



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07415/2017

THE IMMIGRATION ACTS

Heard at Field House
On 31 January 2019

Decision & Reasons Promulgated
On 11 April 2019

Before

LORD BECKETT SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE PERKINS

Between

GS

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Whilst no anonymity direction was made earlier in the proceedings, we now make an anonymity direction because the case involves a child. 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.

Representation:

For the Appellant: Mr Ó Ceallaigh, Counsel, instructed by Wilsons Solicitors LLP

For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, born January 1964, is a citizen of Jamaica who appeals against a decision of the First-tier Tribunal of 31 October 2018 to refuse his appeal against a decision of the Secretary of State to deport him as a foreign criminal.
2. The appellant has a lengthy immigration history since he entered the UK in 1997.
3. On 30 October 2008 he was sentenced to imprisonment for 8 years on a charge of wounding with intent to do grievous bodily harm at Croydon Crown Court.
4. On 9 March 2009 he was sentenced to a concurrent sentence of imprisonment for 4 years for supplying the class A drugs, heroin, cocaine and crack cocaine.
5. Since he was released from his prison sentence in 2012, the Secretary of State has sought to deport the appellant on the basis that he is a foreign criminal within the meaning of UK Borders Act 2007 section 32 and liable to automatic deportation. Following his release from his sentence, the appellant was detained under immigration laws until being released on 2 October 2015.

History relevant to these proceedings

6. The appellant has a son G born in October 2007 by a former partner from whom he is estranged. He had contact with the child in prison between 2009 and 2012 until his relationship with the child's mother ended. There seems to have been a significant gap before telephone contact between the appellant and G commenced in February 2014. In a CAFCASS report, Ms Julia Solly, a family court adviser, reported that this was a positive experience for G and that the appellant may be something of a protective factor where there may be some basis to his concerns as to G's parenting by his mother.
7. Care concerns about G with his mother were identified in December 2013 and in 2014 which included an allegation that G had been assaulted by his mother who acknowledged that she was struggling to cope. There had been a report that she had been assaulted by X, the father of her other son L. X had a drug problem and was subject to a community rehabilitation programme. G may have reported being physically abused by X in 2011. Police had been involved in relation to allegations about X on seven occasions between June 2009 and May 2013, most of which involved him turning up unexpectedly at G's mother's house. On one of those occasions he had seriously assaulted her.
8. On 15 March 2016 his probation officer reported that the appellant had complied with licence conditions and was now assessed to present a medium risk of harm to known adults and the public but a low risk to children.
9. On 30 March 2016 the appellant commenced supervised contact with his son and by October 2016 he had unsupported contact for up to four hours.

10. On 19 October 2016 the Family Court at Aldershot and Farnham ordered that the appellant should have contact with G and they have since had frequent and substantial contact.
11. On 17 January 2017 the Family Court made a final order and in the course of his judgment, District Judge James recorded that the appellant has a genuine interest in having a relationship with his son which was his primary motivation; G had formed a real attachment to his father and wanted to have contact with him; the appellant had G's best interests at heart and had been said by Ms Solly to be a protective factor; it was important that G is of dual heritage and it was the appellant who could introduce him to Caribbean culture.
12. Judge James ordered that the judgment be disclosed in the immigration proceedings, the Secretary of State having notified interest in the family proceedings. In his order the judge recorded that it is in G's best interests to have direct contact with his father; this would not happen if the appellant is deported and would be emotionally harmful for G; the probation service consider the appellant to pose no risk to G and his application for contact had not been brought to delay or frustrate his removal from the UK.
13. Similar conclusions to those recorded in the preceding paragraphs were reached by an independent social worker in a report of 28 August 2018 which was before the FtTJ.
14. On 21 August 2018 G was diagnosed with ASD traits, ADD and dyslexia.
15. An independent psychological risk assessment of 11 September 2018 concluded that the appellant is at low risk of future violent offending.

The determination of 31 October 2018

16. The circumstances described above were before the FtTJ who refers to the points founded on by the appellant in his determination. The FtTJ records at para 20 that the appellant is concerned for his son's welfare including whether he was being fed properly, and is alert to the problems his former partner had had with X. Whilst the appellant has ten other children who now live in Canada, USA, Jamaica and the UK, his relationship with G is different because he needs to be near him to make sure that he is safe and well. He would go back to Jamaica if it were not for G (paras 21 and 22).
17. The FtTJ noted part of the Family Court's reasoning in para 27 of the determination: contact might be appropriate to allow the child to get to know his father for what might prove to be a short period after which the relationship may be cemented in the future with the potential to maintain contact by telephone and Skype.
18. At para 37 the FtTJ noted that Mr Ó Ceallaigh submitted that G's safety was the core of the appeal and an exceptional consideration such that deportation should not be permitted.

