



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

Appeal Number: HU 08164 2017

THE IMMIGRATION ACTS

Heard at Field House

On 8 January 2019

**Decision & Reasons
Promulgated
On 5 February 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M P W

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent: Mr M Jaufurally, Solicitor from Callistes Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent or his child. Breach of this order can be punished as a contempt of court. I make this order because the case touches on the welfare of a child whose interests would not be served by his identity being in the public domain and I see no legitimate public interest in the identity of the Respondent rather than the facts of the case.

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter “the claimant”, against the decision of the Secretary of State on 18 July 2017 to refuse him leave to remain on human rights grounds. The claimant is subject to a deportation order signed on 20 February 2017 which was made because the Secretary of State “deems it to be conducive to the public good to deport from the United Kingdom [the claimant]”. It is plain from paragraph 14 of the “Decision to Refuse Human Rights Claim” that the Secretary of State decided that the claimant’s “deportation is conducive to the public good and in the public interest because you are a persistent offender”.
3. There is a summary of the claimant’s offending which is said to justify the decision. According to the letter the claimant has “thirteen convictions for 22 offences in the UK for serious offences including; offences against the persons, five sexual offences, five drug offences and one firearm/shotguns/offensive weapons.”
4. Before going any further I wish to look more carefully at the claimant’s offending history which, on anyone’s analysis, is discreditable.
5. The claimant was born in April 1974. He was first brought before a court in March 2001 when he was 25 years old. He was fined for possessing a Class B drug. In August 2002 he was sent to prison for ten months for being concerned in supplying Class A drugs. In July 2003 he was convicted of dangerous driving, driving a vehicle whilst uninsured and driving otherwise than in accordance with a licence. He was ordered to serve a community rehabilitation order over twelve months and a community punishment order of 50 hours and disqualified from driving for two years and ordered to retake a test before being allowed a full driving licence. Later the same year, in December 2003, he was sent to prison for three months for driving whilst disqualified. He was also further disqualified. He was then in trouble in August 2006 when he was given an absolute discharge for driving otherwise in accordance with a licence.
6. In August 2008, again for driving otherwise than in accordance with a licence, and he was fined. The next court appearance was in February 2012 when he was fined for resisting or obstructing a person assisting a constable. In August 2012 he was fined for possessing a controlled drug of Class B. In October 2012 he was again fined for possessing a controlled drug of Class B. In March 2013 for assault occasioning actual bodily harm he was ordered to serve a community order the requirement of unpaid work.
7. In May 2014 he was fined for possessing a controlled drug.
8. In March 2015 for possessing an offensive weapon and taking part in an affray he was sentenced to a suspended sentence of imprisonment of eighteen months was an unpaid work requirement.

9. In July 2015 for five offences of exposure he was made the subject of a suspended sentence of imprisonment of eight months with other requirements. He was also guilty of failing to comply with the community requirements of an earlier suspended sentence but no order was made in respect of that conviction.
10. It has also been the subject of a police caution and a conditional caution.
11. The offences of exposure for which he was sentenced on 31 July 2015 were committed on 7 May 2015, 8 May 2015 and 11 May 2015, that is in each case *after* he was sentenced to a suspended sentence of imprisonment on 31 March 2015 for possessing an offensive weapon and affray.
12. The sentencing judge on 31 July 2015 noted that the claimant was initially denying his offences. The sentencing judge said:

“When it comes to sentencing you today, the most significant factor is that you have expressed your guilt and that you have had the courage to confess to your wife and indeed to allow your wife to be present during the pre-sentence report interview. The fact that you accept your culpability and have said that you will work with probation means that I can suspend the sentence. I also bear in mind the progress that has been made under the existing suspended sentence order. The sentence which I will impose currently in respect of all offences will be a suspended sentence order of eight months suspended for two years ...”.
13. The claimant also relied on a letter from the probation officer dated 18 May 2016. Although not strictly a matter for her the probation officer expressed her wish that the decision to remove him from the United Kingdom will be reconsidered because of his family life. More significantly she described the claimant as “currently classed as medium risk of harm by the National Probation Service” but added that it was her assessment that “the risk he potentially poses is not imminent and can be managed in the community”. She noted that he had never missed an appointment and never been reprimanded for negative behaviour and it was to her “a complete surprise” when he was convicted in July 2015. When he was eventually able to admit his behaviour she was able to explore with him the reasons for his offending and was able to “recommend community intervention”. She concluded by saying how his “last appearance at Court made him realise how much damage he had caused his family by his behaviour, and how fortunate he was to have their forgiveness and support”.
14. It was the First-tier Tribunal Judge’s primary conclusion that the claimant is not a persistent offender and that therefore the basis of the decision to deport him falls away.
15. It is not always clear if a person is described properly as a “persistent offender” for the purposes of deportation. The First-tier Tribunal Judge reminded himself of the decision of the Court of Appeal in **SC**

(Zimbabwe) v SSHD [2018] EWCA Civ 929 and the approval it gave to the decision of this Tribunal in **Chege (“is a persistent offender”) Kenya [2016] UKUT 187**. The First-tier Tribunal Judge was careful to analyse the evidence about the reasons for the claimant’s offending. He said at paragraph 19:

“His offending does not tend towards acquisitive offences although it is of dishonesty such as theft or robbery. As shall become clear, his offending is entirely connected to drug use and the behavioural consequences that arise.”

