



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006580

First-Tier Tribunal No: HU/53932/2022
LH/00513/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25th April 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MZ

(Anonymity Order made)

Respondent

Representation:

For the Appellant: Mr C Bates, Senior Home Office Presenting Officer

For the Respondent: Ms L Dickinson, instructed by Curtis Whiteford Crocker Solicitors

Heard at Cardiff Civil Justice Centre on 4 April 2024

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing MZ's appeal against the respondent's decision to refuse his human rights claim further to a decision to deport him from the UK.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and MZ as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Algeria, born on 12 December 1986. He arrived in the UK on 11 August 2003 and claimed asylum on 29 August 2003 on the basis that he was at risk in Algeria as a bisexual. His claim was refused by the respondent on 24 September 2003, but he was granted discretionary leave to remain until 11 December 2004 as an unaccompanied asylum seeking minor. The appellant applied for further leave to remain on 18 January 2005, maintaining his claim to be at risk on return as a bisexual and his claim to have experienced problems in Algeria arising from his sexuality. His application was refused on 19 September 2005 and his appeal against that decision was dismissed on 22 December 2005 by a First-tier Tribunal Judge who accepted that he was bisexual but otherwise did not find his claim credible and found that he was at no risk on return to Algeria. The appellant became appeal rights exhausted on 31 January 2006.

4. In August 2010 the appellant commenced a relationship with NZ and they had a child, LZ, born on 10 October 2011. On 18 January 2011, he made further asylum and human rights representations and was granted three months discretionary leave until 21 May 2011, although his asylum claim was refused on 18 February 2011. On 5 May 2011 he applied for leave to remain in order to exercise access rights to his child and was granted discretionary leave to 20 June 2014.

5. In the meantime the appellant married NZ on 21 April 2012 and they had a second child, LWZ, on 10 September 2013. On 31 March 2014 he applied for leave to remain as a spouse. His application was rejected, as was a further application made on 10 March 2017.

6. As a result of a conviction on 7 March 2019, for which he served six weeks in prison, the appellant was referred to the Home Office to consider deportation action, but none was taken at the time. He was, however, served with removal papers as an overstayer, on 19 March 2019. He then made an application on 9 April 2019 for further leave to remain on the basis of his family and private life.

7. On 22 August 2019 the appellant was convicted of dangerous driving, assault, using a vehicle without insurance, failing to stop motor vehicle when required by constable/traffic warden, and driving while disqualified. He was sentenced to a 10 month prison sentence for the first count and a 4 month sentence for the second, making a total of 14 months' imprisonment, and was made the subject of a victim surcharge and a 3 and 5 year (consecutive) driving disqualification. Following his conviction he was served with a deportation order issued on 29 August 2019 and a decision to deport him on 30 August 2019. He responded to the decision on 29 September 2019, relying on his family life with his wife and two sons and providing evidence of his family life. His solicitors made further representations on 20 January 2020, again relying on his relationship with NZ and their two sons, but also relying upon the appellant's relationship with his daughter SM, born on 16 March 2010, from a previous relationship.

8. The respondent treated the representations as a human rights claim and refused the claim in a decision of 16 June 2022. In that decision, the respondent set out the appellant's previous convictions: on 22 April 2004 he was convicted of driving a motor vehicle with excess alcohol and using a vehicle while uninsured, and was made the subject of a 12 months driving disqualification; on 23 June 2004 he was convicted of failing to provide a specimen of breath, failing to provide a specimen for analysis and failing to surrender to custody at an appointed time, and was made the subject of a fine and 9 months driving disqualification; on 26 September 2005 he was convicted of driving whilst disqualified, using a vehicle while uninsured and resisting or obstructing

a constable, and was made the subject of a community order, unpaid work requirement, fine and 6 months driving disqualification, on 5 January 2011 he was convicted of failing to notify a change of circumstances affecting his entitlement to a benefit payment advantage and was made the subject of a 2 years conditional discharge; on 17 January 2011 he was convicted of destroying or damaging property and was made the subject of a 6 months conditional discharge; on 17 December 2015 he was convicted of driving a motor vehicle with excess alcohol and was made the subject of a fine, a victim surcharge and driving disqualification; on 26 July 2018 he was convicted of driving a motor vehicle with excess alcohol and was made the subject of a community order and 40 months obligatory driving disqualification, unpaid work requirement and victim surcharge; on 7 March 2019 he was convicted of failing to report an accident, driving a mechanically propelled vehicle on a road/in a public place without due care and attention, driving whilst disqualified, using a vehicle while uninsured and using a vehicle with no test certificate, and was sentenced to 12 weeks imprisonment; and on 9 September 2019 he was convicted of treat/ keep/ dispose of without a licence controlled waste in/on land and deposit without an environmental permit controlled waste in/on land, and was made the subject of a 2 years conditional discharge.

