



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08457/2017

THE IMMIGRATION ACTS

Heard at Field House
On 21 August 2018

Decision & Reasons Promulgated
On 7 September 2018

Before

THE HONOURABLE LORD BECKETT
UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FELICIEN NGOULE EKOUME
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr A Mackenzie, instructed by Luqmani Thompson & Partners
Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission to the Upper Tribunal against the decision of a Judge of the First-tier Tribunal who allowed the appeal of Mr Ekoume against the Secretary of State's decision of 10 April 2015 (confirmed on 27 July 2017) to make a deportation order.
2. We shall refer hereafter to Mr Ekoume as the appellant, as he was before the judge, and to the Secretary of State as the respondent, as he was before the judge.
3. The appellant claims to have entered the United Kingdom in January 2005 using a false passport. On 6 October 2006 he pleaded guilty to using a false instrument (the

passport) and was sentenced to fifteen months' imprisonment. No deportation action was taken by the respondent at that time. He made an application for leave to remain on family and private life grounds in August 2013. This was refused with no right of appeal. He made a further application in April 2014 and in November 2014 he was served with a notice of decision to make a deportation order and the order was made on 10 April 2015 and a decision to refuse his human rights claim was certified. This decision was reviewed by the respondent and upheld in May 2015. There was a judicial review of the certification decision, and the respondent subsequently agreed to make a fresh decision. The fresh decision again certified the human rights claim, on 22 September 2016, and after a further judicial review there was a further consent order on 6 July 2017. The fresh decision was made on 27 July 2017 refusing the human rights claim.

4. The appellant met his wife in the summer of 2010 and they have been together subsequently. She is a senior diabetes specialist practitioner nurse earning a salary of £49,000 per annum and directly managing a staff of fifteen and overseeing an entire unit as the lead nurse. They underwent an African traditional religious marriage ceremony at their home on 5 April 2015. The couple's evidence was that it was not realistic to think she can move to Cameroon, the appellant's country of nationality, since the majority of the country speaks French and she does not. She would not have the opportunities to further her career or even work there as a person who did not speak French.
5. Since his release from prison the appellant has worked as a poet performing in clubs and pubs and on the street for money. He has been attending the same church in the United Kingdom for over ten years and is an assistant leader for the men's ministry. In evidence his wife said that she would go with the appellant to Cameroon if he had to return but it would be very challenging to learn French and there would be a language barrier for jobs for her.
6. The judge noted the relevant statutory provisions and relevant provisions of the Immigration Rules. She bore in mind the appellant's offending, noting that whilst clearly any offending was serious, the length of sentence received by the appellant was comparatively towards the lower end of the scale. There were no probation reports on the appellant and there was no evidence that he presented any material risk of reoffending.
7. She noted that there had been a substantial delay in pursuing deportation action against the appellant from 2006 when he was convicted to 2015 when the deportation order was made. She noted the suggestion that this was due to the Prison Service incorrectly indicating to the respondent that the appellant was a French national at the time. The appellant had however consistently maintained that he had never claimed to be a French national and it was said in the appeal before the judge that the respondent appeared to abandon any claim that he did so within the judicial review proceedings. The respondent conceded the fact of the delay but argued that this alone did not outweigh the public interest in the appellant's deportation.

