



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000756

First-tier Tribunal No: HU/02387/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

21st November 2023

Before

UPPER TRIBUNAL JUDGE OWENS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IPT

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Da Silva, Fountain Solicitors

For the Respondent: Mr Howells, Senior Presenting Officer

Heard at Cardiff Civil Justice Centre on 6 October 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Boyes “the judge” sent on 17 February 2023 allowing IPT’s appeal against the decision dated 9 March 2021 to refuse his human rights claim and refusing to revoke his deportation order.
2. Permission to appeal was granted by First-tier Tribunal Judge Gumsley on 27 February 2023.

Background

3. IPT is a Jamaican national born on 28 February 1966 who originally entered the UK as a visitor on 23 September 1988. His leave was extended until 28 March 2002. On 2 December 2002 he married MT, a British national with three children of her own. On 30 September 2002 they had a son R.
4. On 11 February 2009 he was sentenced at Bristol Crown Court, to a total of 42 months’ imprisonment, for four offences of supplying class A controlled drugs, namely cocaine. The Secretary of State decided that it was in the public interest to deport IPT from the UK and on 29 October 2009 served a deportation order on him. IPT’s appeal against the decision was dismissed on 14 January 2010 and on 21 July 2010 he was deported to Jamaica.
5. On 23 September 2013 he applied to revoke his deportation order. The application was refused on 9 May 2014. His appeal was allowed and there was an onward appeal to the Upper Tribunal who upheld the decision. The Secretary of State further appealed to the Court of Appeal which allowed the Secretary of State’s appeal and remitted the appeal to the Upper Tribunal. IPT’s appeal to the Supreme Court was unsuccessful.
6. On 29 April 2019 Upper Tribunal Judge Grubb dismissed the appeal against the decision of 9 May 2014 finding that it was not unduly harsh for the appellant’s wife and child to remain in the UK without him.
7. On 13 July 2020 the appellant applied again to revoke his deportation order and the Secretary of State refused the application on 9 February 2021. On 4 October 2021 the First-tier Tribunal allowed the appeal. Permission was refused by the First-tier Tribunal. It is not clear what happened thereafter, but I infer that the appeal was remitted to the First-tier Tribunal to be heard again. The appeal was heard by First-tier Tribunal Boyes on 16 February 2023 and the decision was promulgated on 17 February 2023. This is the decision in respect of which the grounds relate.
8. IPT’s case is that he has been separated from his British partner and British son for 12 years. It is the proper course to maintain the deportation order, unless in the case of a person sentenced to a period of less than four years, ten years have elapsed, in which case the representations will be dealt with on a case-by-case basis and there it would be a breach of the appellant’s human rights to maintain the deportation order. He asserts that ten years have elapsed. It is unduly harsh for his wife and son to live in the UK without him and in any event, there are very compelling circumstances which would warrant revocation of the deportation order because of the passage of time and lack of offending. MT can no longer rely on assistance from her parents to help with her son and she continues to be depressed and is on long-term sick leave.

9. The Secretary of State's position is that the starting point are the findings of Upper Tribunal Judge Grubb. There has been no material change in circumstances. It is not unduly harsh for his wife to remain in the United Kingdom without him. Contact can be maintained by visits and modern communication methods. It is not in the public interest to revoke the deportation order despite the passage of time because of the serious nature of the offending.

The decision of the judge

10. The judge had sight of witness statements from the appellant and his wife. The judge took the findings of Upper Tribunal Judge Grubb as a starting point. The judge concluded that Upper Tribunal Judge Grubb's findings remained intact because MT's parents were unable to assist her with caring for her son at the time of the earlier appeal because of their health conditions and there was therefore no change. The judge took into account MT's poor mental health but found that the increased dose of her medication did not qualitatively increase the harshness encumbered by MT. Her poor mental health had been taken into account by Upper Tribunal Judge Grubb and there had been no dramatic decline. He found that it is not unduly harsh for MT to remain in the UK without her husband.
11. The judge then turned to the wider Article 8 ECHR assessment. He found that the passage of time had reduced the public interest in maintaining the deportation order and that the appellant had stayed out of trouble. The risk of reoffending is low and there is significant rehabilitation. He found that there are very compelling circumstances which outweigh the public interest in the maintenance of the deportation order.

Grounds of appeal

12. The grounds of appeal assert the following:

Ground 1 - Material misdirection of law

The judge has failed to take into account that very compelling circumstances must be "above and beyond" the circumstances set out at the Exceptions to s 117C of the Nationality Immigration and Asylum Act 2002.

The judge also misdirected himself by failing to have regard to paragraph 390 of the immigration rules and the relevant caselaw of ZP (India) [2015] EWCA Civ 1197 and EYF (Turkey) v SSHD [2019] EWCA Civ 592. After the expiry of ten years the presumption in favour of maintaining the deportation order no longer applies but there is no presumption in the other direction. The judge failed to give adequate weight to the public interest in maintaining the deportation order. The judge failed to undertake an adequate balancing exercise. The judge fails to set out why the appellant will not reoffend in the UK where his index offence took place.

