



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08172/2017

THE IMMIGRATION ACTS

Heard at Field House
On 4 October 2018

Decision & Reasons Promulgated
On 17 October 2018

Before

THE HONOURABLE LADY RAE
DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHAEL [W]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C. Avery, Senior Home Office Presenting Officer
For the Respondent: Mss A. Akusu-Ossai of Counsel

DECISION AND REASONS

1. The Secretary of State appeals against the determination of the First-tier Tribunal Judge promulgated on 26 June 2018 following a hearing that took place on 31 May 2018. The First-tier Tribunal Judge considered the deportation appeal in relation to Mr [W], to whom we shall refer as 'the appellant' as he was in the First-tier Tribunal. He was born on 7 November 1972 and is now 45 years old. On 22 August 2016 the Secretary of State made a decision to make a deportation order and, in doing so, he

reflected what he considered to be the misconduct of the appellant in circumstances to which we shall later refer.

2. The immigration history is relatively straightforward. The appellant entered the United Kingdom in July 2002 and applied lawfully in July 2004 to remain as the spouse of a British national. The couple were married on 8 November 2003 and they subsequently had six children. Of those, the relevant ones for our purposes are T, a daughter, who was born on 15 March 2004 and is now 14 years old and D, their son, who was born on 3 May 2005 and is now 13. As a result of the family life that the appellant enjoyed in the United Kingdom with his British wife, the appellant successfully made an application for indefinite leave to remain which was granted on 5 September 2006. The making of the deportation order revokes that grant.
3. There is only one conviction which is of concern to us and it is the centrepiece of the deportation decision. On 13 June 2014 the appellant was convicted at Inner London Crown Court of possession of ammunition without a certificate, possession of a hand gun and possession of a firearm with intent to cause fear of violence. He was sentenced to seven years and two months' imprisonment.
4. The bare recital of the offences for which he was convicted does, of course, little justice to the events underlying those convictions.
5. What had occurred is that, on an occasion in January 2014, the appellant had entered a kebab shop late at night. He was unable to recollect the events as a result of his being either drunk or high on narcotics and, in those circumstances, he was not able to account for his actions (or indeed to be responsible for them) except in the very real, legal, sense. What he did was to enter the shop with a loaded gun. There was ammunition in the chamber. It was cocked and ready to fire. He brandished the gun in order to ensure that he was served with food as he considered that those behind the counter were being too slow in their service of customers. Those in the shop were threatened with the gun. The appellant himself was not responsible for his own actions as a result of the influence of drugs or alcohol and anything could have happened in the course of those events, even a fatality. It might have been a person who spoke out of term. It might have been an indication that somebody was trying to resist what he was doing. It only needs a little imagination to see what terrible, tragic consequences might have flowed from his behaviour.
6. It was accepted that the weapons which were found in the appellant's possession were weapons that he had been asked to store and it was also accepted that a reduction in sentence of 25% should be given, reflecting his plea of guilty. He did so at an early stage. There was in the preparation of his appearance in the Crown Court a psychiatric report.
7. The tariff for an offence of this type was 9½ years. In the case of the appellant the judge properly reduced that by 25% to reflect his plea of guilty but it has to be said that a guilty plea was inescapable. Nevertheless, we look at this offence not as an offence meriting a sentence of 9½ years, but as an offence which merited a sentence

of 7½ years imprisonment. That offence, and the gravity which is associated with a sentence of imprisonment of such length, is the centrepiece of the Secretary of State's appeal.