8. It was clear that the appellant had to show there were very compelling circumstances over and above those described in paragraphs 399 and 399A of the Immigration Rules. As regards the situation under section 117C of the 2002 Act, the question was whether the effect of the appellant's deportation on his wife would be unduly harsh.
9. The judge referred to the relevant case law such as Hesham Ali [2016] UKSC 60, Rhuppiah [2016] EWCA 803 and MM (Uganda) [2016] EWCA Civ 450. She also took account of what had been said with regard to delay in EB (Kosovo) [2009] AC 1159 and in MN-T (Colombia) [2016] EWCA Civ 893. She accepted that due to the weight attached to the general public interest in the deportation of foreign offenders there was a high threshold of "very compelling circumstances" that must be met. She noted that the cases also made it clear that the public interest was not fixed and it depended on the individual's circumstances including the risk of reoffending, the extent and nature of family life, and delay might also be significant in reducing the public interest. She adopted the balance sheet approach that has been recommended by the Supreme Court in assessing such matters as the appellant's criminal history, failure to regularise his immigration status for some six years, and the delay on the part of the respondent. She regarded that as making a critical difference and as constituting an exceptional circumstance in this case.
10. The judge also found that the family life enjoyed by the appellant and his wife was significant and longstanding. She did not consider that the evidence showed that there would be very significant obstacles to his integration into Cameroon, particularly if his wife continued to assist him financially until he had established himself. She considered however that the position of his wife was very different. She had no ties to Cameroon, did not speak French which is the predominant language spoken, and had been highly successful in following a specialised career to the point where she held the position described above. The background information indicated that only natives of Cameroon might work as nurses, and the judge thought it might be significantly difficult for her to find work in the non-government health sector in relation to her specialised area of diabetes, particularly as she did not have the French language to help her work and integrate into the country. She took into account in assessing the public interest the fact that the appellant's wife is a British citizen family member undertaking an important and socially useful job within the NHS in the United Kingdom. She concluded, attaching particular weight to the significant delay in taking the deportation action which had allowed the appellant to strengthen substantially his family life and demonstrate his rehabilitation, that there were sufficient factors in his favour to amount to very compelling circumstances outweighing the public interest and rendering his deportation disproportionate.
11. The respondent sought and was granted permission to appeal the judge's decision, arguing first that the respondent was culpable for no more than part of the time delay since for a number of years it had been of the view that the appellant was an EU national and also the appellant had been compliant in the delay with his failure to regularise his status and remaining illegally and a further two years' delay before the decision was due to the judicial review actions that he had taken. Reliance was placed on a decision of the Upper Tribunal in RLP [2017] UKUT 00330 (IAC). It was argued

that the appellant had had a significant part to play in the delay. The second ground concerned the undue harshness implications for the appellant's wife. It was argued that the relationship had been established and progressed whilst both parties were aware that the appellant had no basis to remain in the United Kingdom and she could remain and continue the relationship with visits to him until he could apply to return. The decision to relocate to Cameroon was a matter for his wife and she could seek employment if she chose to when she relocated and he could support her on relocation.

12. Permission to appeal was granted, on all grounds.
13. In his submissions Mr Melvin relied on and developed points made in the application for permission and the grant of permission. Partial responsibility for the delay was accepted, but what the judge had concluded needed to be balanced with the appellant's history as set out in the grounds, and this was a critical point that the judge had not properly addressed. As regards the undue harshness point, the evidence was that the language split in Cameroon was in terms of 70:30% French to English in a country of 25,000,000 people and the judge had not considered the choice open to the couple. The point was emphasised that the decision in UE (Nigeria) [2010] EWCA Civ 975 could not be relied on since that was not a deportation case.
14. In his submissions Mr Mackenzie relied on and developed points made in his Rule 24 response. Having rehearsed the chronology, he made the point that it was unclear why the Prison Service had assumed the appellant was French and had told the Secretary of State this. The appellant could not be criticised for instituting judicial review proceedings twice in order to obtain the right of appeal which was subsequently granted to him. The two decisions successfully challenged had been unlawful ones.
15. Mr Mackenzie also attached weight to what had been said by the Court of Appeal in MN-T, in particular the rationale at paragraphs 41 and 42. The decision in RLP was very different, as had been argued in the response, and that the appellant there had been sentenced to four years for wounding, had at best a "flimsy" family life and had had little else in his favour. The judge had been entitled to conclude as she did and the grounds were essentially a matter of disagreement. It had not been argued that the decision was irrational.
16. By way of reply Mr Melvin argued that MN-T was a case on its own facts and had not been before the Upper Tribunal in RLP. The appellant in MN-T had come to the United Kingdom as a small child and spent her formative years in the United Kingdom, in contrast to this case. It could not be argued that even if the Secretary of State had thought the appellant to be French he could have deported him, as the policy was that an EU national required a sentence of at least two years before deportation proceedings were brought or it was a case of numerous offences, and neither was the case here. Although Mr Mackenzie had argued that deportation authorities had been cited in UE, that was a decision before the changes in the Rules and in particular the emphasis on public interest as now set out in the Rules, so it had to be seen in light of that.