9. The respondent deemed the appellant's deportation to be conducive to the public good under section 5(1) of the Immigration Act 1971 pursuant to section 3(5) because he had been convicted of an offence which had caused serious harm/ he was a persistent offender owing to his 11 convictions for 27 offences between 22 April 2014 and 9 September 2019. As for his human rights claim, the respondent noted that the appellant had not produced any evidence in relation to his child SM and did not accept that he had a genuine and subsisting parental relationship with her. The respondent accepted that the appellant had a genuine and subsisting parental relationship with his wife NZ and their 2 sons, all of whom were British citizens, but did not accept that it would be unduly harsh for them all to accompany him to Algeria or for them to be separated from him upon his deportation. The respondent did not accept that the appellant had been lawfully resident in the UK for most of his life, that he was socially and culturally integrated in the UK or that there would be very significant obstacles to his integration in Algeria. It was therefore not accepted that he met the exceptions to deportation on family and private life grounds and neither was it accepted that there were any very compelling circumstances outweighing the public interest in his deportation. The appellant's outstanding application of 9 April 2019 for further leave to remain on the basis of his family and private life was also refused.

10. The appellant's appeal against that decision was heard on 21 October 2022 in the First-tier Tribunal by Judge Lester and was allowed in a decision promulgated on 20 November 2022. Judge Lester heard oral evidence from the appellant and his wife. He recorded the appellant's evidence that his prison sentence had been a big wake up call for him and that whilst he was in prison his son had collapsed and had been taken to hospital and diagnosed with diabetes type one, and that that was therefore the end of crime for him and he had not been arrested for anything since. The judge considered that the appellant was not a persistent offender, that he had not received a sentence of over 12 months and that his convictions did not 'illustrate' serious harm. He concluded that the public interest did not, therefore, require the appellant's deportation. He found that the appellant had a genuine and subsisting relationship with both his children and his partner, that the appellant and his wife were open, honest, frank and credible witnesses, and that the impact upon the diabetic child should the appellant be deported would be severe and extremely harsh. He concluded that the respondent's decision was a disproportionate and unlawful interference with

the rights of the appellant and his wife under Article 8 and he accordingly allowed the appeal.

11. The respondent sought permission to appeal the decision on the grounds that the judge failed to give adequate reasons for finding that the appellant was not a persistent offender and the crimes that he had committed did not involve serious harm, and that his finding that the effect of the appellant's deportation on the children would be severe and extremely harsh was inadequately reasoned.

12. Permission was granted by the First-tier Tribunal in a decision dated 19 December 2022.

13. On 26 March 2024, the respondent sought to amend the grounds by adding the further grounds that the judge had failed to consider the 'go' scenario of the appellant and his wife and children all residing in Algeria, and that the judge had misdirected himself in law in referring to the immigration rules not being a complete code in the context of deportation and by failing to consider proportionality via section 117C(6) of the Nationality, Immigration and Asylum Act 2002.

Hearing and Submissions

14. The matter then came before me and I heard submissions from both parties.

15. Mr Bates submitted that the amended grounds raised 'Robinson-obvious' errors and that the appellant had had ample notice of those grounds, so that they should be admitted. He therefore relied upon the additional grounds. With regard to the original grounds, Mr Bates submitted that the judge had failed to address the relevant caselaw Chege ("is a persistent offender") [2016] UKUT 187 when considering whether the appellant was a persistent offender, and had based his finding simply on the fact that he had not offended since 2019 without considering other significant factors. With regard to his finding on 'serious harm', the judge had failed adequately to grapple with the fact that the appellant's offences had the potential to cause serious harm. The judge had wrongly considered that the immigration rules were not a complete code. The judge had applied the wrong test when considering the 'unduly harsh' matter and had failed to give adequate reasons for his finding in that regard. Mr Bates submitted that when the judge considered the headteacher's letter at [38], he failed to take account of the fact that the headteacher was not medically qualified. He did not consider the other forms of support available to the appellant's wife if he was deported. There was also a tension in the evidence in that the appellant claimed that his wife was the main breadwinner and that he was the primary carer for the children, yet there was also evidence that the index offence occurred when he was working cash in hand in an uninsured car and panicked when he saw the police. The judge had therefore approached the matter on an incorrect legal footing and failed to address all the issues raised by the respondent. The decision needed to be set aside in its entirety.

