IAC-FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00896/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 October 2015	**On 30 October 2015**

Before

THE HONOURABLE LORD BURNS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DG
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Miss A Holmes, Home Office Presenting Officer
For the Respondent: Mr A Miah, Counsel instructed by Sony Sadaf Haroon Solicitors

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. We shall refer to the respondent as the appellant as he was before the First-tier Tribunal. He is a citizen of South Africa and his date of birth is 18 March 1987.

2. The appellant came to the UK aged 12 with his mother. He was granted indefinite leave to remain on 24 July 2000. On 30 November 2004 he was convicted of two counts of aggravated burglary and he received a custodial sentence of 42 months. At the same time he was made subject to an anti-social behaviour order the duration of which was seven years. As a result of the conviction the Secretary of State made an order to deport the appellant. He appealed this and his appeal was allowed on 29 January 2008. On 12 March 2008 he was convicted of possession of a class B drug. On 12 August 2009 he was convicted of two counts of possession with intent to supply a class A drug and he was sentenced to an eighteen month community order. On 10 September 2010 he was convicted of possession of an offensive weapon and he received a twelve month custodial sentence. A three month concurrent sentence was imposed for having breached the anti-social behaviour order.

3. On 1 April 2011 the Secretary of State made a deportation order pursuant to Section 32(5) of the UK Borders Act 2007 ("the 2007 Act"). The appellant's appeal against this decision was dismissed by the First-tier Tribunal in 2008. Following further submissions as a result of his relationship with H, a British citizen, the Secretary of State made a further appealable decision refusing the application. The appellant appealed and his appeal was dismissed by the First-tier Tribunal on 23 May 2013.

4. The appellant made further representations to the Secretary of State on the basis that he was in a relationship with another British citizen, P, and that she was pregnant with their child. The child, Z, was born on 2 May 2014. The Secretary of State refused the application. Another appealable decision was generated maintaining the deportation order made on 1 April 2011. The appellant appealed and his appeal was allowed under Article 8, by Judge of the First-tier Tribunal Sethi. The Secretary of State was granted permission by Upper Tribunal Judge Coker on 11 August 2015.

The Legal Framework

5. The Immigration Rules ("the Rules"):

> "**A398.** These rules apply where:
>
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
>
> (b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good [and in the public interest] because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good [and in the public interest] because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

or

(c) the deportation of the person from the UK is conducive to the public good [and in the public interest] because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, [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].

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) [it would be unduly harsh for the child to live in the country to which the person is to be deported]; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a [British Citizen or settled in the UK], and

(i) [the relationship was formed at a time when the person (deportee) was in the UK lawfully

and their immigration status was not precarious; and]

(ii) [it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and]

(iii) [it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.]"

6. Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"):

"**117B. Article 8: public interest considerations applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C. Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(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 in 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.

(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.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subSections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

The Decision of the First-tier Tribunal

7. The First-tier Tribunal Judge heard evidence from the appellant, P, the appellant's mother and his stepfather. She considered the evidence

contained in the witness statements of the wider family and friends and that of Ms A from SBS.

8. The decision of the Secretary of State was made with reference to paragraph 398(b) of the Rules. The appellant claimed that deportation would breach his rights under Article 8 of the ECHR with reference to paragraph 399 of the Rules.

9. The First-tier Tribunal found at [30] that paragraph 399(b) of the Rules could not apply because the appellant and P had reconciled at a time when he was subject to a deportation order. Paragraph 399(a) did not apply because Z, who is a British citizen, could remain living in the UK with his British citizen mother. For this reason only the judge concluded that it would not be unduly harsh for him to remain in the UK without the appellant (see [31]).

10. At [36] the judge found that the appellant had failed to meet the requirements of the Rules and that this was a significant consideration in the overall assessment of proportionality. She stated that she recognised that states were entitled to decide that there is generally a compelling public interest in deporting foreign criminals and that this is reflected through the provisions of Section 117C(1).

11. At [37] the judge found that there could be no doubt that the trigger offence was serious, noting that the offensive weapon was a baseball bat and that the appellant had presented the threat of violence against the public. The judge went on to direct herself in relation to Section 117C (2) (the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation). She found that the appellant has an appalling history as a persistent young offender and that the offending behaviour appeared to be associated with childhood difficulties and gang and drug-related associations.

12. The judge noted that the appellant had not re-offended for almost five years (see [39]) and she found this to be strongly indicative of his desire and intention to lead a law-abiding life which she found corroborated his evidence and that of his witnesses that he has made progress in removing himself from a life of crime. The judge took into account that in 2011 the First-tier Tribunal found that the appellant's risk of re-offending was medium, but she noted that the assessment had been based on the appellant having been released from prison for a short period of time. She noted that he had continued to offend after his successful appeal in January 2008. The judge found that although the appellant had in the past claimed to have left his offending lifestyle behind, and that this had been shown not to be the case, she was satisfied at the date of the hearing before her that "there is now persuasive and reliable evidence of the appellant's genuine and durable rehabilitation." The judge referred to the findings of the panel in 2011. They found that the appellant had an exceptionally difficult and uncompromising background. The judge attached weight to the evidence of Ms A (from SBS), who has worked with

the appellant providing educational and pastoral support to him up until he was aged 18. Her evidence was that the appellant has worked for the organisation over the past three years teaching young people. In relation to the risk of re-offending the judge directed herself that she was required to attach considerable weight to the wider objective of deportation as a deterrent and as an expression of society's revulsion.