8. The determination refers to the sentencing remarks of the sentencing judge without comment at paragraph 6 of the determination.
9. The judge then immediately moves on to the appellant's case and the importance of the position of T and D who were the relevant minor children affected by the decision. They are now aged 14 and 13. They remain therefore the focus of the appellant's claim to resist removal and properly so.
10. The determination then goes on to deal with the mitigating circumstances, as it were, of the situation in which the appellant found himself. He and his wife had been separated following a difficult period in their relationship. The appellant was living in a hostel. Since his release, he had returned to the family home. He was in a genuine and subsisting relationship with both his wife and children. Thus far, the determination centres wholly upon the impact of the deportation order upon the family.
11. In paragraphs 9 and 10 the judge refers to the fact that T suffers from emotional behavioural problems and D had a number of school exclusions for aggressive and disruptive behaviour. In each case it is said that the presence of the father has a beneficial effect. The judge then repeats in general terms that removal would lead to further emotional instability and impact upon the family's wellbeing.
12. In paragraphs 13 to 15 the judge then recites the medical evidence and does so at considerable length. Those documents are within the bundle. They are set out at length in the determination and so it is only necessary for us to refer to them in the most general terms.
13. On 11 July 2017 a letter was written which described the impact on T, describing the fact that the sudden loss of her father was likely further to increase her distrust of the services provided to her by the authorities and making the engagement of a supporting relationship with her in the future extremely difficult.
14. There was also a letter of 28 February 2018 which evidenced the fact that the children were involved in a multi-systemic therapeutic team for children and adolescents suffering mental health difficulties. That is sometimes referred to as MST. This treatment was being provided to the family and the report indicated that there had been a marked improvement in the behaviour of T and D. In particular, focus was directed towards the position of T who had been diagnosed with ADHD and conduct disorder. Both T and her brother, it was said, had a strong attachment to their father and his removal would lead to further emotional instability and the writer had grave concerns about the children's future emotional development. That was particularly so in the case of T.

15. There was a final piece of the medical evidence in the form of a letter dated 30 May 2018 which described how the changes that were improving the condition of the children by reason of the treatment with MST were likely to be jeopardised. There was concern that the effect upon the children, in the event of the appellant leaving the family home, would be *incredibly disruptive and destabilising* for T and the rest of the family. The report continued that, without the input of the appellant, D would struggle to be heard because the appellant was often seen as a mediator between him and the tensions within the home and he would be left unsupported without him. Necessarily the report concluded that a return to Jamaica would cause great distress to the family as a whole but particularly to the children.
16. It follows from the description that we have provided in summary form of the medical evidence that this was solely directed towards the interest of the children. In paragraph 16 there was a reference to the interests of the appellant's wife and her gynaecological problems.
17. In paragraph 17 the judge then goes on to consider the case by reference to Article 8 and s. 117 of the Nationality, Immigration and Asylum Act 2002. At this point it is as well to point out the considerations that are in play in a case of this nature. Sections 117A, B, C and D are Parliament's instruction to decision-makers to take into consideration various factors when considering the deportation of what are described within s.117D as foreign criminals. The appellant himself of course falls within that definition.
18. Section 117C is in these terms:
- 117C Article 8: additional 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 four 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 in 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 four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2. [Our emphasis.]**

19. It is important to see the centrality, as well as the common sense, of s.117C (2) which states, *'The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.'* In the context of this case, it can hardly be necessary to repeat the fact that the appellant was convicted of an offence which, on any view, was of the most serious nature, as reflected in the sentence of 7 years and 2 months.
20. The judge then went on to consider the family life considerations in paragraphs 18 and 19 and the issue of proportionality considering the best interests of T and D as a primary consideration. She made the general comment that, in most circumstances, their best interests are to live as a family unit with both parents. The judge noted what was apparent from the evidence that there was very little evidence of a private life that required protection. We are concerned simply with family life.
21. Paragraph 21 is of the greatest significance because it is the only effective reference in the determination to the public interest. The judge said:
- "I attach great weight to the public interest in deporting foreign criminals and there can be no dispute as to the gravity of the offence for which the appellant was convicted in 2014."

That is the global recognition of the offending.

22. It is then followed by a series of mitigating factors. Those mitigating factors are prefaced by the word, *'However, ...'*. There then is a reference to the appellant having learning difficulties. Those appear to be centred upon the fact that he had learned to read and write comparatively recently whilst in prison. The judge repeated the fact that the appellant had been asked to store the ammunition. The judge then went on to deal with the OASys Assessment suggesting that his lack of accommodation and the fact that he was living in a hostel may have been linked to his offending and that the absence of a stable environment may have made the appellant vulnerable. All of these factors seem to be directed towards reducing the weight to be attached to the public interest. It continues in paragraph 22 where the sentencing judge noted that the appellant had no previous convictions for any similar offences. That is not exactly correct because the appellant had a previous conviction for possessing a bladed or pointed instrument.
23. The OASys Assessment is then relied upon as assessing the appellant as posing a medium risk of harm to the public and that he is in a stable relationship with adequate accommodation. The judge concludes in dealing with the OASys Report the probability of proven re-offending and proven violent-type re-offending are all assessed as low. Accordingly, the reference to the public interest is then subjected to reduction by the various factors outlined from 21 to 23.
24. The judge then concludes by saying in paragraph 24:
- "I have set out at length the relevant medical evidence at paragraphs 13 and following. The appellant's wife has shown considerable fortitude in dealing with T and D whilst she has been living apart from the appellant. I found that they