19. At para 41 the FtTJ noted that G is now aged 10 and living with his mother in circumstances which had not led to social services intervening by putting him in care or introducing any specific supervision.
20. At para 42 the FtTJ considered whether enforced separation would be not just unduly harsh but would actively place G in harm's way. He concluded that: "G's home life may not be ideal but there are no immediate and obvious risk factors."
21. At para 43 he noted that the appellant's living conditions were such that there was no prospect that G would live with him so he will live with his mother.
22. Para 44 includes the following:

"... Aside from his difficulties and the consequences of his father being overseas and therefore not being able to see him on a regular basis, there is nothing else which is critical to this case that makes the father's removal undesirable. If he is really concerned about his child's welfare, he can continue to make contact by writing and/or through Skype calls, and if there is any obstruction on the part of his child's mother, then he can complain to Social Services who would undoubtedly take steps to remedy that."
23. At para 44 the FtTJ explained that he found nothing amounting to very compelling circumstances against a very strong public interest in deportation for serious offending.

The challenge

24. There are three grounds of appeal:
 - In ground 1 the appellant contends that the FtTJ erred in finding that there were not risk factors bearing on the appellant's son on the basis that there was no social work intervention in that regard.
 - The contention in ground 2 is that the FtTJ failed to take account of the significance of the appellant's son being of mixed-race with the implication that he would lose access to part of his heritage on the appellant's deportation.
 - Ground 3 proposes an error in finding that the appellant could secure protection of his son via Skype communication from Jamaica.

Submissions for the appellant

25. In a lengthy skeleton argument which is essentially the same as that before the FtT, Mr Ó Ceallaigh summarised the facts of the case from the appellant's perspective, making the same points which were before the FtT.
26. In his oral submissions, counsel submitted that we should approach the case in the manner proposed in Ali v Secretary of State for the Home Department [2016] UKSC 60. On the facts of this case there were circumstances which went well beyond those

which are present in the case of someone who is deported. The appellant is a protective factor in his son's life as the Family Court had determined. It was he who had discovered that the child had bruises and "razor" cuts for which there was no explanation. Whilst the police information before the FtT came from several years ago, the appellant had been ruthlessly policing the circumstances of his son which had ensured that there was no repetition. It is not in the ordinary run of things that deportation increases the risk of abuse and physical harm to a child which makes this a very exceptional case.

27. G is a mixed race child and the appellant is the only link he has to his Jamaican heritage, which is particularly important as one of the appellant's concerns related to racist abuse directed at G by his stepfather. Failing to address G's dual heritage, which had been accepted by the Family Court as being of significance, was an error of law.
28. The FtTJ had said that there was no social services plan in place, no prospect of social work intervention and no immediate and obvious risk factors. This was an error because it was the presence of the appellant as a protective factor which underpins the current circumstances and if the appellant is removed G may well be taken into care. State institutions could not be expected to be as alive to the risks to the child as the appellant who had brought injuries to their attention in the first place. The conclusion that there were no immediate and obvious risk factors demonstrated a failure to engage with the evidence of razor injuries and police attendances which had been drawn to the attention of the FtTJ. In suggesting that ongoing contact by Skype was of importance, the FtTJ had failed to recognise that it would be dependent on G's mother's cooperation and it was not possible to police the child's safety, as the appellant had been doing, via Skype.

Submissions for the Secretary of State

29. Mr Avery characterised the appellant's position as amounting to no more than disagreement with the FtTJ. Given the concurrent prison sentences of 8 years for serious violence and 4 years for drugs offences, the appellant must meet the test in section 117C (6) of the Nationality, Immigration and Asylum Act 2002 so that it would not be sufficient to show that deportation would be unduly harsh. In any event that test could not be met in the circumstances of this case: KO (Nigeria) v Secretary of State for the Home Department [2018] 1 WLR 5273 at paras 23 and 27. The FtTJ had engaged with the appellant's concerns but was not satisfied that they met the high test of very compelling circumstances.
30. The FtTJ had considered, at paras 41 and 42, if the child would be at risk of harm in the absence of the appellant. Whatever concerns there may be on the part of the appellant, the fact was that social services had not deemed it necessary to intervene and most of the incidents founded on are historic, relating to a time when the appellant was in prison. Whilst it is always possible to criticise a determination for

lack of detail, on a fair reading of this determination the FtTJ had taken into account the concerns raised and his conclusion that they do not reach the section 117 C (6) threshold was a conclusion properly open to the FtTJ on the evidence.

Relevant law

31. The 2002 Act provides in section 117 C:

“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.
- (7) 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.”

32. We note the observations of Lord Reed and Lord Thomas in *Ali*, where the Supreme Court was not considering section 117C in its current terms but was considering the almost identical Immigration Rules 398, 399 and 399A:

“38 The implication of the new rules is that paragraphs 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of paragraphs 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the *SS (Nigeria)* case [2014] 1 WLR 998 . 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 paragraphs 399 and 399A provide an indication of the sorts of matters which the Secretary of State

regards as very compelling. As explained at para 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 *4816 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 (as counsel for the Secretary of State accepted, consistently with the Huang case [2007] 2 AC 167 , para 20), but they can be said to involve “exceptional circumstances” in the sense that they involve a departure from the general rule.”