17. We reserved our decision.
18. Ground 1 in essence challenges the weight placed by the judge on the delay on the part of the respondent in taking deportation action. As the judge noted, a not dissimilar situation occurred in MN-T where the appellant was sentenced to eight years' imprisonment for drug dealing but the Secretary of State delayed for some five years after her release before beginning deportation action, a delay which had extended to nine years at the time when the decision appealed was made. The Court of Appeal made the point at paragraph 35 that that lengthy delay made a critical difference and was an exceptional circumstance. It had led to the claimant substantially strengthening her family and private life in the United Kingdom and it had also led to her rehabilitation and to her demonstrating the fact of her rehabilitation by her industrious life over the last thirteen years. The Court of Appeal considered that the matter might have been decided either way but it was an evaluative decision within the range which the Upper Tribunal was entitled to make.
19. The point was also made at paragraph 41 that there were three important reasons in particular why the deportation of foreign criminals was in the public interest. The first of these was that once deported the criminal will cease offending in the United Kingdom. The second was that the existence of the policy to deport foreign criminals deters other foreigners in the United Kingdom from offending. The third was that the deportation of such persons expresses society's revulsion at their conduct. At paragraph 42 the Court of Appeal went on to say the following:

“42. If the Secretary of State delays deportation for many years, that lessens the weight of these considerations. As to (1), if during a lengthy period the criminal becomes rehabilitated and shows himself to have become a law-abiding citizen, he poses less of a risk or threat to the public. As to (2), the deterrent effect of the policy is weakened if the Secretary of State does not act promptly. Indeed lengthy delays, as here, may, in conjunction with other factors, prevent deportation at all. As to (3), it hardly expresses society's revulsion at the criminality of the offender's conduct if the Secretary of State delays for many years before proceeding to deport”.
20. We of course entirely endorse this reasoning. We do not consider that the case can be said to be one limited to its own facts. These are points of general principle enunciated by the Court of Appeal.
21. We also agree with Mr Mackenzie that the history is essentially that as set out by the judge. It does not appear to be asserted by the respondent that the appellant said he was a French national, that seems rather, as the judge took into account, a matter in respect of which any claim that the appellant had claimed to be a French national was abandoned by the respondent within the judicial review proceedings. Certainly, the appellant cannot be criticised for delay in the course of trying to get an appeal right in relation to which he was subsequently successful, after two failed attempts by the respondent to certify the claim.

22. We consider that the judge was fully entitled to attach the weight that she did to the period of delay in this case for the reasons given, and supported by the reasoning of the Court of Appeal in MN-T. In her mind that was a key factor, and it was fully open to her to come to that view.

23. As regards ground 2, we see no error in that regard either. The judge was entitled to regard as relevant to the public interest the valuable and important contribution of the appellant's wife to the United Kingdom in terms of the senior and responsible job she has in the NHS. Clearly there would be difficulties for her, to say the least, in undertaking work at a similar level in Cameroon bearing in mind the evidence that the judge noted that only nationals of Cameroon may work as nurses and the language difficulties that would no doubt be a factor also. Accordingly, bringing these matters together, we do not consider that it has been shown that the judge erred in law in any respect in what was a full, careful decision with a proper and detailed analysis of the relevant legal authorities. Her decision allowing the appeal of the appellant is upheld.

No anonymity direction is made.



Signed

Date

Upper Tribunal Judge Allen