



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003398

First-tier Tribunal No: HU/02011/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 16th of November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

TENDAYI ROBERT NGULUBE
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None

For the Respondent: Miss Young, Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 8 November 2023

DECISION AND REASONS

1. The Appellant was born on 19 February 1990. He is a citizen of Zimbabwe. He appealed against the decision of the Respondent dated 21 July 2022, refusing his human rights claim and upholding a deportation order made on 30 October 2009.
2. The Appellant did not attend the hearing before me. The electronic file revealed that he had been served with details of the date time and venue for the hearing. There was no application to adjourn. He had not attended by the time the appeal was called on at 11.20am. I had his grounds seeking permission to appeal and all the papers before the First-Tier Tribunal. In all those circumstances I determined it was fair to proceed in his absence. The heading was recorded.
3. He appeals against the decision of First-tier Tribunal Judge (FtTJ) O'Hanlon, promulgated on 5 June 2023, dismissing the appeal.

The Appellant's grounds seeking permission to appeal

4. These are summarised in [2] of the grant as:

"a) The Judge failed to assess the applicant's family life properly by focusing solely on financial issues and his ability to support his children. However, the Judge appeared to accept that the appellant had a genuine and subsisting relationship with his children and consider all relevant factors (paragraphs 63 to 65). It does not appear the Judge gave excessive weight to the appellant's ability to provide financial support when considering the impact of his deportation on the children.

b) The Judge failed to take into account the applicant's rehabilitation and the fact that the relevant statistics show he is unlikely to reoffend. However, the Judge was aware the appellant had not offended since being released from prison (paragraph 44) and accepted the applicant's position had changed since his appeal against deportation was refused and that the applicant had developed some degree of cultural integration in the UK (paragraph 74). Nevertheless, the Judge did not specifically refer to the applicant's rehabilitation when undertaking the article 8 balancing exercise.

c) The Judge failed to take into account '*the Home Office's mishandling of my case*' which the applicant says resulted in '*my financial and family devastation*'. However, the appellant has not made clear what mishandling he is referring to. Nevertheless, the chronology of events shows that this is likely to be a reference to the delay in enforcing the deportation order. It appears that no effort to remove the appellant had been made between the rejection of his further submissions in December 2014 and his application in July 2020. The Judge does not appear to have considered whether this reduced the weight to be given to the public interest."

Permission to appeal

5. Permission was granted by FtTJ Hamilton on 8 August 2023 who stated:

"Limited weight can be given to rehabilitation (**Jallow v SSHD [2021] EWCA Civ 788**). However, it is clearly established that time elapsed and conduct since an offence was committed should be taken into account in all cases (**Boultif v Switzerland (2001) 33 EHRR 50** and **Uner v Netherlands (2006) 45 EHRR**). It is unclear to what extent this was done. Furthermore, it is arguable the issue of delay was obvious (**Robinson [1997] 3 WLR 1162**) and the Judge should have considered whether the delay, in combination with other factors, reduced the weight that should be given to the public interest in the applicant's deportation (**SSHD v MN-T (Columbia) [2016] EWCA Civ 893**). It is not clear this was done. I therefore find that the grounds disclose an arguable error of law and grant permission to appeal. I grant permission in respect of all grounds although the ground set out at paragraph 2 (a) above appears to have less merit than the other issues relied on."

Rule 24 notice of 16 August 2023

6. It was asserted that:

"3. the FTTJ clearly records at paragraph 44 the Appellant's case and the factors to be considered by the Tribunal. It is evident that delay was not a factor raised either at the hearing or in the Appellant's skeleton argument. As such the Respondent respectfully submits that the FTTJ cannot be said to have materially erred in failing to consider something he was not asked to do.

4. It is respectfully submitted that in granting permission to appeal FTTJ Hamilton has failed to refer to the case of **Durueke (PTA: AZ applied, proper approach) [2019] UKUT 00197 (IAC)**, where at headnote "i" the Tribunal found,

*“In reaching a decision whether to grant permission to appeal to the Upper Tribunal on a point that has not been raised by the parties but which a judge considering such an application for permission considers is arguably a Robinson obvious point or other point falling within para 3 of the head-note in AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245 (IAC), **the evidence necessary to establish the point in question must be apparent from the grounds of appeal to the Upper Tribunal (whether or not the appellant is represented at the time) and/or the decision of the judge who decided the appeal and/or the documents on file.** The permission judge should not make any assumptions that such evidence was before the judge who decided the appeal. Furthermore, if permission is granted on a ground that has not been raised by the parties, it is good practice and a useful aid in the exercise of self-restraint for the permission judge to indicate which aspect of head-note 3 of AZ applies.”* (parenthesis added).

5. The statement in the Appellant’s case regarding the Respondent’s mishandling of the case contains no supporting reasons as to what that mishandling refers to and as such the permission grant assumption that it refers to delay is evidently speculative and unsupported by evidence and as such it is respectfully submitted that permission should not have been granted on this basis.

6. In the alternative the Respondent respectfully submits that at paragraph 74 of the decision the FTTJ has clearly referred to the passage of time since the last decision and finds it is a factor that goes in the Appellant’s favour.

The First-tier Tribunal decision of 5 June 2023

7. Judge O’Hanlon made the following findings in relation to the issues raised in the permission to appeal application:

“63. I have considered all of the documentation provided by the Appellant regarding the extent of his involvement with the children. The Appellant’s oral evidence at the hearing is that he has been separated from the children’s mother for some two years. His evidence was that he had no current address and was living with friends or “sofa surfing” and that he also had a tent that he used when he had nowhere else to stay. It is therefore the case that the Appellant is not residing with his children. I accept on the basis of the evidence that I have seen that the Appellant has an ongoing involvement with his children. The documentation provided from the children’s school shows that the Appellant has a continuing involvement, sometimes taking them and collecting them from school. The Appellant’s oral evidence at the hearing was that he saw the children once a week. The reason for this limited physical contact was that he had no money to travel to see them as much as they and he wanted. He also stated he spoke to them on the telephone four or five times a week...”