16. The judge also considered an email from a detective constable based within the claimant’s local police station’s Public Protection Unit from the officer responsible for managing in the community persons subject to the requirements of the Sexual Offences Act 2003. Persons subject to such restrictions have to disclose a great deal of personal information and accept visits from the police at any time. The officer told the judge that the claimant was identified as “high risk” under the statistical model but “medium risk” on the basis of behaviour and engagement. The officer then spoke appreciatively of the claimant’s attitude towards the police and to the officer doing his duties and confirmed that the claimant had not come to the attention of the police for the almost three years between the conviction and the reference being written.
17. At paragraphs 37 and 38 of his decision the First-tier Tribunal Judge summarised the arguments for and against finding the claimant to be a persistent offender. Mr Jaufurally drew attention to the remarks of the sentencing judge and his decision to suspend the sentence and the evidence that “his family was now his focus and the reason why he would not reuse drugs or reoffend”.
18. The Secretary of State’s representative, predictably and entirely properly, had pointed out that the claimant had previously been warned about his behaviour and had gone on to reoffend. The claimant had offended because he had continued to take cannabis and that was his downfall. The claimant’s wife had given evidence that she trusted the claimant to have given up taking cannabis.
19. The Judge reviewed the offending pattern and noted there were significant gaps in the offending history. There were periods when the claimant did not get into trouble. At paragraph 47 the Judge said:

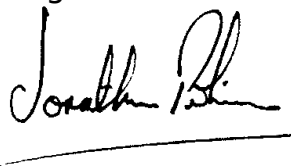
“In this appeal the question posed by **Chege** can therefore be reduced to whether the current period of non-offending since May 2015 is another fallow period or represents the end of the [claimant’s] criminal history. If his offending has truly been over since May 2015, rather than paused, then in my assessment he has succeeded in losing the badge of ‘persistent offender’. This is because there is a passage of time without conviction is longer than at any point for many years, and can strongly indicate a recognition of the root cause of his offending and steps having been taken to avoid it.”

20. The Judge then concluded that the claimant's "offending is over". He regarded the gap in offending as telling evidence of a change of heart and the ability to give effect to the new intention. He then considered the position in the event of the decision that the claimant was not a persistent offender being wrong and found that the appeal should nevertheless be allowed for other reasons.
21. The Secretary of State, commendably, has not set out overly extensive grounds and his case is all the clearer as a result. The main complaint is at point 2 where it is said that the Judge "fails to give clear reasons as to why it is accepted the [claimant] has addressed the source of his offending". It was said the Judge did not accept the explanation the claimant had given for the sexual offences and the Judge did not give sufficient weight to the warning letter sent in July 2013.
22. I have given considerable thought to this case both before and after the hearing. Certainly it is hard to think that the Judge could have been criticised if he had reached a different conclusion but that is not at all the same as saying that the decision that he reached is wrong or otherwise unlawful. There is no precise formula to follow when making decisions of this kind. The judge has given reasons for his finding. That the claimant was a drug user and drug use got him into trouble. The last episode of criminal behaviour, which must have been deeply embarrassing to the claimant and shocking to his family, (as well as quite horrible for those who saw it) was an event that had caused him to rethink his position and to understand the importance of behaving and he had given effect to that intention by keeping out of trouble for three years. Accepting evidence that the last episode of criminal behaviour was a turning point is not perverse. It might have been more pleasing to the Secretary of State if the Judge had explained why the warning letter was not heeded but the claimant was still believed when he said that he was no longer going to offend. The Judge clearly did not ignore the significance of previous offending. It was very much in his mind.
23. Mr Duffy expanded the grounds appropriately. He accepted that he had to show that the decision was simply not open to the judge for the reasons given. It was effectively a challenge on grounds of perversity although the word "perverse" was not actually used. He said, given the long history of reoffending and the absence of some particular reason for accepting the evidence of a change of heart, the decision was not open to the judge.
24. The Judge heard evidence from the claimant's wife. She believed he would not offend again. The claimant said the same. It is not an error of law to believe a witness. Further the "good side" of the claimant's character was something that has been apparent throughout this case. This is not an entirely straightforward point. There have always been good things to say about the claimant even when he has been behaving very badly indeed because of his cannabis misuse. Nevertheless I am satisfied that the judge's reasons for finding there has been a genuine rather than convenient change of heart were open to him and that the claimant is not

a persistent offender when the judge made his decision. It follows that the appeal was allowed properly.

25. There may have been difficulties with the other parts of the decision. The grounds have merit when they point out that the Judge did not seem to consider most likely the result of deportation which is that the claimant's wife and son would remain in the United Kingdom and preserve a relationship in any way they could with the claimant. Certainly there was evidence that the claimant's removal would have considerable adverse impact on the claimant's wife and son. That is the way of deportation. I see no point in resolving these matters further because the decision that I have already made is sufficient to dispose of the appeal.
26. I am not persuaded there has been a material error and I dismiss the Secretary of State's appeal against the decision of the First-tier Tribunal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', written over a horizontal line.

Dated 28 January 2019