



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

Appeal Number: DA/02096/2013

THE IMMIGRATION ACTS

Heard at Birmingham

On 12 August 2014

Determination

Promulgated

On 2 September 2014

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MJY

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Eaton, Counsel instructed by Crown & Mehria Solicitors

For the Respondent: Mr Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Kenya, born on 19 March 1991. He arrived in the United Kingdom on 16 November 2007 to join his father and family. In due course he received indefinite leave to remain on 23 November 2009.

2. He was convicted on 26 February 2013 of inflicting grievous bodily harm. On 22 March 2013 he was sentenced to twelve months' imprisonment.
3. The respondent, by a decision of 3 October 2013 invoked the provisions of Section 32(5) of the UK Borders Act 2007, namely to bring into effect the deportation of the appellant.
4. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Astle and Mr Getlevog (Non Legal Member) on 29 January 2014.
5. The appeal was dismissed.
6. Grounds of appeal were submitted to the effect that the Tribunal had not fully considered the extent of the dependency upon the appellant of his family had been somewhat dismissive of the effect that his removal would have upon them. Permission to appeal was granted on that basis.
7. The matter came before me on 17 April 2014. Having heard the submissions of both parties on that occasion I was concerned whether the appropriate test can be applied to the factual matrix, in particular whether the test of removal being unduly harsh had been applied to the family members as well as to the appellant. Although the Tribunal seemed to have highlighted much of the evidence which the appellant sought to rely upon, it seemed that there were areas of that evidence which were not fully engaged in the application of the test. I was also concerned as to whether full consideration had been given to the effect of returning the appellant to Kenya.
8. In relation to those matters therefore I determined that the decision should be set aside for those matters to be considered.
9. Thus the matter came before me for a re-hearing on 12 August 2014.
10. Most helpfully at the hearing it was agreed that there had been no challenge to the credibility of any of the witnesses or of their statements which had been submitted before the First-tier Tribunal. There had been no challenge to what the appellant had to say as to his situation and circumstances. The family situation and circumstances had been clearly set out in the many witness statements which had been prepared and the medical reports which had been submitted. In those circumstances Mr Eaton, who represents the appellant, was of the view that it was unnecessary to call further oral evidence and that it was entirely proper to rely upon the evidence that had been presented. Mr Richards, who represents the respondent, agreed with that approach. Thus it was that the re-hearing proceeded on the basis of submissions made and evidence previously presented.

11. I have regard in particular to the large bundle which was presented before the First-tier Tribunal which sets out many of the statements from witnesses that attested to the appellant's character and the family life.
12. So far as the offence itself was concerned it was one of violence committed whilst the appellant was drunk. It was the only offence which he had committed and it was submitted that he was unlikely to commit any further offences. My attention was drawn to the probation officer's report at A31 and 32 of the bundle which spoke of the appellant's response to custody and thereafter. It speaks of the steps taken by the appellant to address his behaviour, particularly attending the stepping stones programme which focused on drug misuse and the consequences of same. It spoke of the appellant's positive attitude as a volunteer at the prison and his hard work as part of a team in prison. It spoke of the fact that custody was very difficult for him, how upset he was that he was separated from his family, particularly given their physical and emotional needs of him.
13. Perhaps what lies at the heart of this appeal is in reality the complex needs of the appellant's family. My attention was drawn to the medical evidence relating particularly to the appellant's father. He is assessed as requiring need at the highest level. He has physical difficulties in walking and mobility such that in fact he attended the hearing in a wheelchair.
14. In particular he needs constant care and support, particularly getting in and out of bed, managing his toilet needs, washing and drying himself, using a bath or shower, dressing and undressing, going up and downstairs or moving about. He requires attention not only during the day but also at night, particularly in relation to his toileting needs. It is perhaps unnecessary to set out in great detail the difficulties faced by the appellant's father. The appellant himself sets that out in a detailed statement of 20 January 2014.
15. His father has a number of illnesses including diabetes, heart failure, angina, kidney problems, prostrate problems, depression and gout. He has had a coronary artery bypass. He is on anti-coagulation therapy, with a high risk of stroke and further complications. He has to take some 23 medicines a day.
16. The appellant speaks in paragraph 21 of his statement of his unique relationship with his father which is over and above the normal relationship that a child has with a parent. His father relies upon him to help him lead a normal life as possible treating him not only as a son but as a best friend. They spend a lot of time together and when time permits the appellant takes his father out for walks or to have other activities.
17. The added complication in this family context is that his mother also is unwell. She has had a number of illnesses. She has required eye surgery and suffers severe visual impairment and restricted mobility. She suffers

