



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02181/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*
On 5 February 2021

Decision & Reasons Promulgated
On 8 February 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

JOSE OLIVARES PENROZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In Person

For the Respondent: Mr. I Jarvis, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Chile and is presently aged 56. He appeals a decision of the respondent to refuse human rights representations made in relation to a decision to deport him. The decision is dated 16 January 2018.
2. The proceedings in this matter have an extensive history. The appellant's appeal was initially allowed by the First-tier Tribunal (JfT Paul) by a decision dated 13 August 2018. The respondent was granted permission to appeal to this Tribunal and the

decision of JFtT Paul was set aside by a decision dated 15 November 2018 (UTJJ Finch and Plimmer). The matter was remitted to the First-tier Tribunal and the appellant's appeal was allowed by a decision of JFtT Cockril dated 3 July 2019. The respondent was granted permission to appeal, and I set aside the decision of the First-tier Tribunal on 11 September 2019. I directed that the decision in this matter be remade by this Tribunal.

Hearing

3. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the appellant and Mr. Jarvis in exactly the same way as if we were together in the hearing room. The appellant's wife also spoke to me. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Anonymity

4. No anonymity direction has been issued to date in this matter. I addressed the issue of anonymity at the hearing, consequent to the filing of medical evidence concerning the appellant's wife and two of their children.
5. I am mindful of Guidance Note 2013 No 1 concerned with the issuing of an anonymity direction and I observe that the starting point for consideration of such a direction in this Chamber of the Upper Tribunal, as in all courts and tribunals, is open justice. The principle of open justice is fundamental to the common law. The rationale for this is to protect the rights of the parties and also to maintain public confidence in the administration of justice. Revelation of the identity of the parties is an important part of open justice: *Re: Guardian News & Media Ltd* [2010] UKSC 1; [2010] 2 AC 697.
6. The appellant's circumstances are not, alone, such as to justify the overriding of article 10 rights. He has committed a serious criminal offence which is a matter of public record. I further observe that the decision of this Tribunal (UTJJ Finch and Plimmer) has been placed on the Tribunal's website and no anonymity direction was made in that matter.
7. I note that the children in this matter are adults. Being mindful of their medical conditions, and the personal circumstances of the appellant's wife, I am satisfied that respective article 8 and article 10 rights can be proportionately balanced by their not being named in this decision and no detail being given to the area of the country in which they reside. Such steps are appropriate in circumstances where it is in the

public interest that this Tribunal provides reasons as to its consideration of a deportation appeal.

Background

8. The appellant asserts that he first entered this country in 1975, in the company of his mother, brother and sister, when aged 11. He returned to Chile in 1983 and some sixteen months later travelled back to the United Kingdom. He was granted indefinite leave to remain in November 1984.
9. The appellant has been married to a British citizen since 1983 and they have three adult children, all of whom are British citizens.
10. The appellant led a law-abiding life until undertaking events that resulted in his pleading guilty at Blackfriars Crown Court on 12 August 2014 to one count of fraud by abuse of position which involved theft from an employer, amounting to £82,000. He was sentenced on 13 April 2015 to a custodial term of sixteen months.
11. In sentencing the appellant, HHJ Peter Clarke QC remarked, *inter alia*:

‘I accept that you were, and I do not mean this in any way disparagingly, simply a bookkeeper. You were not the accountant or the auditor of that firm, but you betrayed the trust that he had placed in you. You did not do so for several years which only in a way heightens the fact that you lost employment where people trusted you with large sums of money.

... I do accept that there is no evidence of you spending that money on luxuries, and I accept that you are and have been for some while the breadwinner for your family, one of your children being mentally disadvantaged.’
12. Following conviction, the respondent served the appellant with a notice of decision to make a deportation order dated 21 April 2015. The appellant submitted human rights representations.
13. On 26 January 2016 the appellant was made subject to a deportation order and subsequently served with a decision giving reasons for his deportation. The appellant enjoyed out-of-country appeal rights.
14. On 4 July 2017 Blackfriars Crown Court imposed a custodial term of 913 days upon the appellant for non-payment of a confiscation order in the sum of £100,000.
15. The appellant states that he subsequently sold the family home to meet the requirements of the confiscation order.
16. The respondent served a new deportation decision on 16 January 2018 refusing his human rights claim but affording him an in-country right of appeal.