Lord Thomas proposed that an FtT judgment in a “very compelling circumstances” case might be structured in the following way:

“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.”

33. We note the judgment of the Supreme Court in *KO (Nigeria)* where Lord Carnwath observed at para 23 that, “One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent” and at para 27 he endorsed this commentary on Exception 2 in 117 C (5):

“27 Authoritative guidance as to the meaning of “unduly harsh” in this context was given by the Upper Tribunal (McCloskey J President and Upper Tribunal Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] INLR 563 , para 46, a decision given on 15 April 2015. They referred to the “evaluative assessment” required of the tribunal:

“By way of self-direction, we are mindful that ‘unduly harsh’ does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. ‘Harsh’ in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb ‘unduly’ raises an already elevated standard still higher.

...”

Analysis

34. Whilst counsel founded principally on the danger potentially posed by X we note that in his statement of 7 September 2018, the appellant spoke of X having caused problems in the past although he attributed the child’s safety to the deterrent effect of the appellant’s involvement in G’s life. The concerns he expressed focus on G’s mother not feeding him properly, failing to seek medical attention for minor ailments and not providing effective personal care for G. He feared that she had abused G but social services took no action when he reported his concerns. She was not ensuring that he was adequately supported at school for his recently diagnosed condition.

35. The Family Court was aware that the appellant may be deported at any time as Judge James noted in para 16 of his judgment of 17 January 2017. At para 18 Judge James observed, in light of the possibility that the appellant will be deported, that immediate contact;

“...may be the only short window of opportunity this boy will have to really get to know his father. To my mind that makes it even more important that he is afforded that opportunity even if it proves to be of short duration. He is of an age that it will allow him to cement that relationship, so that he will be able to take it up again in a few year time. In the meantime he will still have the opportunity of keeping in touch with his father by telephone or more likely Skype. Further, whatever the mother may say now, there is a distinct possibility that in time the child will be able to visit his father in Jamaica. These few months will enable father and son to share experiences that will help bond them and give them things to jointly remember. I will therefore make the order for contact in the form proposed by the father (which for the avoidance of doubt also includes holiday contact...) Naturally I recognise that there is a possibility that this contact will not happen because the father is deported beforehand, but I have no control over that.”

36. At para 17, having noted that Ms Solly of CAFCASS had said that the appellant is a protective factor, noted the importance of G being of dual heritage and the appellant’s enthusiasm to introduce him to his paternal culture Judge James reached findings which were relevant to the issues put before the FtTJ:

“The only harm that this child is suffering is the consequence of his parents’ animosity to each other. The child is clearly aware of this but it does not detract from the importance of him forming a close attachment to his father. Both these parents are capable of meeting his needs.”

37. From the information presented to the FtT and to US, we understand that G’s mother maintained that she had separated from L’s father in about 2005 or 2006 and the last recorded incident relating to him at her home was 2013. According to the appellant’s 2015 statement, the occasion when he was told about G being cut with a razor was in 2011.
38. Against this background, whilst L’s father X may still have an interest in L which could cause him to contact G’s mother, there was no objective evidence of anything untoward involving X having happened since 2013. In those circumstances, there was no contemporary external danger from which G required protection and, given his intermittent contact, it is difficult to see how effective the appellant could be against the possibility of a random attendance by X. According to the appellant’s statement of 2015, G’s mother had formed a new relationship and had another child. As a matter of fact there was no social work intervention in G’s home-life.
39. Accordingly we do not consider that the FtTJ made any error in law in assessing G’s circumstances and safety and the extent to which the appellant was required to protect G. The FtTJ was entitled to find that whilst G’s home circumstances may not be ideal, there were no immediate and obvious risk factors.

40. The FtTJ understood that even if he were not deported, the appellant would have contact with his son, but G would not live with the appellant. He understood the issue of his dual heritage and noted the submission in that regard, and its evidential basis, at para 14 of the determination. Judge James's order and judgment were founded on before the FtTJ who plainly understood the decision and reason; paras 13-15 and 40 of the determination.
41. Judge James had noted that Skype communication was one way in which the limited father/son relationship could continue following deportation. The FtTJ observed at para 44 that such communication offered a possible means for the appellant to monitor his son's welfare and that he would be able to draw any such difficulty to the attention of social services. This does not appear to us to involve the FtTJ suggesting that Skype communication was an adequate protection against a material risk of harm. There was no contemporary material risk of harm as the Family Court and the FtTJ were both entitled to conclude.
42. Accordingly we do not consider that there is any error of law, far less a material error of law. Even had there been such an error, we do not consider that it would have been open on the facts of this case for the FtTJ to find that there were very compelling circumstances over and above the family life exception in section 117 C (5) and there is nothing in the Supreme Court's judgment in *Ali* to suggest that there is.
43. For the foregoing reasons, the appeal against the FtT's decision of 11 October 2018 is dismissed.

Notice of Decision

The decision of the FtT does not involve the making of an error of law.

The appeal is dismissed.

The decision of the FtT still stands.

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 their 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.

Signed

Date

Lord Beckett sitting as an Upper Tribunal Judge