from Zollinger disease and has other difficulties with her health. She too requires some physical and particularly moral and emotional support to cope not only with her condition but also with that of her husband. She is not capable of physically lifting him and therefore requires other assistance.

18. Neither parents drive and therefore are dependent upon somebody else to take them to hospital appointments, to go shopping and generally to move them around.
19. In addition the appellant has his sister who is attending university. She too has suffered heart surgery and finds it difficult physically to do much around the house. She too is often depressed at the situation of the family and again emotionally vulnerable, depending very heavily upon the appellant for her emotional support. She has every possibility of doing well in her studies. She attends the same university as the appellant and they commuted together three to four days a week.
20. Although the family receive financial assistance from the state, particularly the father who receives disability living allowance, that is not sufficient to meet all the needs of the family and so they are dependent to some extent upon the modest earnings which the appellant manages to make in addition to his studying.
21. As was submitted there is a complicated interconnection of family support as required, the lynchpin being that of the appellant. Despite his youth and his responsibilities in study he has committed himself fully to supporting his family and without him that family would be in a bad state. It was not simply the physicality of the support but also of the emotional inter-dependence that each family member had with the others.
22. It was not suggested that the family could relocate to be with the appellant in Kenya. The father was in any event a British citizen and that status as well as the indefinite leave to remain status afforded to the other members of the family was something to be recognised in the proportionality exercise.
23. My attention was drawn to the decision of **Kugathas** and I was invited to find that on a proper construction of the family chemistry and grouping that there was a great deal of emotional dependency upon the appellant in particular. Such was an important basis, particularly for those prone to depression.
24. As to the appellant's return to Kenya that of course would be difficult for him, he having no relatives there to support him and having little connection with the country since he arrived in the United Kingdom. It was not argued however by Mr Eaton that such a return would be unduly harsh in all the circumstances that the appellant was a relatively young man with education and ability to work. It would however devastate his

family to remove from them the main support and help that they have. His sister has in fact passed her degree but is hopeful of undertaking a postgraduate degree. Thus her need of the care and support of her brother, the appellant, continues.

25. The period during which the appellant was in custody which was for some six months was a particularly difficult time for the family. They relied upon the services of a friend to drive them around. That friend himself is not in good health and it was only a temporary arrangement. There are family members that are in the United Kingdom, they are essentially cousins with their own family responsibilities. It is submitted that even some modest help from them which is all they could offer, if at all, would not cater for the complex medical needs of the family, in particular the need for somebody to be at home most of the time in order to assist the father with his care needs. It is unlikely, given the complexity of his needs that they would be served by a third party or outside agency even if that support could be avoided. Given the difficult financial position of the family, any additional expenses on taxis and so forth was a serious consideration.
26. My attention was drawn to the various witnesses that had spoken as to the matter including statements from the appellant's father, mother and sister and medical statements concerning the health of all three.
27. Mr Richards, in his submission, invited my attention to the Immigration Act 2014, in particular to paragraph 117C thereof. The appellant did not fall within any of the two exceptions in that Section. I was invited to find that the situation was relatively straightforward, namely that the Act clearly indicated that it was in the public interest that there by deportation and that that should be the decision made in this case. I was asked to find that the appellant did not come within any of the exceptions to deportation and that the public interest was clearly expressed in the Act, namely that he should be deported and his appeal dismissed. I was invited to do so.
28. It is to be recognised that the legislation has changed both as to the Rules and Act of Parliament but I am obliged to take these matters into account. So far as the change of Rules is concerned, I note the amendment to Rule 398 provides:-

“The public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.”
29. I note also the amendment to paragraph 399A. It substitutes the requirements as follows:-

“(a) the person has to be lawfully resident in the UK for most of his life;

- (b) is socially and culturally integrated into the UK; and
- (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.”