are in a genuine and subsisting relationship following the appellant's release but the presence of the appellant in the household amounts to far more than another pair of hands to help with the shopping and cooking whilst the appellant's wife is working part-time. As appears from the psychological evidence the return of the appellant to the family has had a marked and very important impact upon the children, in particular T. The mental health professionals involved in dealing with her complex range of problems are satisfied that she and her brother both enjoy a strong attachment to the appellant and that 'his removal could lead to further emotional instability' with consequent impact upon her emotional development. The most recent letter of 30 May 2018 describes the impact of removal of the appellant as 'incredibly disruptive and destabilising for T and the rest of the family'. She goes on say that in the context of T's education that the removal of her father would cause her further distress during the first year as beginning to study for her GCSEs."

25. It is on the basis of that passage that the judge then concluded that the importance of the presence of the appellant in the light of his two minor children, in particular T, amounted to '*exceptional and compelling circumstances*' having regard to the best interests of the children. According to the judge, the respondent's decision gave rise to a disproportionate breach of Article 8 in the context of the appellant's family life.
26. This is a reference, somewhat misquoted, to the seminal passage in s.117C (6) that '*in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2*'. The exceptions include, in Exception 2, where there is a genuine and subsisting parental relationship with a qualifying child and the effect of C's deportation on the partner of the child would be *unduly* harsh. However, the exceptions are not directly applicable in the case of a person sentenced to 4 years or more. Those are confined to those sentenced to less than 4 years.
27. Importantly as is set out in sub-paragraph (6) in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years the public interest requires deportation unless there are very compelling circumstances *over and above* those described in Exceptions 1 and 2. It was therefore necessary for the judge to find *very compelling* circumstances in order to reach that conclusion. It was not enough to find that the effect of deportation would be harsh or even unduly harsh.
28. The circumstances upon which she clearly relies as being the governing circumstances are plainly in relation to T and to a lesser extent in relation to D. However, what is in our judgment lacking in the determination is any proper consideration of the public interest. The public interest in this case has been engendered by the fact that this was a most serious offence and that very compelling circumstances have to be identified and balanced against the very significant public interest when an individual has been sentenced to a period of imprisonment of such a length.
29. In the determination there is no sense in which the public interest is given proper ventilation. It is true that the judge records the sentencing remarks but does so

without comment. It is also true that the judge says that she attaches great weight to the public interest in deporting foreign criminals and to the gravity of the offence for which the appellant was convicted. However, that simply does not address the seriousness of this offence and the requirement to find the very compelling circumstances which *compelled* the decision maker to prevent his removal notwithstanding this very serious offending. In our judgment there was simply nothing within the evidence that was recited that amounted to the very compelling circumstances that are needed in the context of the case where the offending is of such seriousness. For these reasons we consider the appeal of the determination discloses an error of law and we set it aside.

30. That brings us on to the disposal of this case. Directions were provided in this case. Paragraph 4 of them states that there is a presumption that in the event of the Tribunal deciding that the decision of First-tier Tribunal is to be set aside as erroneous in law the re-making of the decision will take place at the same time at the same hearing. The fresh decision will normally be based on the evidence before the First-tier Tribunal. Any further evidence admitted must be submitted in accordance with provisions made in the directions. The parties must be so prepared in every case.
31. There has been no submission of further evidence and, at the conclusion of the submissions in relation to the error of law, we asked whether there was any further evidence that was to be provided. We were told only that there was the possibility of psychiatric evidence being sought relating to the appellant. With the greatest respect to that submission, the possibility of further evidence is not sufficient, not even psychiatric evidence which has not yet been obtained, the contents of which is entirely speculative. In particular, given that it is suggested that there may be psychiatric evidence in relation to the appellant, it is very unlikely that such psychiatric evidence would prevent his removal if it was not before the sentencing court.
32. The consequence therefore is that there is nothing to prevent the Tribunal this afternoon from re-making the decision in accordance with the evidence that was before the First-tier Tribunal Judge and paying proper regard to the public interest.
33. In re-making the decision, we have well in mind the evidence that was so meticulously set out by the First-tier Tribunal Judge in favour of this family and the reasons why they should not suffer the removal of the appellant. For our part we consider we should exercise great sympathy for people who are the victims of a deportation order. We use the word '*victims*' advisedly because that is what they are. But it is as well to remember that it is not the Secretary of State who causes the inevitable adverse consequences that flow from the appellant's misconduct, nor is it the Courts or Tribunals that cause that damage. Rather it is the appellant's conduct that is the cause of the disruption that will inevitably flow from the appellant's removal.

