



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

Appeal Number: HU/04689/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 18 June 2019**

**Decision & Reasons Promulgated
On 27 June 2019**

Before

**THE HONOURABLE MRS JUSTICE THORNTON DBE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE McWILLIAM**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SO

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant/Secretary of State for the Home Department:

Mr N Bramble, Home Office Presenting Officer

For the Respondent: Mr P Lewis, Counsel instructed by Wilson Solicitors LLP

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

Unless and until a Tribunal or court directs otherwise, the Appellant 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 Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

This is an appeal by the Secretary of State against the decision of the First-Tier Tribunal (“the FTT”), promulgated on 25 March 2019, allowing the appeal of SO against the decision of the Secretary of State to deport him and refuse his human rights claim, following a series of motoring offences. In this decision, for ease of reference, we shall refer to Respondent as the Appellant as he was known before the FTT.

We have made a direction to anonymise the Appellant in order to protect the identity of his brother F. He has a history of mental health problems.

The Appellant is a citizen of Ghana. His date of birth is 15 June 1985.

The Appellant arrived in the United Kingdom at the age of eleven and was granted limited leave to remain. He was granted indefinite leave to remain on 29 August 2012.

Between 04 July 2016 and 10 November 2017 the Appellant was convicted of a total of 9 driving offences including driving with excess alcohol, driving whilst disqualified and driving whilst uninsured. He was sentenced to a total period of imprisonment of 38 weeks.

Following his conviction for offences on 10 November 2017, on 30 November 2017, the Appellant was served with the Secretary of State’s decision to deport him pursuant to section 5(1) of the Immigration Act 1971 on the ground that his deportation was deemed to be conducive to the public good.

In January 2018, the Appellant made representations against deportation, which included a human rights claim. In a decision sent by letter of 06 February 2018, the Secretary of State rejected the representations and refused the human rights claim.

The Appellant’s appeal against the Secretary of State’s decision was heard before First Tier Tribunal Judge Norton Taylor who allowed the appeal.

The legal framework

The Appellant is a ‘foreign criminal’ as defined by Section 117D(2) of the Nationality, Immigration and Asylum Act 2002, having been found by the FTT Judge to fall into the category of ‘persistent offender’.

Part 5A of the Nationality, Immigration and Asylum Act 2002 sets out the considerations where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person’s right to respect for private and family life under Article 8

European Convention on Human Rights. In the case of foreign criminals Section 117C provides as follows:

“117C Article 8: additional considerations in cases involving foreign criminals

The deportation of foreign criminals is in the public interest.

The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

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.

Exception 1 applies where -

has been lawfully resident in the United Kingdom for most of C's life,

C is socially and culturally integrated in the United Kingdom, and

there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

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.

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 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.”

Similarly; under paragraph 396 of the Immigration Rules, where a person is liable to deportation the presumption shall be that the public interest requires deportation.

Paragraph 398 of the Immigration Rules, insofar as the material applies to persistent offenders like the Appellant, provides:

“Where a person claims that their deportation would be contrary to the UK’s obligations under Article 8 of the Human rights Convention, and

...

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if that 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.”

Paragraph 399 of the Rules applies if a person has a parental relationship with a child under the age of 18 years or relationship with a British or settled partner and where deportation would be unduly harsh. Paragraph 399A concerns private life factors.

The FTT and the Upper Tribunal will respect the high level of importance which the legislature attaches to the deportation of criminals (NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 622, [2017] 1 W.L.R. 207, para 22).

The test in the Rules (and the corresponding test in section 117C of the Nationality, Immigration and Asylum Act 2002) is intended to *“provide a structured basis for application of and compliance with Article 8, rather than to disapply it”* (NA (Pakistan), above, para 26).

An Appellant who cannot meet the requirements under para 399 or 399A (Exception 1 or 2 of the 2002 Act) may nonetheless meet the “very compelling circumstances” test in paragraph 398 of the Immigration Rules (s.117 C (6) of the 2002 Act); but such cases must be especially strong and will therefore be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient (NA (Pakistan), above, paras 29 and 33).

The Secretary of State and any tribunal “must look at all the matters relied on collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation” (NA (Pakistan), above, para 32).

It follows that the question which fell to be determined by the FTT was whether the public interest in deportation was outweighed by very compelling circumstances over and above those described in paragraphs 399 and 399A and Exceptions 1 and 2 of the Act. That is undoubtedly a very high test.

The FTT decision

The Judge reached his conclusions having seen and heard the Appellant and his partner give evidence. There is no challenge to any of the FTT's findings of fact. The judgement is detailed.

Having assessed the evidence, the Judge arrived at the following key conclusions:

"181. I conclude, by a narrow margin, that this is one of the small minority of cases in which there exists a combination of factors, the cumulative effect of these being that 'very compelling circumstances over and above' those described in paragraphs 399 and 399A of the Rules and Sections 117C(4) and (5) NIAA 2002 are disclosed, such that the very strong public interest in deporting the Appellant is outweighed.

...

183. The Appellant is only able to succeed because of the combined effect of the factors resting on his side of the balance sheet... In order of significance these are:

- i. the Appellant's relationship with F [his brother] and its surrounding circumstances;*
- ii. The Appellant's relationship with KS [his partner] and her familial circumstances;*
- iii. The interconnected factors of the Appellant's time away from Ghana and the time spent in the United Kingdom.*

184 No single factor is of itself 'very compelling' over and above the factors set out in the exceptions, although the first comes extremely close.