13. The judge went on to consider Section 117C in the context of the impact of deportation on P and Z. The judge found P to be insightful and that she was a credible witness. She had resided in the UK her entire life and was intending to qualify as a chartered accountant. She concluded that it was not reasonable to require her or Z to leave the UK. P's evidence was that she would leave the UK to join the appellant in South Africa if she had to. The judge found that she had no practical family or cultural affiliation with South Africa and that she has a strong private life in the UK. She has never been to South Africa and neither had she desired to visit. The judge found that should she relocate she would "struggle immensely in attempting to re-establish herself and her work in a country in which she has no practical, family or cultural support".

14. The judge referred to the finding of the First-tier Tribunal in 2011 that the relationship will almost certainly break down should the appellant be deported. The judge found that the difficulties would be compounded now because P is a mother with a young child who is reliant on her parents in the UK and a support network here. The judge took into account that the appellant left South Africa at the age of 12 and he has not returned since then. She found that return would involve obvious hardship for him. She found that there would be real obstacles against relocating to South Africa in order to continue family life. The judge considered the impact on P should she remain here and found as follows:

> "... would result in harsh consequences for her practically and emotionally and so adversely impact upon not only her family life but the progression of enjoyment of her private life, to include her career ambitions to qualify as an accountant and establish a stable family environment for her son."

15. The judge took into account Z's best interests and uncontroversially found that it would be in his best interests to be raised by both parents. The judge found that fatherhood had strengthened the appellant's resolve to stay out of trouble. She found at [44]

> "... that where the appellant's deportation will have unduly harsh consequences on [P] as the relationship between her and the appellant will be at least seriously thwarted, if not brought to an end, then the same will impact adversely on the couple's child who will be denied the opportunity of being brought up in the stability of a shared family home with both parents."

16. The judge went on to find that relocation as a family would deprive Z of any opportunity to build a close and meaningful relationship with both sides of his grandparents, uncles, aunts and cousins all of which live in the

UK and are British citizens. The judge concluded that the appellant's deportation would have unduly harsh consequences for P and Z.

17. The judge considered Section 117B (4), but concluded that although the relationship between the appellant and P was formed at a time when the appellant's status was precarious there was nothing within Section 117B or Section 117C or the Rules that would indicate that this would disqualify the appellant from qualifying or meeting the requirements of the Rules.

18. The judge concluded that the appellant had made real progress in his rehabilitation since 2009 when he last committed a criminal offence and that deportation was not in the public interest because this was a case in which Section 117C(5) applied. The judge concluded by finding that:

> "Where the appellant has demonstrated that the public interest is deemed not to require his deportation by reference to the criteria laid down in primary legislation any decision by the respondent to pursue his deportation must then itself be disproportionate."

Error of Law

19. The First-tier Tribunal misunderstood the legal framework relating to deportation. This was a deportation pursuant to Section 32 of the 2007 Act and it is conducive to the public interest to deport the appellant. The Secretary of State was compelled to make a deportation order unless that would involve a breach of the appellant's rights under the ECHR. The Rules are a complete code (see MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192. The judge considered the appeal under the Rules, finding that the appellant could not meet the Rules. She then considered Section 117C (5), as a distinct and less onerous test, finding that the impact of deportation would be unduly harsh on P and Z. Section 117 is not an additional test to be applied but simply provides a statutory framework codifying considerations to which the Tribunal must have particular regard. Section 117C subsections (4) and (5) simply reflect paragraphs 399 and paragraph 399A of the Rules. It cannot be the case that the Rules are a stricter version of Section 117C because the Rules are a complete code.

20. The judge did not find that the appellant satisfied the requirements of 399 Rules and there was no counter challenge to these findings by the appellant. The thrust of Mr Miah's submissions was that it was open to the judge to allow the appeal with reference to Section 117C (5) notwithstanding the decision under the Rules. We do not accept this for the reasons that we have given above. We gave Mr Miah the opportunity to address us on compelling circumstances. He indicated that he relied on the findings of the First-tier Tribunal. There was no further evidence produced by the appellant.

21. The judge fell into error because she misunderstood the legal framework and proceeded to allow the appeal under Article 8 on the basis that the appellant had established that the impact of deportation would be unduly harsh (in the context of Section 117C (5)) on his partner and their child, but this finding was not open to her as she had found that the appellant would not satisfy the requirements of paragraph 399 and it follows he could not come within Exception 2 (Section 117C (5)).