16. Ms Dickinson submitted that the respondent's case for the appellant being regarded as a persistent offender and for having caused serious harm, as set out in the refusal decision and the respondent's review, was very limited, and the arguments now being raised by Mr Bates had not been made before the judge. Her skeleton argument before the judge had, however, provided a far more detailed argument and it was clear that the judge had taken that into account when making his decision. In any event, whatever the judge found in relation to the appellant being a serious offender or having caused serious harm, that was immaterial because he went on to

consider the case on the basis that the appellant was a foreign criminal and considered the exceptions in section 117C. Although the judge referred to 'severe and extremely harsh' rather than 'unduly harsh' when considering Exception 2 in section 117C(5), it was obvious that he was considering the same matter and applying the same test. He gave adequate reasons for concluding that the test was met. The rest of the submissions made by Mr Bates about the nature and contents of the evidence in that regard was simply by way of a disagreement with the judge's findings on the evidence. As for the additional grounds, Ms Dickinson objected to those grounds being admitted, but in any event submitted that the judge may well have thought that the 'go' scenario in relation to the 'unduly harsh' test was a bad argument. She submitted that there was very limited chance of the respondent succeeding on the 'go' scenario in any event. The question of whether the judge had considered proportionality under the correct test was immaterial as he had found that the appeal succeeded on the basis of Exception 2. Ms Dickinson submitted that the judge's decision should therefore stand.

17. In response, Mr Bates reiterated the points previously made.

Analysis

18. I agree with Mr Bates that there are several criticisms to be made of the judge's decision, in particular his self-directions at [13] to [21] some of which are either wrong or irrelevant and have evidently been cut and pasted into his decision. It is also the case that the judge's findings at [36] in regard to whether the appellant was a persistent offender and whether his offences caused serious harm are somewhat limited in their reasoning and would have benefitted from a more detailed analysis. However, as Ms Dickinson properly submitted, none of those matters are material to the outcome of the appeal given that the judge proceeded to determine the case on the alternative basis that section 117C applied and, ultimately, that the appellant met the exception to deportation in section 117C(5). In such circumstances, the proportionality assessment under section 117C(6), by reference to the 'very compelling circumstances' test, was not required, and the appeal was bound to succeed provided that the judge had properly determined the 'unduly harsh' issue in section 117C(5).

19. The material challenge to the judge's decision, therefore, was in respect to his findings on Exception 2. The Secretary of State's grounds in that respect are limited to [5] and [6] and are extremely brief. I agree with Ms Dickinson that the judge's use of the term 'severe and extremely harsh' at [38] was effectively the same as the 'unduly harsh' test and that that was simply a matter of semantics. There is no suggestion that the relevant considerations were not made when the test was being considered or that the evidence was not properly considered in its correct context. The judge referred to the relevant test at [7] when setting out the respondent's case in the respondent's review. I do not consider there to be any error of law in the judge's reference to the relevant test.

20. As for the application of the test, it seems to me that the judge's findings at [38] and [39], albeit brief, are adequate. It is clear that the judge had regard to the relevant evidence. He accorded significant weight to the letter of 13 July 2022 from the headteacher of the school which the appellant's children attended and I see no reason why he was not entitled to do so. In so far as Mr Bates sought to challenge the judge's reliance on that letter on the basis that the headteacher was not medically qualified, I do not consider that to be relevant to the context in which she referred to LZ's health issues, and it seems to me that that was simply a disagreement with the

weight the judge accorded to the letter. The judge set out the appellant's skeleton argument in full in his decision, as well as the respondent's review, and he made clear at [9] and [10] that he had taken the submissions of both parties into account. He therefore had full regard to the impact of the appellant's deportation on the family in terms of LZ's medical and care needs. Mr Bates' criticisms of the judge's findings at [39] in relation to the issue of other forms of support available to the appellant's wife were, in my view, essentially an attempt to re-argue the respondent's case, whereas the judge clearly considered the matter and provided reasons for concluding that the appellant's presence was essential.

21. As for the additional ground pleaded, namely that the judge had failed to consider the 'go' scenario, there was no adequate reason given as to why that had not been pleaded in the original grounds. It did not form part of the grant of permission. It was not an issue argued in any detail in the respondent's review, albeit that it had been raised in the refusal decision, and there is nothing to indicate that it was an argument pursued with any vigour before the judge. It seems to me in any event that the findings at [38] could be seen as addressing that matter, as well as the 'stay' scenario, albeit not specifically expressed in those terms. Given the findings made by the judge at [38], such an argument made by the respondent was highly unlikely to have met with any success in any event. As such I do not see any reason to admit the ground, but even if I did, I find it to have no merit.

22. For all these reasons I consider that the judge was entitled to conclude that Exception 2 was made out and that adequate reasons were given for reaching that conclusion. As such, and irrespective of the criticisms that can otherwise properly be made of the judge's decision, there is sufficient for the decision to be upheld. I therefore do not find that the grounds identify any material error of law in the judge's decision and I uphold the judge's decision.

Notice of Decision

23. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to allow the appeal stands.

Anonymity

The anonymity direction made by the First-tier Tribunal is maintained.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 April 2024