Submissions

13. Mr Howells argued that the judge had incorrectly found that there is a presumption in favour of revocation after ten years. He referred me to the wording of [22], [28B] and [28F] as examples of where the judge had applied this presumption.

14. He also stated that the judge had not provided adequate reasons for finding that there were very compelling reasons for revoking the deportation order. The very compelling circumstances should be over and above the Exceptions. Public interest considerations take into account the prevention of an individual committing further offences, the deterrent effect and public abhorrence especially in respect of certain crimes. He submitted that there is an interlinked reasons challenge.
15. Mr Da Souza submitted that the judge had a clear understanding of paragraph 391 of the immigration rules. IPT had been out of the UK for nearly 13 years and he continued to be in a genuine and subsisting relationship with his wife. The judge has not misdirected himself. He has taken into account the relevant factors and found that the continued deportation is disproportionate and given adequate reasons for finding that there are very compelling circumstances. The grounds amount to a disagreement with the decision of the judge.

Material misdirection of law

16. I start with the principle that an appeal court should be slow to interfere with the decision of a court below who will have had sight of the “sea” of evidence before it. I also note that in this appeal the grounds do not seek to challenge any of the judge’s individual factual findings in respect of IPT’s and his family’s circumstances.
17. These findings include that IPT was convicted of a sentence of less than 4 years imprisonment in 2009 for drugs offences and was deported in July 2010. By the date of the appeal hearing, he had been absent from the UK for over 12 years. There had been protracted litigation in the intervening period. His most recent appeal was allowed but remitted. During his 12-year absence, he has maintained a strong family life with his British wife, and also with his British son. His wife has anxiety and depression which has been exacerbated by the long separation from her husband and ongoing legal proceedings. Her medication has increased recently, and she has been on long term sick leave. The appellants son has microencephaly, special educational needs and needs ongoing support. The absence of IPT meant that MT did not have as much support as she could have.
18. The Secretary of State also did not challenge the judge’s finding that IPT has not committed any further offences during the 12 years that he has been in Jamaica and that he is rehabilitated. There were some further findings carried over from the decision of Upper Tribunal Grubb including that IPT’s son has a fear of flying and has not been to visit his father in Jamaica. He had additional one to one support from school.
19. The asserted errors turn on whether the judge misapplied the law.
20. I start firstly with the principle that an experienced judge can be expected to adhere to self-direction in accordance with the principles set out by Lady Hale at [30] in AH (Sudan) v SSHD [2007] UKHL 49 and would be aware of the relevant authorities in line with Popplewell LJ in AA (Nigeria) v SSHD [2020] EWCA Civ 1296.
21. The judge properly directed himself to the relevant statutory provisions in respect of the deportation of foreign criminals which can be found at 117C of the Nationality, Immigration and Asylum Act 2002 at [17] of his decision.

22. I do not agree that the judge failed to have regard to paragraph 391 of the immigration rules. This was expressly mentioned at [22].
23. I consider whether the judge erroneously found that there is a presumption in favour of deportation for an individual who was sentenced to a period of less than four years and been out of the country for over ten years which was Mr Howell's submission. The correct legal position is as set out in the rules. This makes clear that maintaining a deportation order is the proper course unless an individual was sentenced to less than four years imprisonment and ten years have elapsed from being deported in which case each case should be dealt with on a case-by-case basis. In any event the order will be maintained unless there is a breach of the Human Rights Convention.
24. In EYF it was clarified that for someone who has been sentenced to less than four years, after ten years the presumption in favour of maintaining the order no longer applies but not that there is a new presumption the other way. The correct approach is set out at [28] of that decision as follows:
- “Within the ten year period, it will be very difficult for other factors to counterbalance the presumptive effect of the Secretary of State's policy. That is consistent with the decision of this court in ZP (India). Once the ten-year period has elapsed it becomes easier to argue that the balance has shifted in favour of revocation on the facts of a particular case because the presumption has fallen away; but that does not mean that revocation thereafter is automatic or presumed. The question of revocation of a deportation order will depend on the circumstances of the individual case”.
25. From reading the decision it is manifest that the judge has not directed himself that there is a presumption in favour of revoking a deportation order after ten years.
26. At [22] the judge states:
- “I read into Rule 391 that there is at least a contemplation that those who have served less than 4 years and have been deported for at least ten years from the UK have at least the standing to argue that it is disproportionate to remain”. (my emphasis)
27. I am satisfied that this sentence reads entirely in accordance with paragraph 391. Before ten years elapse the presumption in favour of deportation remains. After ten years the Secretary of State will consider any further representations. At [25B] the judge states that “the law allows for revocation claims to be made and be dealt with on a case by case basis” which is the wording of the immigration rule itself. There is no indication of any presumption in the appellant's favour. I also find nothing amiss in his comment at [25D] that “If the Secretary of State was of the view that there would or could never be rehabilitation or such as reduced risk of reoffending then no doubt she would have said it and there would be provision in the rules placing an absolute embargo on revocations”. At [25F] similarly the judge's comment that “there comes a point in the life of deportation order that the Secretary of State allows for the testing of it” does not indicate that the judge considers that the fact that ten years have elapsed mean that the order should be revoked. The judge is very clearly stating that because ten years have elapsed the presumption of maintaining the order has fallen away and he must consider whether there is a disproportionate breach of the appellant's human rights to maintain the order in light of the provisions of s117C. I cannot see any evidence of the judge assuming that there is some kind of presumption

