the material parts of the FTT decision are:

[29]. Ms [O] is now pregnant for the second time and the baby is due in June 2018. Much of the oral evidence given both by the appellant and Ms [O] focused on the role the appellant plays in the life of [child A] in terms of taking her to and from school and in terms the appellant's role in the home in the context of shopping and preparation of food. This allows Ms [O] to work full-time. She said that if the appellant were to be deported it would give rise to financial and practical difficulties in the context of childcare. Ms [O] has, of course, looked after her child while the appellant was in prison and, in any event, it is not open to the appellant to resist deportation on the grounds that, as he put it in his oral evidence - "it would make things easier me being around."

[30]. There is very limited evidence before me relating to [child A]. A letter from her school says that the appellant has "dropped off and collected her". There is no evidence of any concerns relating to her health or any other aspect of her well-being. The best interests of the child are a primary consideration under section 55 of the Borders, Citizenship and Immigration Act 2009. They are, however, not sole or paramount but must be balanced against other factors. Only the strongest claim will outweigh the public interest in deporting an individual sentenced to at least 4 years imprisonment. The issue is not whether the appellant is a good father but whether the very strong public interest in favour of deportation is trumped by the best interests of the appellant's child or children. Neither the British nationality of the children nor their likely separation from their father for a long period of time amounts to exceptional circumstances such as to outweigh the public interest in his deportation. That deportation does not oblige either Ms [O] or [child A] to leave the United Kingdom.

...

[34]. In the light of all the of the evidence for the reasons given above and for the reasons given by the respondent, I find that the appellant has failed to demonstrate that there are very compelling circumstances such as to outweigh the public interest in deportation and that the respondent's decision does not give rise to a disproportionate breach of Article 8."

Applicant's submissions

24. Reliance is placed on the principles set out in *Kaur (Children's best interests / public interest interface)* [2017] UKUT 00014, in which it was emphasised that the best interests of a child are an integral part of the proportionality assessment under Article 8. In such cases, the best interest of the child is a primary consideration: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC per Baroness Hale at paragraph [23], although not the sole, primary consideration: *Zoumbas v the Secretary of State for the Home Department* [2013] UKSC 74 per Lord Hodge, giving the judgment of the court, at paragraph [10].
25. Mr Waheed, on behalf of the appellant, submitted that the summary set out in paragraphs [29] and [30] of the FTT Decision did not represent accurately the evidence that was before the Tribunal. The FTT Judge failed to consider adequately the evidence of the appellant that he provided a stable influence in the home and had regular contact with child A through prison visits. Further, the FTT Judge failed to consider adequately the evidence of Ms [O] that child A had maintained contact with the appellant when in prison and subsequently; also that she would have difficulty in coping with their second child if the appellant were deported. Although the FTT Decision referred to practical difficulties in the context of childcare, it did not consider the increased difficulties caused by the imminent birth of child B.
26. Mr Waheed submitted that the FTT Judge failed to carry out a proper assessment of the best interests of child A. That renders flawed the balancing exercise required in respect of the child's best interests and the public interest in deportation. He invites this Court to allow the appeal and remit the case to the FTT for re-hearing.

Respondent's submissions

27. The respondent's case is that the FTT Judge directed herself appropriately. She properly considered the best interests of the child and balanced the competing interests of the appellant against the public interest. The FTT Judge was entitled to conclude that there were no exceptional circumstances that would outweigh the public interest in deportation.
28. Reliance is placed on *AJ (Zimbabwe) v SSHD* [2016] EWCA 1012 per Elias LJ at paragraphs [12] to [17], including the following:

- “12. It is now firmly established that in any decision affecting children, the best interests of the children must be a primary (but not the paramount) consideration but they can be outweighed by the cumulative effect of other considerations: see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 paras. 27-28 per Baroness Hale. However, the very strong weight given to the public interest in deporting foreign criminals is not diluted where the rights of children are affected.
13. This court has on a number of occasions had cause to emphasise that the mere fact that there will be a detrimental effect on the best interests of the children where the parent (almost always the father) is deported in circumstances where the children cannot follow him does not by itself constitute an exceptional circumstance...
17. These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules if the interests of the children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. 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. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be largely otiose. In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary.”
29. Mr Melvin, on behalf of the respondent, submits that there are no exceptional circumstances that would outweigh the public interest in deportation in this case. The appellant has not produced evidence as to the adverse effect on Ms [O] for child A. There is no evidence that Ms [O] was unable to cope with child A when the appellant was in prison or that she will be unable to cope with 2 children.

30. Mr Melvin submits that there is no material error of law in the FTT Decision. However, if he is wrong, he invites us to consider the case law and facts and make a fresh decision.

Discussion and conclusion

31. There is no merit in the grounds of appeal relied on by the appellant.
32. There was no error of law. The FTT Judge directed herself appropriately. She referred to section 55 of the 2009 Act and the requirement to properly consider the best interests of the child. She correctly identified what is a high hurdle for the appellant to establish very compelling circumstances that would outweigh the public interest in his deportation.
33. The appellant's contact with child A and his contribution to the household were considered, as was the forthcoming birth of the second child. It was not necessary for the FTT Judge to set out in detail every part of the evidence relied on by the appellant.
34. The FTT Judge balanced the competing interests of the appellant, his partner and child, against the public interest and was entitled to conclude that there were no very compelling circumstances that would outweigh the public interest in deportation.

Notice of Decision

The first-tier tribunal decision did not involve the making of an error on a point of law.

The decision shall stand.

Signed:

Date: 2nd May 2018

Mrs Justice O'Farrell