Decision

17. This is a matter where the respondent has properly sought to defend her decision over the course of several hearings. In accordance with directions, the appellant filed further evidence focused upon the health of his wife, one of his two sons and his daughter. These two children currently reside at the family home. A second son lives elsewhere in the country with his own family. Upon considering the evidence now filed, and following questioning of the appellant at the hearing, Mr. Jarvis confirmed on behalf of the respondent that it is now accepted that the appellant meets the exception to deportation established by section 117C(3) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') and so his appeal should be allowed. The approach adopted is consistent with observations made by the respondent at a previous adjourned hearing as to the issue of proportionality if the appellant were to file relevant further medical evidence.
18. Section 117A(1) of the 2002 Act is applicable when the Tribunal is required to determine whether a decision to deport made under the Immigration Acts disproportionately interferes with a person's right to respect for private and family life under article 8 and as a result would be unlawful under section 6 of the Human Rights Act 1998. Section 117A(2) confirms that in considering the public interest question the Tribunal must have particular regard in all cases to the considerations listed in section 117B and in cases concerning the deportation of foreign criminals to the considerations listed in section 117C of the 2002 Act.
19. Section 117C(1) confirms that the deportation of foreign criminals is in the public interest. Laws LJ noted in *SS (Nigeria) v. Secretary of State for the Home Department* [2013] EWCA Civ 550, [2014] 1 W.L.R. 998, at [54]:
54. ... The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed.
20. Parliament has provided exceptions to the public interest in deportation by means of section 117C(3) to (5) of the 2002 Act. Section 117C(3) and (5) provide:
- (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.
- ...
- (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.'

21. Mr. Jarvis appropriately conceded that it would be unduly harsh to expect the appellant's wife to relocate to Chile with her husband. The medical evidence clearly establishes that she is in poor health. Though she does not provide full-time care for her son who resides at home, who has Asperger's Syndrome, the evidence before the Tribunal establishes that she provides significant care. I am also satisfied that the evidence identifies that there would be significant concerns as to the daughter's mental health if her mother were to depart the family home and relocate to Chile.
22. The question before this Tribunal is therefore one as to the proportionality of separating the appellant and his wife. Section 117C(5) of the 2002 Act confirms that an unduly harsh test is to be applied. In *KB (Jamaica) v. Secretary of State for the Home Department* [2020] EWCA Civ 1385 the Court of Appeal confirmed that this is an elevated test carrying a much stronger emphasis than mere undesirability of what is merely uncomfortable, inconvenient or difficult; but the threshold is not as high as the 'very compelling circumstances' test in s.117C(6). In so concluding, the Court recognised the approach adopted towards the unduly harsh test by the Supreme Court in *KO (Nigeria) v. Secretary of State for the Home Department* [2018] UKSC 53, [2018] 1 W.L.R. 5273, at [27], and the Court of Appeal in *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, [2020] I.N.L.R. 639, at [56] - [52].
23. Mr. Jarvis confirmed that for the purpose of both the respondent's considerations in this matter, and the Tribunal's, weight could properly be placed upon the behaviour of the appellant's wife at a previous hearing where it was apparent to all present in the hearing room that she was labouring under significant and adverse mental health concerns. It was apparent to me, and expressly observed by the presenting officer attending, that the appellant's wife was exhibiting unhealthy heightened anxiety akin to a breakdown. Her description as to her personal feelings in respect of the proceedings themselves and possible separation from her husband identified clear concerns as to her mental health. Soon after the hearing she was hospitalised.
24. Mr. Jarvis observed that there are a constellation of different, but relevant, factors in this matter, ranging from the concerns of two of the non-qualifying children, who have attendant care and emotional mental health needs, and the health concerns of the appellant's wife. Upon considering the totality of the evidence now filed with the Tribunal, it was conceded by Mr. Jarvis that when applying the elevated test, it would be unduly harsh to separate the appellant and his wife. On considering the evidence, I am satisfied that this is the only lawful conclusion that can be reached. In the circumstances the respondent was correct to identify that the appellant met the requirements of section 117C(3) of the 2002 Act, in conjunction with section 117C(5), and accordingly her concession before me was appropriately made. Mr. Jarvis observed that the concession was not made lightly, and I record that observation. The appellant is to be mindful that if he were to offend again, though on the evidence before me that is highly unlikely, he can expect deportation proceedings to be at the forefront of the Secretary of State's considerations.

Notice of Decision

25. By means of a decision dated 11 September 2019 this Tribunal set aside a decision of the First-tier Tribunal promulgated on 3 July 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.
26. The decision is re-made, and the appellant's appeal is allowed on human rights (article 8) grounds.

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 8 February 2021