185. The specific circumstances of the Appellant's offending, as I have assessed them on his side of the balance sheet, are relevant in that they show that the already very strong public interest is not substantially enhanced by his actions.

186 The Appellant has shown that he has a very strong claim under Article 8. In the very particular circumstances of this case, his appeal falls to be allowed"

The grounds of appeal

On behalf of the Secretary of State, it is contended that the FTT Judge failed to give compelling reasons why the higher threshold of very compelling circumstances is met over and above those described in paragraphs 399 and 399A (which the Judge found did not apply). Mr

Bramble submitted that the needs of the younger brother are not sufficient to meet the threshold. In oral submissions Mr Bramble focused on paragraph 184 of the FTT decision. He submitted the Judge erred in paragraph 184 (with reference to paragraph 183). He explained that matters identified at paragraph 183 (ii) and (iii) to which the Judge attached weight are not matters capable of amounting to “very compelling over and above...” because they are matters that concern Exceptions 1 and 2 of s117C but do not meet the threshold or requirements under those provisions.

Conclusions

The matter came before us to decide whether the FTT made an error of law, permission having been granted to the Secretary of State by Upper Tribunal Judge Martin on 23 April 2019.

Before us, Mr Lewis, on behalf of the Appellant, submitted that Judge Norton-Taylor carried out a meticulously careful analysis in which he weighed all relevant factors in the balance. We agree.

The Judge carefully directed himself at [157-8] as to the public interest in deporting foreign criminals and the high threshold that the Appellant must meet in order to establish “very compelling circumstances”.

He weighed up all the relevant factors in the round in concluding that there were “very compelling circumstances”, rather than basing his conclusion on one factor alone. He took into account the impact of deportation on the Appellant’s immigration history and close ties to the United Kingdom [165-6], his lack of meaningful ties with Ghana [167], the circumstances and nature of his offending [168-170], and the impact of deportation on the Appellant’s relationship with his partner [178-180]. He combined those with what he described as the “single most significant factor”, namely the impact of deportation on the Appellant’s brother, who suffers from schizophrenia [171-5].

We reject Mr Bramble’s oral submissions relating to paragraphs 183 and 184. This is not matter which was raised in the grounds. It amounts to a challenge based on the Judge having attached weight to immaterial matters or having applied the wrong legal test. There is no basis for such a challenge. Judge Norton-Taylor was entitled to take the view that, while Exceptions 1 and 2 were not met, matters relevant to the exceptions could be taken into account, together with the other relevant factors, in the overall balancing exercise in assessing whether there were “very compelling circumstances”. In this respect the Judge has followed precisely the approach prescribed by the Court of Appeal in NA (Pakistan) [2016] at [32]:

“... in principle there may be cases which... [a medium] offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very

compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.”

The Judge was entitled to give very significant weight to the relationship between the Appellant and his brother and to the impact of deportation on that relationship. Judge Norton-Taylor made significant findings of fact in respect of F which are not challenged including those at [171-4], *“there is a particularly strong bond between brothers,”* the Appellant’s mother *“struggled to cope with F when [the Appellant] was in prison ... [and] now relies more and more on [the Appellant] to help her with F,”* and *“[the Appellant] represents an extremely important factor in F’s life and indeed that of his mother too... [the Appellant] is the only family member who has [F’s] full trust and an ability to substantially assist F in maintaining a more stable lifestyle”*. He went on to hold that *“[the Appellant’s] departure from the United Kingdom would deprive a very unwell individual of his closest (at least on an emotional level) relative...”* The Secretary of State has not suggested that the Judge was not entitled to reach these findings of fact on the basis of the evidence before him. Clearly the Judge was entitled to conclude that these powerful considerations, taken in the round together with the other relevant considerations, amounted to “very compelling circumstances”.

In carrying out the balancing exercise, Judge Norton-Taylor was also right to consider at [168] the nature and circumstances of the Appellant’s offending. There is no suggestion that he did not consider very compelling circumstances, having properly considered the extent of the Appellant’s criminality. The Court of Appeal has previously made clear that in considering whether there are “very compelling circumstances”, it is relevant whether the sentence received is, for instance one of 4 years or one of 10 (RF (Jamaica) [2017] EWCA Civ 124 at [19]). Here, the Judge considered that

“save for the offending period between 2016 and 2017, the Appellant has an unblemished record. While I have found that he is a ‘persistent offender’ the period in question was short. I have attributed a degree of severity to the driving offences, but they were not at the higher end of the spectrum”.

The scope of the challenge is narrow. It is essentially a reasons challenge. However, there is no substance in the challenge. The Judge’s conclusion that there are very compelling circumstances was open to him on the evidence. There is no challenge to the findings of fact or to

the judge's self-direction. In the absence of perversity, which is not in any event, a ground of challenge, the application must fail. The remaining challenges are an attempt to re-argue the merits. The Judge properly applied the law and identified what he considered to be compelling circumstances outweighing the strong public interest in deporting the Appellant.

Notice of decision

The Secretary of State's appeal before the Upper Tribunal is dismissed. The First-Tier decision allowing the Appellant's appeal is to stand.

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

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Signed

The Hon. Mrs Justice Thornton DBE

Date 20 June 2019