in the appellant's favour. In my view the judge has directed himself properly in accordance with EYF.

28. I turn to whether the judge failed to take into account the public interest in deportation. It is manifest that the judge has given significant weight to the public interest at [18] where he reiterates that the deportation of foreign criminals is in the public interest and the more serious the offence the greater the public interest. The judge goes on to consider the seriousness of the offence at [19] noting that it was a drugs offence and the negative impact of this type of offending on wider society. At [24] the judge notes that at the time IPT was deported the public interest in deporting him was very high because of the nature of his crimes. The judge has manifestly not erred by failing to take into account the public interest. I do not understand the Secretary of State's submission that the judge did not look at the risk of IPT offending in the UK. This is implicit in the decision and in any event if he were intent on reoffending this would be an easy matter in Jamaica where there are high levels of crime.
29. The judge then correctly comments that the public interest is a "malleable and moveable creature". He goes on to find that the public interest is diminished because of the passage of time. In this case over 12 years have elapsed since the deportation. There has been no further offending. He finds that in this case the deportation has achieved its aim. It has acted as a deterrent. The order has met the aim of preventing crime and disorder for over 12 years. IPT has stayed out of trouble and his risk of reoffending is low. Mr Howells did not seek to argue that the judge's finding that "I am therefore satisfied that the public interest is lessened by his conduct in not reoffending and in the rehabilitation of him" was in anyway legally flawed. I am not in agreement that the judge did not have at the forefront of his mind the seriousness of the original offence, the public interest in deportation and that the weight to be given to the public interest might depend on the case diminish as time went on. I can find no error in the judge's approach to the weight that he gave to the public interest.
30. I turn to the judge's consideration of "very compelling circumstances". I find the Secretary of State's grounds to be somewhat opaque. Even where an appellant does not meet the Exceptions at s117C it is open to the judge in accordance with NA(Pakistan) [2016] EWCA Civ 662 to take into account the extent to which the Exceptions have been met including factors which have been considered under the Exceptions and any other relevant compelling factor which includes those factors on the public interest side of the balance.
31. The judge expressly found that IPT did not meet either of the Exceptions. However, in his consideration of "very compelling circumstances" he went on to consider all of the relevant factors at [28A] to [28F]. This is in line with HA (Iraq) v SSHD [2022] UKSC 22 in which it is said that the relevant factors are the nature and seriousness of the offence, the time since the offences were committed and the conduct of the individual in that time, the nationalities of the persons concerned, the family situation including the length of marriage, whether the partner knew of the offence when she entered into the relationship, the age of any children of the relationship, the seriousness of the difficulties the spouse is likely to encounter etc These were precisely the type of factors considered by the judge.
32. The judge found that the public interest in maintaining the deportation order is reduced by the lack of offending and clear and tangible rehabilitation. The order has worked. Over 12 years have elapsed. IPT has maintained a strong, genuine

and subsisting relationship with his wife and son over that period. MT's mental health has deteriorated, and the separation and proceedings have had a negative impact on her. She is lacking the additional support of her husband. His son has a learning disability and medical needs. IPT's wife and son are British. The only place family life can reasonably take place is the UK. Elsewhere the judge has imported Upper Tribunal Grubb's finding that ITP's son has not seen his father in person for 12 years because he has a fear of flying. I am not satisfied that the judge applied the wrong test and erred by finding holistically that these factors amount to "very compelling circumstances". I cannot identify an error in the judge's reasoning.

33. The grounds are a disagreement with the decision. The finding of "very compelling circumstances" is perhaps generous but was firmly rooted in the evidence and does not reach the high threshold of perversity. The judge himself acknowledges that this was a difficult and finely balanced decision which is apparent from the history of the appeal which has been allowed on four occasions in total and dismissed on two occasions.
34. In this respect I take into account the words of Reed LJ in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 at [62];

"It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

Conclusion

35. It follows that none of the Secretary of State's grounds of appeal are made out and the Secretary of State's appeal is dismissed.

Decision

36. The decision of the First-tier Tribunal allowing the appeal is upheld.

R J Owens
Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 November 2023

