



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17907/2016

THE IMMIGRATION ACTS

Heard at Field House
On 27 February 2018

Decision & Reasons Promulgated
On 8 March 2018

Before

THE HONOURABLE MR JUSTICE NICKLIN
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms C Robinson, Counsel, instructed by Lupins, solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal brought by the Secretary of State from the decision of First-tier Tribunal Judge Griffith, promulgated on 20 December 2017. The appellant in the First-tier Tribunal was made the subject of an anonymity direction, which we continue, and we will refer to him as SB in this decision.

2. There were a number of issues which fell to be determined by the First-tier Tribunal which included SB's nationality and whether he was married to his partner, a Dutch national, Ms DD. Having heard and considered evidence and submissions on those points, the judge came to the conclusion that SB was a Liberian national and that the proxy marriage to which he had been a party was a valid and regular marriage in accordance with the local law where it was contracted.
3. There is no appeal in relation to these findings. The issue of substance for the purposes of this appeal concerns the consideration of whether SB's deportation to Liberia as a foreign criminal would amount to a violation of his Article 8 rights.
3. The immigration history concerning SB is fully set out in the First-tier Tribunal decision at paragraphs 3 and following and I do not need to rehearse it here. At paragraphs 12 and following, the judge summarises the reasons given by the Secretary of State for refusing the application made by SB in her refusal letter of 14 July 2016. At paragraphs 24 and following there is a recitation of the evidence given by SB in the hearing when he adopted three witness statements and was cross-examined on their content. In addition, evidence was given by Ms DD, which was similarly subject to cross-examination.
4. The other substantive evidence which was put before the First-tier Tribunal was in the form of what has been classed as an expert report by Christine Brown, who is an independent social worker. This is summarised at paragraph 72 of the decision, which sets out the content of the report and an addendum dealing primarily with the relationship between the children and SB. By the term children in this context I refer to two children of Ms DD by a prior relationship which were treated as SB's own children (and following the marriage became his stepchildren) and three biological children of SB born during the currency of his relationship with Ms DD.
5. In the First-tier Tribunal it was conceded on behalf of SB that he did not come within the provisions of paragraphs 399 and 399A of the Immigration Rules because (a) his children are not British citizens and/or have not lived in the United Kingdom for the qualifying period of 7 years; (b) the lack of status at the commencement of the relationship; and (c) the fact that SB had not been lawfully resident in the UK for most of his life. That concession is properly repeated in paragraph 5 of SB's rule 24 response, settled on his behalf by Ms Robinson of counsel who represents him today as he did before the First-tier Tribunal.
6. In the circumstances it was unnecessary to address directly the issue of whether it would be "unduly harsh" either for the children and/or partner to relocate to Liberia or, in the alternative, for them to be separated in consequence of SB's deportation. Instead, the question which then fell to be determined was whether in all the circumstances there very compelling circumstances over and above those in rules 399 and 399A by which the proposed deportation would amount to a violation of SB's article 8 rights. The "unduly harsh" hurdle is however a relevant feature in considering whether the public interest arguments should prevail notwithstanding

the engagement of Article 8. See generally **Chenge (section 117D Article 8 approach) [2015] UKUT 165 (IAC)**, particularly at paragraph 33.

7. Perhaps in consequence of the time taken in the disposal of the other issues to which we have adverted above, the judge dealt with this substantive matter comparatively briefly in the concluding paragraphs of the decision. She made reference to the decision of the Supreme Court in **Hesham Ali [2016] UKSC 60** (reported as **Ali v Secretary of State for the Home Department [2016] 1 WLR 4799**) and quoted in full from the judgment of Lord Reed at paragraph 38, which reads as follows:

“The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and Rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at paragraph 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of Section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new Rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary [...] but they can be said to involve ‘exceptional circumstances’ in the sense that they involve a departure from the general rule.”

8. In oral submissions, Ms Robinson took us to this passage and also to one from the concurring judgment of Lord Thomas of Cwmgiedd:

“[82] ... Judges should, after making their factual determinations, set out in clear and succinct terms their reasoning for the conclusion arrived at through balancing the necessary considerations in the light of the matters set out by Lord Reed at paragraphs 37 to 38, 46 and 50. It should generally not be necessary to refer to any further authorities involving the deportation of foreign offenders.

[83] One way of structuring such a judgment would be to follow what has become known as the ‘balance sheet’ approach. After the judge has found the facts, the judge would set out each of the pros and cons in what has been described as a balance sheet and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders.”