30. I bear in mind also Section 117C of the Immigration Act 2014 which impose additional considerations in cases involving foreign criminals in the context of Article 8. It is to be noted that exception 1 in that section generally speaking reflects that which is now set out in Rule 399A.
31. There are no transitional provisions and therefore my findings of fact and findings of law are to be considered within the context of the new legislation and requirements.
32. That the appellant is in general terms a commendable young man who is concerned not only to progress his study but is also committed to the welfare of his family is not in doubt.
33. It is said that he would not pose any threat to society by re-offending but rather that he has much to give to society in his acceptance of responsibility as a citizen would also not seem to be in any doubt. I take into account the glowing references that are given in the statements about him and I take into account the positive factors that can be spoken about him. Those however do not replace what is enshrined in statute, namely that the deportation of foreign criminals is in the public interest. The more serious the offence committed the greater the public interest in deportation.
34. Section 117C(3) provides that:
- “(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.
 - (4) Exception (1) applies where –
 - (a) C has been lawfully resident in the United Kingdom for most of C’s life,
 - (b) C is socially and culturally integrated into the United Kingdom, and
 - (c) there would be very significant obstacles to C’s integration into the country to which C is proposed to be deported.”
35. It is not suggested to me during the course of the submissions that the appellant meets that exception.

36. He arrived in the United Kingdom when he was 16 years of age. He has been in the United Kingdom for some seven years and thereafter. It will be said therefore that he has been resident in the United Kingdom for most of his life. Clearly it is entirely arguable that he has socially and culturally integrated into the United Kingdom. He had not sought to argue that there would be very significant obstacles to his integration into Kenya although there would be clearly initial difficulties in his so doing. Although the documentation that was originally presented seeks to show a country that is dangerous, particularly to the stranger or to the person that is not culturally integrated into the community, that aspect of the matter is not pursued before me. He clearly has the intelligence, skills and ability to integrate himself into Kenyan society, being mindful clearly as to where he should reside in Kenya for that purpose.
37. Prior to the coming into effect of the 2014 Act there were numerous decisions as to the proper interpretation at paragraph 398, 399 and 399A. Also, as consideration of Article 8 should the appellant not meet the requirements as therein set out.
38. In general terms therefore were the appellant not to meet the strict requirements of the Rules it would generally only be in exceptional circumstances Article 8 would be held to apply. There would need to be compelling circumstances outside of the Rules which would make deportation unduly harsh in all the circumstances.
39. Looking at the circumstances of this case I have no hesitation in considering that the complex physical and emotional needs of the appellant's family and their inter-dependence upon him to be such a compelling circumstance. I disagree with the findings of the First-tier Tribunal that there would be other support available to the family from other family members. Those members are not close family members and although there is some connection with them and with the appellant's core family in terms of communication and occasional meetings, they are all people having their own family responsibilities and I accept entirely from the generality of the evidence as presented that they would not be in a position to provide the nature of the support that is required. The assistance of a friend to help in emergencies is not quite the same as the requirement to provide what is in effect full-time care, particularly to the father. It may of course be that the statutory bodies have an obligation to provide carers to help out the family but it is unlikely they would be able to provide the quality of care and consistency of care that is at present provided, particularly by the appellant. Funding such care is also a further issue.
40. It is to be recognised that so far as the appellant's sister is concerned she has currently a dependency upon him, particularly in emotional terms. He and she share responsibility towards their parents, he also needs the support of the appellant for her needs. Long-term such needs are likely to age with growing maturity and with responsibilities but I focus at present

upon what is the situation rather than what could be the situation. Equally the appellant's mother has a closer than normal bond with him because of her difficulties.

