



Upper Tribunal
(Immigration and Asylum Chamber)

HU/17373/2017

THE IMMIGRATION ACTS

Heard at Glasgow
On 19 October 2018

Decision & Reasons Promulgation
On 26 October 2018

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M T O

Respondent

For the Appellant: Mr A Govan, Senior Home Office Presenting Officer
For the Respondent: Mr C H Ndubuisi, of Drummond Miller, Solicitors

DETERMINATION AND REASONS

1. Parties are as above, but the rest of this decision refers to them as they were in the FtT.
2. This decision is to be read with:
 - (i) The SSHD's decision dated 8 December 2017 refusing the appellant's claims to be entitled to leave to remain, and declining to revoke the deportation order made against him.
 - (ii) The appellant's grounds of appeal to the First-tier Tribunal.

- (iii) The decision of FtT Judge SPJ Buchanan, promulgated on 6 April 2018, allowing the appeal.
 - (iv) The SSHD's grounds of appeal to the UT, stated in the application for permission to appeal filed on 18 April 2018.
 - (v) The grant of permission by FtT Judge Keane, dated 11 May 2018.
 - (vi) The rule 24 response on behalf of M T O, dated 20 August 2018.
3. Mr Govan had nothing to add to ground 1, which is that the FtT did not take a prior decision as a starting point. Mr Ndubuisi referred to *AA (Somalia) v SSHD* [2007] EWCA Civ 1040 at paragraphs 20 and 29 and to the FtT's decision at paragraph 7.12. I indicated that ground 1 would not be upheld.
 4. Ground 2 contends that the FtT allowed the appeal on the unduly harsh effects of deportation on the appellant's children, without identifying anything exceptional to outweigh the compelling public interest. Ground 3 says that while the FtT noted the criminal history, it did not weigh his serious criminality and immigration history when deciding in his favour. Both representatives said that these grounds overlapped, and dealt with them together.
 5. Relevant passages from *AR (Pakistan) v SSHD* [2010] EWCA Civ 816, *AJ (Zimbabwe) v SSHD* [2016] EWCA Civ 1012 and *MM (Uganda) v SSHD* EWCA Civ 450 are set out in the grounds.
 6. Mr Govan further founded upon these passages in *AJ*:

"45. Nowhere in the tribunal's decision is there a clear recognition of the very powerful weight to be given to the public interest in deporting foreign criminals or the need for compelling factors to outweigh it. Acknowledging that "considerable weight" should be given to certain aspects of the public interest does not suffice: see *Secretary of State for the Home Department v MA (Somalia)* [2015] EWCA Civ 48 para.25 per Richards LJ.

46. Nor do I think that this case should be remitted to the UT. In line with the authorities I have already discussed, had the FTT properly understood the force of the public interest in deportation, it could not have concluded that separation from his children, without more, could amount to compelling reasons. No doubt there will be some emotional damage to the children, but that is not unusual whenever a parent is deported and the child is unable to live with that parent outside the UK. There was nothing special or unusual in the circumstances here which would justify a conclusion that the interference with article 8 rights was disproportionate.

...

48. In my judgment if the proper legal test had been applied, the only proper answer is that there were no compelling circumstances in this case which could displace the very heavy weight to be given to the public interest in removing foreign criminals. Accordingly, there is no purpose in remitting the case. I would uphold the appeal and restore the deportation order."

