IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01921/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 5th March 2015	**On 22nd April 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KAMAL AMINI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr M Diwnycz, Home Office Presenting Officer
For the Respondent: Mr B Marshall, Legal Representative instructed by NBS Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Fox made following a hearing at Bradford on 4th December 2014.

Background

2. The claimant is a citizen of Iran born on 1st July 1980. He arrived in the UK on 31st March 2003 and claimed asylum. He was ultimately refused and became appeal rights exhausted on 21st September 2004.

3. On 27th June 2005 he was convicted of unlawful wounding and sentenced to 18 months' imprisonment. On 17th November 2005 he was issued with a notice of intention to make a deportation order and became appeal rights exhausted on 17th February 2006. On 17th September 2007 the deportation order was signed but not implemented. A series of further representations were made and finally, on 2nd October 2014 a decision was made to refuse to revoke the deportation order by virtue of Section 5(2) of the Immigration Act 1971.

4. The judge accepted that the claimant enjoys family life with his wife and his two British citizen children, then aged 5 and 2 years old. His wife is a locum pharmacist and she is the breadwinner in the household. The claimant is the primary carer for the children. The Presenting Officer accepted, as did the author of the refusal letter, that he has a caring relationship with both his wife and his children.

5. The judge recorded that the public interest requirement, so far as Article 8 was concerned, was covered at Sections 117A to 117D of Part 5 of the Nationality, Immigration and Asylum Act 2002. After recording the facts the judge said:

> "On the evidence before me today I am satisfied that the appellant has a genuine and subsisting relationship with his wife and children. I am satisfied that he provides the main care for the children by taking them to and from school and nursery. I am satisfied that it would be unduly harsh for these two children to live in a country to which the appellant may be deported. Although young enough to adapt the overall impact upon the entire family would be disproportionate. The appellant's wife would find it difficult to re-integrate even if she could return to Iran. There is no certainty that she would be able to return.
>
> In all the circumstances I am satisfied that the appellant can meet the requirements of the exception to deportation as set out in paragraph 399(a) of the Immigration Rules."

6. The judge then considered the broader Article 8 claim outside the Rules and allowed the appeal both under the Immigration Rules and under Article 8 of the Convention.

The Grounds of Application

7. The Secretary of State sought permission to appeal on the grounds that the Tribunal had erred by only assessing whether it was reasonable for the children to leave the UK. It would not be unduly harsh for his children to remain without him. There was no evidence that his wife could not care for them in his absence and it would not be unduly harsh on her to either change her employment hours or change employment or hire child care in his absence. It remains the choice of his wife as to whether she and the children remain here without him or leave.

8. The claimant's wife is originally from Iran, which would assist re-integration and it cannot be said that she has become estranged from the way of life there.

9. The remainder of the grounds argue that there was no provision for a deportation appeal to be allowed on Article 8 grounds outside the rules in reliance on MF (Nigeria) v SSHD [2013] EWCA Civ 1192 since they are a complete code

10. They cite a number of cases including the Court of Appeal judgment in LC (China) [2014] EWCA Civ 1310 and SSHD v AJ (Angola) [2014] EWCA Civ 1636 and submit that the Tribunal failed to recognise that the scales were very heavily weighted in favour of deportation and something very compelling was required to outweigh the public interest in deportation. The Tribunal failed to give any consideration to the Secretary of State's public interest policies given the severity of the offence committed and the findings are inadequate. The deportation has the effect not only of removing the risk of re-offending by the deportee himself but also of deterring other foreign nationals in a similar position. Deportation of foreign criminals preserves public confidence in a system of control whose loss would itself tend towards crime and disorder. In DS (India) [2009] EWCA Civ 544 the Court of Appeal said that even if it could properly be said that there was no risk of re-offending the respondent would be entitled to say in appropriate circumstances that the removal of an offender from the country was in the public interest.

11. Permission to appeal was granted by Judge Grimmett on 23rd January 2015 for the reasons stated in the grounds.

Submissions

12. Mr Diwnycz acknowledged that the Secretary of State's grounds were in part based upon a mistake of fact. The claimant's wife was not from Iran but from Iraq. Otherwise he relied on the grounds.

13. Mr Marshall submitted that the grounds amounted to disagreement with the decision. The judge reached a decision open to him and was mindful of all of the relevant factors in the case. He relied on the recent Tribunal decision in Dube (Sections 117A to 117D) [2015] UKUT 00090 for the proposition that it was not an error of law for the judge to fail to refer to Sections 117A to 117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance and not form.

Findings and Conclusions

14. Under Section 117C additional considerations in cases involving foreign criminals are set out. Under Section 117C(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.

15. Exception 1 is not relevant. 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.

16. The judge used the terminology of the Act. Mr Diwnycz did not seek to develop any argument at the hearing that he had in fact applied a reasonableness test rather than one of undue harshness. On the facts as found by the judge and not challenged by the Secretary of State the claimant is the primary carer of the children since his wife works very long hours.

17. The judge took into account the fact that the children were young enough to adapt to life in Iran but it was open to him to find that the overall impact upon the family would be disproportionate.

18. Insofar as the grounds challenge the judge's considerations under Article 8 outside the rules they are misconceived since the judge allowed the appeal on Article 8 grounds within them.

19. There are two real difficulties with these grounds. One is the clear mistake of fact so far as the nationality of the claimant's wife is concerned. There was no confusion in the refusal letter which accepted that she is an Iraqi national. Mr Marshall said that there was no such confusion at the hearing either. The wording in paragraph 26 of the determination is ambiguous and I suspect that this is the foundation of the Secretary of State's view. Nevertheless it is a mistake of fact.

20. Second, there appears to have been a concession by the Presenting Officer at the hearing. The judge records the detailed reasons for the Secretary of State's decision in the refusal letter where it was accepted that he enjoyed family life with his wife and child. He then states:

> "These submissions have been slightly altered in that the respondent now concedes that it may be difficult to fully justify and resist the Article 8 arguments under the heading of family life. It is now accepted that the appellant has a caring relationship with his wife and his two children."

21. That suggests that the respondent was not only conceding that family life existed, but also that the Presenting Officer was accepting that the Article 8 arguments being made at the hearing had some merit.

22. This determination is a little thin. It would have been less susceptible to challenge had the Immigration Judge provided a greater depth of reasoning and explained his conclusions more fully. However that may have been because of his view that the stance of the Secretary of State had changed and that a concession had been made that it was difficult to resist the Article 8 arguments.

23. The Secretary of State is in a difficult position to argue that a judge erred in law on the basis that his conclusions were not properly open to him if an impression had been given at the hearing that the claimant's arguments might be difficult to resist.

24. This is not a decision which every Immigration Judge would have reached but that is not the test. The Secretary of State has not established that the judge erred in law.

Notice of Decision

25. The Secretary of State's appeal is dismissed. The original judge's decision stands.

No anonymity direction is made.

Signed Date **10th March 2015**

Upper Tribunal Judge Taylor