41. I bear in mind the case of **Kugathas v SSHD [2003] EWCA Civ 31**. I have no doubt that there is a degree of emotional dependency within the family unit as a whole and one upon the other such as to firmly establish family at present.
42. It was clear from the Probation Officer's letter that separation from his family caused the appellant great distress in that he was not able to be as helpful to his family or supportive of their needs as he wished to be. It is clear also that the appellant's removal from the United Kingdom would in the circumstances cause great difficulty to the family and much emotional distress to its members. It is to be noted that the father in particular suffers from depression and the appellant's mother also has episodes of emotional turbulence. These matters are very relevant to the issue of dependency within the aspect envisaged in the case of **Kugathas**.
43. I have no doubt therefore that the particular circumstances of the family are such that their needs would not be met or nearly met were the appellant to be removed. As I have indicated I do consider, contrary to the findings of the First-tier Tribunal, that that factor is a compelling one when set within the overall context of this case.
44. Were the law to be as it was therefore I would have had no hesitation in concluding that that was such a compelling circumstance as to render removal disproportionate. Clearly the more serious the offence the greater the public interest in that proportionality exercise.
45. The issue for me, however, is whether or not the coming into force of the new legislation renders of no effect the compelling circumstance in my consideration of Article 8 within the ambit of Section 117C.
46. Mr Richards is adamant that if the exceptions are not met that is the end of the matter so far as Article 8 is concerned and that whatever may be other considerations they do not serve to defeat the deportation. Mr Eaton however invites me to find that the 2014 Act merely gives statutory recognition to the Rules as existed and does not substantively change the approach to be taken to Article 8. He thus invites me to allow the appeal were I minded to find compelling and compassionate circumstances.
47. The 2014 Act sets out at 117B the public interest considerations that are applicable to all cases that are considered under Article 8.
48. I take those into account. In this case it is clear that the appellant and indeed his family are lawfully present in the United Kingdom having indefinite leave to remain. There is no suggestion that the appellant is any financial burden upon the establishment. Indeed it may be argued

that his dedication towards his family both in terms of a financial contribution to the household income and to the looking after of his father and mother are such that relieves the state of what otherwise might be an expensive financial burden.

49. In terms of the Rules themselves it would seem that the appellant is somewhat falling within 398(b) or (c) in which case it would only be in exceptional circumstances that the public interest in deportation would be outweighed by other factors. Paragraph 399 and 399A do not apply. Given the structure of the code and the amount of public interest enshrined therein it is difficult, without more, to understand what additional requirements are sought to be imposed by the 2014 Act.
50. It is to be noted that part 5A is said only to apply when the Tribunal considers Article 8(2) of the ECHR directly. It is not entirely clear what is meant by that statement.
51. I have regard in any event to the Act as required to do so and note particularly Section 117A(2). In considering the public interest question, the court or Tribunal must (in particular) have regard –
 - (a) in all cases, to the considerations listed in Section 117B, and
 - (b) in cases concerning the deportation of foreign criminals, the considerations listed in Section 117C.
52. Paragraph 117A(3) provides:

“In Section (2), ‘the public interest question’ means the question of whether an interference with a person’s right to respect for private and family life is justified under Article (2).”
53. As I have indicated I have had regard to Sections 117B and 117C. I note particularly in Section 117C(iii) that if the appellant does not fall within either of the exceptions in that Section the public interest requires is removal. The wording of that particular sub-Section sits uncomfortably as I so determine with the overall responsibility of the Tribunal as set out in 117A(ii). Thus the focus of attention would seem to be “the public interest question”. Although I recognise that it would be relatively rare for considerations not contemplated within 117B and 117C to found the basis to uphold an Article 8 decision, it does seem to me that the circumstances of this particular case are so exceptional such a consideration should prevail in this particular case.
54. It is in the interest of three members of the appellant’s family and their needs should be considered in the wider context, irrespective of the needs of the appellant.

55. In all the circumstances therefore the appellant's appeal before the Upper Tribunal is allowed. The decision of the First-tier Tribunal shall be re-made such that the appellant's appeal in respect of deportation is allowed and that in respect of Article 8 ECHR is also allowed.

Signed

Date

Upper Tribunal Judge King TD