65. Although on the basis of the evidence before me I have no doubts that the Appellant has a genuine and subsisting relationship with the children, there is nothing to suggest that the Appellant is the main care provider for his children or that the Appellant contributes significantly to the children. I accept that, financially, the Appellant’s circumstances would restrict his ability to contribute financially. So far as the question of the care responsibilities for the children is concerned, the Appellant in his oral evidence referred to a family friend, Gillian Gilliatt, who provided one of the letters which the Appellant handed in at the hearing as having contributed significantly to the care and upbringing of the children. I have taken into account the letter from the children’s mother which details the relationship between her and the Appellant and also refers to the support given to the children by the Appellant and describes the Appellant as being a perfect role-model of a father. I have taken all of these factors into account but having done so, conclude that the Appellant is not the main care provider for the children. No evidence has been put before me to suggest that there are any concerns over the children and the

mother's parenting abilities or to suggest that the children have any medical conditions with which the Appellant significantly assists to resolve.

66. I find that whilst the deportation of the Appellant would clearly impact emotionally upon the children, notwithstanding this the children's mother would be able to continue to provide safe and effective care and support to adjust to any change in the contact which the children might have with the Appellant. Whilst it may be the case that the best interests of the children would be served by a relationship with both parents which involves a physical presence, I bear in mind that the deportation of foreign criminals is in the public interest and that public interest issues can override the best interests of any relevant children. I have not found that the Appellant has significant caring responsibilities for the children and that in the event of the Appellant's deportation caring requirements for the children could continue to be carried out effectively by the children's mother and that any negative emotional impact upon the children as a result of the deportation of the Appellant could be minimised.

67. I further find that the Appellant could maintain some form of communication with the children in the event of his deportation via modern means of communication...

74... The Appellant formed a relationship which resulted in the birth of his children. There is evidence before me of the Appellant having attended educational establishments and there is also the issue of the passage of time since the earlier determinations. Some evidence has been put before me by way of letters of support from the Appellant's father and family friends. In his oral evidence the Appellant referred to residing with friends since his separation from the children's mother and also family and friends assisting him financially to contribute towards the support of his children. Given the passage of time since the previous determination and the length of time that he has been in the UK overall, I find it likely that the Appellant has developed some degree of social and cultural integration into the United Kingdom...

84. It is necessary for me to consider whether the interference with the family and private life of the Appellant is proportionate. I have approached this question on the basis of the balance sheet approach suggested in **Hesham Ali (Iraq) v SSHD [2016] UKSC 60** and in doing so have balanced the personal interests of the Appellant and his daughters with public interest consideration. Public interest in this case requiring the Appellant to leave the United Kingdom would be a strong factor, bearing in mind the provisions of the Immigration Rules have not been satisfied. I have borne in mind the judgement in **Bank Mellat v HM Treasury (2) [2013] UKSC 39**, namely considering whether the objective of maintenance of effective immigration controls is sufficiently important to justify the limitation of a qualified, protected right and whether the measure is rationally connected to the objective. Having taken all the relevant factors into account, including the best interests of the children, I find the effect of the Respondent's decision would not be disproportionate to the Appellant's qualified rights. I have taken into account all of the factors set out herein and the public interest considerations in the maintenance of effective immigration controls and the deportation of foreign criminals as provided in Section 117 of The 2002 Act. Having done so, I find that the requirement for the Appellant to leave the United Kingdom would not be disproportionate to the qualified family life rights of the Appellant and his daughters and the private life rights of the Appellant."

Oral submissions

8. Miss Young noted in addition to the matters raised in the Rule 24 notice that the Judge referred to the assertion that "following his period of imprisonment there has been no allegation of further offending" at [44(b)]. It is not material that the Appellant has not reoffended. Regarding the financial issues, the grounds are just a disagreement with the findings. The Judge set out at [17 and 18] all the documents considered.

Discussion

9. There is no material error of law regarding issue (a), the financial issue, as the Judge plainly set out in detail the relationship the Appellant had with his children at [63, 65, and 66]. The Judge's decision was not based solely or even mainly on financial matters. It was a thorough and holistic assessment.
10. There is no material error of law regarding issue (b), the reoffending issue. As rightly stated in the grant of permission, limited weight can be given to rehabilitation. I am satisfied that the Judge was plainly aware that time elapsed and conduct since an offence was committed should be taken into account as he referred specifically to it by stating at [44(b)] "following his period of imprisonment there has been no allegation of further offending". He further said at [84] he had "taken all the relevant factors into account". The Judge did not have to repeat what he had said at [44(b)].
11. There is no material error of law regarding issue (c), the mishandling/delay issue. FtTJ Hamilton said "the appellant has not made clear what mishandling he is referring to". It is not referred to in the grounds. The grant did not follow the guidance in **Durueke**. It was based on FtTJ Hamilton reading the chronology. The chronology is not evidence in the proceedings. It is not a witness statement. It is by no means clear to me that delay was the mishandling that the Appellant referred to. It is not a "Robinson obvious" point. In any event FtTJ O'Hanlon clearly referred to the passage of time since the last decision as he stated at [74] "Given the passage of time since the previous determination and the length of time that he has been in the UK overall, I find it likely that the Appellant has developed some degree of social and cultural integration into the United Kingdom."
12. The Judge did not make a material error of law.

Laurence Saffer

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
8 November 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).**

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent” is that appearing on the covering letter or covering email.