7. Mr Govan said that the judge founded on the effect of the appellant's departure on relations between two of his children, half-siblings who live in separate households (in Aberdeen and London), and made brief reference to psychological and medical evidence, but did not show any unusual impact and did not give any reasons which justified allowing the appeal. He submitted that this was a case like *AJ*, where the outcome fell to be reversed.
8. The main points which I noted from the submissions of Mr Ndubuisi were these:
 - (i) The FtT correctly identified the issues at 7.4. The appellant's relationships were not in doubt. The eldest child, M, could not go to Nigeria. The case was effectively governed by whether it was unduly harsh for the children, M, L, and A, to remain in the UK without the appellant. It was not in the category of "very compelling circumstances over and above" such considerations. It was only on whether any exception applied.
 - (ii) At 7.15 the judge took account of the offending being serious and repeated. At 7.16 he rejected parts of the appellant's claims. At 7.17 he was clear that the findings about the consequences for the children depended on the evidence of others, not the appellant.
 - (iii) The crucial conclusion at 7.17.1 was open to the judge, was reasoned on the basis of the evidence, and went beyond the usual incidents of family life impact on a family. This was backed up by the citations from reports at 7.13.4 – 5. M had already lost a sibling, and on the appellant's departure she faced effective loss of contact with two more siblings.
 - (iv) The case was comparable to *Nguyen v SSHD* [2017] EWCA Civ 258, *SSHD v ZP (India)* [2015] EWCA Civ 1197, and *Quarey v SSHD* [2017] EWCA Civ 47, all referred to in the FtT.
 - (v) This might have been a borderline case, and another panel might have decided differently, but there was no error of law.
 - (vi) It was agreed that this was not a case with any scope for remittal, but which fell either to be upheld, or to be reversed.
9. In respect of grounds 1 and 2, I reserved my decision.
10. Parties were correct in agreeing that the case fell either to be upheld or to be reversed in the UT. There was no significant dispute about the primary facts, no suggestion of any significant change, and no application to introduce further evidence.
11. The respondent founded upon the case law making it clear how high the tests are in deportation, but did not show that the judge was not aware of that.
12. The respondent has shown no error to be derived from the judge's self-directions on the law.
13. Mr Ndubuisi was right to point that this case is in the category of undue harshness, not of "very compelling circumstances over and above", and gleaned some support

from *Nguyen* at 44, *Quarey* at 37 – 38, and *ZP* at 47 – 48. However, each case turns ultimately in its own facts.

14. At 17.13.4 – 5 and 7.14 the judge deals with reports on the effect on the child L and finds it would be unduly harsh, which is possibly a marginal judgement on whether separation would bring more than the expected incidents. The crux of the judgment then comes at 7.17.1:

“I conclude that the eldest child, M, cannot live in Nigeria (as conceded by the respondent) and that the consequences of removal of the appellant to Nigeria would mean that her half-brother L would either have to leave with his father (and thereby sever the ongoing relationship between eldest and middle/youngest children); or L would need to live in the UK without his father. In my judgement it would be unduly harsh for L to do either for the reasons given above. In my judgement, it would be unduly harsh for M to live in the UK without her father because to do so would impact on L in an unduly harsh manner and would probably sever the ongoing relationship between eldest and middle/youngest children. The association between children is probably only likely to develop if the appellant remains in the UK to cause the children to interact at contact sessions between appellant and eldest child. It is the latter consideration which forms the most significant factor in reaching my conclusion that removal of the appellant to Nigeria is unduly harsh for M. I also include conclude that M, having had to cope with the death of her full-blood sibling would be likely to suffer adversely from cessation of ongoing contact with her father which is described by her mother as “good-quality contact”. That too would render the appellant’s removal unduly harsh on the child.”

15. Matters are further summed up at the end of 7.18:

“It is the unduly harsh consequence of ending the relationships between children; and the unduly harsh consequence of cessation of direct ongoing contact between eldest child and the appellant which weighs heavily in favour of the appellant in this appeal.”

16. This case was on the borderline, but it had individual features going to the impact upon both M and L. The judge did identify what was distinctive, and he did not minimise the weight to be given to the public interest. The foregoing passages from the decision explain why he came down on the side he did. The respondent has not shown that to have involved the making of an error on a point of law.
17. The decision of the First-tier Tribunal shall stand.
18. The FtT made an anonymity direction, and the matter was not addressed in the UT, so anonymity is maintained herein.



22 October 2018

Upper Tribunal Judge Macleman