34. Sympathy for the victims of a deportation order however cannot be determinative and merely to list the disadvantages that a family will suffer as a result of the removal of an individual cannot be sufficient unless there is proper reference made to the public interest. The amorphous concept of the public interest is perhaps difficult to describe and is certainly less easy to describe when compared with a simple description of the heartache that will be suffered by an 8 year-old or a 10 year-old or a 14 year-old by the removal of their father. However, that is what deportation often does, when the seriousness of the offence merits it and, in this case, we would regard the offending as very serious indeed.
35. For these reasons we consider that we have to do that which the judge did not do. This requires a clear and express assessment of the balance that has to be struck between the public interest and the harm that these children will suffer. In our judgment, that balance, paying due regard to the requirements of s. 117C and the fact that this is a very serious offence and that the more serious the offence committed by a foreign criminal the greater the public interest in deportation is weighed against the effect upon the family.
36. Bearing in mind these factors there is, on one side of the balance, a very heavy public interest in favour of the appellant's removal. Merely to look at that side of the balance however is plainly insufficient. What we must do is to look at those consequences which were identified by the First-tier Tribunal Judge in her determination and balance them, one against the other. In doing so we are quite satisfied that the balancing factors advanced by the appellant do not amount to the very compelling circumstances which are necessary in a case of this nature and that the hardship that will undoubtedly flow from this decision is a hardship which is the inevitable consequences of serious misconduct. It is not unduly harsh when considered against the level of offending in respect of which the appellant was convicted. Further, s.117C(6) requires something more than ('over and above') its being found that it is harsh, even unduly harsh. In those circumstances carrying out the re-making of the decision we consider that the balance is firmly in favour of the appellant's removal.
37. We need say little more save this. There was a significant factor which the judge did not take into account in her determination and that is the long period of absence that has occurred in the relationship between the appellant and his family. We were told that some eighteen months before the offence took place in January 2014 the appellant had left the matrimonial home and had spent some eighteen months in a hostel. The period that then followed was a period where the appellant was detained. We calculate that he would have been detained for something like 43 months being one half of the term of his imprisonment. Consequently on our calculations the appellant was absent from the family home for a full period of five years, probably five years and two months before he was reunited in mid-September 2017 when he was released. We consider this to be an important factor in the overall consideration and by the time the judge dealt with the case in May of 2018 the family had only been reunited for a period of eight months. That consideration was omitted from the determination.

38. We consider it was an important consideration. The father left the matrimonial home when the children were aged 8 and 7 respectively and he returned home in the middle of September 2017 when the children were then 13 and 12. That is a factor we take into account.
39. We also take into account the very careful gradation which exists in these cases of deportation depending upon the period of imprisonment. The periods of imprisonment within the terms of sections 117A-D in the 2002 Act draw clear distinctions between periods of imprisonment which are less than twelve months, periods of imprisonment which are at least twelve and periods of imprisonment which are four years and more. This shows a decisionmaker that there is a distinct pattern in the consideration of offending which has to be taken into account. The persons who are therefore deported as a result of serious offending are not simply deported on a blanket basis but by careful analysis of the various categories into which they fall. In this case it was plain that, in the case of a period of seven years and two months, the appellant fell within that most serious category (and by a significant margin). That is something to which, inevitably, proper consideration is to be given. We are quite satisfied that deportation was the inevitable result of this appellant's offending notwithstanding the circumstances which he could properly put forward as to his family and the consequences upon his children.
40. For these reasons we re-make the decision allowing the appeal of the Secretary of State, setting aside the decision of the First-tier Tribunal and re-making it by dismissing Mr [W]'s appeal to the Tribunal.

DECISION

- (i) The appeal of the Secretary of State is allowed.
- (ii) The decision of the First-tier Tribunal is set aside.
- (iii) On the re-making of the appeal of Mr [W], his appeal against the decision of the Secretary of State is dismissed.
- (iv) No anonymity direction is made.

ANDREW JORDAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL

Dated 11 October 2018