22. We set aside the decision of the First-tier Tribunal to allow the appeal under Article 8 and remake the decision. The primary findings of fact relating to the appellant's history and criminality, the impact of deportation generally and the family relationships were not challenged. There is no reason for us to go behind these. The judge erred in her Article 8 assessment specifically in relation to unduly harsh in the context of that legal framework and the wider Article 8 assessment.

Conclusions

23. There is a statutory presumption and a presumption set out in the Immigration Rules that deportation is in the public interest. There was no firm evidence which would indicate that the appellant was at risk of committing further offences and he had no convictions for five years. However, risk of re-offending is only one aspect of public interest (N (Kenya) v SSHD [2004] EWCA). We have attached weight to the other facets of public interest, particularly in this case that of deterrence.

24. We have attached weight to the fact that the appellant has been out of trouble for some time and the positive findings made by the judge relating to his intentions supported by the evidence of Ms A. However, the appellant's history in this case is of much concern to us. He has committed a number of serious offences and it is significant that he continued to offend time and time again despite the First-tier Tribunal in 2008 allowing his appeal against a deportation order and effectively giving him a second chance to start afresh. However, he decided, well into adulthood to continue to re-offend.

25. We have considered the sentencing comments. The judge said as follows:

> "I have seen something of the DVD which demonstrates that the explanation that you gave to the police is not the case, this was not defensive action whilst surrounded by traffic at I think 6 o'clock in the morning, it was clearly offensive in nature, it occurred while you were on bail for a drugs offence, there is clearly a drugs background to you, whether this offence had its part in your drug-related background I know not but I am bound to say that there are suspicions raised when people are driving around in cars armed with weapons and confronting each other at 6 o'clock in the morning, the inference must be of a gang-related event of some kind involving the public carrying by you and your co-defendant of a hammer and a baseball bat, the public carrying of weapons in cars in that way simply cannot be tolerated and I would be failing in my duty if I did not take a serious view of it."

26. On any account the offence was serious and this is reflected in the sentence.

27. Whilst the appellant was subject to a deportation order he chose to start a family here having reconciled with P at a time when his status here was precarious. Despite this they started a family together.

28. We have taken into account the sustainable findings made by the First-tier Tribunal relating to the impact of deportation on P and Z. Z would effectively grow up in the UK without his father. It is of significance that Z is a British citizen. We accept that the separation of the family would not be in the best interests of Z. P and Z would face difficulties and upset as identified by the judge should they decide to remain in the UK or should they decide to follow the appellant to South Africa. It is in Z's best interests to remain here. The judge made findings which established that it would be very difficult for P and Z to relocate to South Africa with the appellant.

29. It is of significance that the appellant came to the UK as a child. This is a significant factor in favour of the appellant, but it has to be weighed against the strong public interest in deportation. We have taken into account the impact of the judgment of the Grand Chamber of the Court of Human Rights in Maslov v Austria [2008] EHRR 546. We adopt the interpretation of the Upper Tribunal in Akinpar, R (on the application of) v Upper Tribunal [2014] EWCA 937. In this case the appellant has not simply committed acts of juvenile delinquency. He has continued to commit crimes well into adulthood.

30. There is some ambiguity in the decision of the First-tier Tribunal and conflation of the Rules and Section 117, but it is clear that the judge dismissed the appeal under the Rules. In remaking the decision under the Rules we adopt the approach of the Upper Tribunal in KMO (section 117 - unduly harsh) Nigeria [2015] UKUT 00543 and consider unduly harsh in the context of the public interest. From our assessment, on this basis, the appellant is unable to meet the requirements of paragraph 399 of the Rules. A child centred approach, as conducted by the Upper Tribunal in the earlier decision of MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 would have a different result in relation to Z. KMO was decided after the grounds of appeal were prepared by the Secretary of State, but they make the position of the Secretary of State very clear; namely, that an assessment of unduly harsh should be considered of context of the public interest and a balancing exercise is required. Mr Miah did not address us specifically on the issue or seek to advance a different position.

31. We arrive at the same conclusion as the First-tier Tribunal and dismiss the appeal under the Rules. The appeal turns on whether the appellant has established that the public interest in deportation is outweighed by compelling circumstances over and above those described in the Rules. Paragraph 397 of the Rules reminds us that should the Rules not be met it will only be in exceptional circumstances that the public interest in

deportation is outweighed. Deportation will have a distressing impact on the family who will now have to make difficult and life changing decisions. However, compelling circumstances, outside of matters considered within the Rules, have not been identified by the First-tier Tribunal or by Mr Miah in submissions. The strength of the appellant's case depended very much on his child and partner which has been considered in the context of the Rules. It is a weighty consideration in favour of the Secretary of State that the appellant's family life has been formed at a time when his immigration status was precarious. We have attached weight to the period of time that he has been here and the fact he came here as a child, but ultimately the balance of the scales tips in favour of the Secretary of State and the appeal is dismissed.

32. We were not addressed in relation to anonymity, but in the light of the child in this case we have decided to make an anonymity direction.

Notice of Decision

The appeal is dismissed on human rights grounds.

Signed Joanna McWilliam Date 29 October 2015

Upper Tribunal Judge McWilliam