9. As we have already noted, the judge's decision on this point was very briefly stated and did not seek to adopt the so-called "balance sheet" approach by indicating the countervailing factors which militate in favour and against the contentions of SB. In paragraph 77, whilst the judge cites sections 117B and 117C of the Nationality, Immigration and Asylum Act 2002, the consideration given to those provisions is brief. The judge's conclusions can be found in paragraphs 78 and 79:

"78. As stated in **Hesham Ali**,

'ultimately, [the Tribunal] has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life.'

79. Taking into account all the relevant circumstances, but in particular the interests of the children and the potentially serious effect the removal of the appellant would have not only on his own biological children who are still quite young but his two stepchildren, I find this is one of those 'very small minority' of cases where the public interest in requiring the appellant's deportation is outweighed by his family life."

10. Despite the assertion made by the judge, there is no analysis of why, on its fact, this matter comes within one of those very small minority of cases. Nowhere does the judge express with any degree of specificity her reason for finding that SB's case was within that very small minority of cases, nor the evidence upon which she based such a conclusion.
11. Ms Robinson has sought to place particular reliance upon the evidence of Christine Brown, the independent social worker. She has taken us not merely to the summary of the report by the judge in paragraph 75 of the decision but also to the underlying report itself, not least paragraph 3.46, which for completeness, reads as follows:

"Having spent time with the five children, in my view they will be deeply affected on a number of levels by their father/stepfather's removal from the United Kingdom. I would strongly suggest that the older two children would become stuck and fixated at the point where their stepfather had been removed from the United Kingdom, with continued thoughts of what might have been, as indicated by Chris Beckett and Hilary Taylor in their study of human development, had the family been able to remain together and continue to provide the elder children with the stability that had been lacking in their younger lives. As for [the three named biological children], they have never known instability or insecurity in their lives and it would be a travesty to now introduce this into their lives, with the removal of their father, whether this would be in the longer or short term, as the separation between SB and the children could only introduce severe elements of doubt and possibly a sense of rejection that will compromise

their relationships with one another. I cannot envisage this being averted, other than by [SB] being allowed to remain in situ with his family members and they with him.”

12. Taking the report in its totality, it does not come close to being indicative, still less probative, of the existence of very compelling circumstances. Nowhere within the decision does the judge go so far as to say that it is the content of the report which demonstrates very compelling circumstances or that she reached such a conclusion based on her independent assessment of the evidence. The judge did make brief reference to the appellant’s crime, albeit she perhaps miscategorised it as simply an offence of dishonesty whereas in reality it related to the possession of false identity documents, engaging issues of immigration control.
13. In all the circumstances, we consider that Christine Brown’s report goes no further than setting out the typical consequences of fracturing of familial relationships when a father is separated from his children. There is no exceptional feature (such as medical need, for example) that might amount to very compelling circumstances. We are drawn to the inevitable conclusion that the judge failed to approach and resolve this appeal before her by applying the proper legal framework. This amounts to an error of law.
14. Ms Robinson’s fallback submission today has been that even if we are satisfied that there is an error of law, such error is not material to the eventual outcome of the matter. She relies upon what is an obiter statement from the judge at paragraph 68 of the decision relating to the application of Regulation 27 and the EEA Regulations, the judge having found as a fact that SB was married to Ms DD, an EEA national exercising treaty rights in the United Kingdom.
15. However, that matter was not before the First-tier Tribunal for determination so any comment by the judge is at best illustrative background. It is certainly not dispositive of the appeal. It may be that the judge’s conclusions on this peripheral issue infected her consideration of the substantive matter which fell to be determined.
16. In our view, the error of law which has been identified is material and is such as to undermine the decision in its totality. Both Mr Wilding, who acts for the Secretary of State, and Ms Robinson submit to us that were we to find there to be a material error of law the proper course would be to remit the matter to be reheard in the First-tier Tribunal by a judge other than Judge Griffith. Amongst other reasons, Mr Wilding has indicated that, in the light of the conclusions of the First-tier Tribunal, it would be appropriate for the Secretary of State to give further consideration to the application of the EEA Regulations, which previously she had concluded were irrelevant as she did not accept the validity of the proxy marriage. It is not for the Upper Tribunal to direct reconsideration by the Secretary of State, but we are pleased to record Mr Wilding’s assurance that he will refer the matter internally in the light of the judge’s finding on the validity of the marriage we do not disturb.

Notice of Decision

- (1) The appeal is allowed and the decision of the First-tier Tribunal is set aside.
- (2) The appeal is remitted to the First-tier Tribunal for redetermination by a judge other than Judge Griffith.
- (3) The following findings of fact are expressly preserved:
 - i. that SB is a Liberian national;
 - ii. that SB is lawfully married to Ms DD.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent (SB) is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the respondent and the appellant. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Mark Hill*

Date 6 March 2018

Deputy Upper Tribunal Judge Hill QC