



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02414/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13 September 2018

Decision & Reasons Promulgated
On 9 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ABRAHAM [P]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Deller (Home Office Presenting Officer)

For the Respondent: Ms F Allen (Counsel)

DECISION AND REASONS

1. The appellant in this case is the Secretary of State. However, for convenience I will refer to the parties as they were referred to in the First-tier Tribunal.
2. The appellant is a citizen of Ghana born on 12 April 1959 who entered the UK in 1995 and made an unsuccessful application for asylum. In 1996 he married and in 2002 was granted indefinite leave to remain.

3. In February 2013 the appellant was convicted of conspiracy to do an act to facilitate the commission of a breach of UK immigration law by a non-EU person and of assisting unlawful immigration into an EU state and was given concurrent sentences of four years and twenty months' imprisonment. A deportation order was signed on 8 January 2015. The appellant submitted that deporting him would breach his right to respect to family life under Article 8 ECHR given his relationship to his wife and five children. The respondent's reasons for refusing the appellant's human rights claim are set out in a letter dated 13 January 2016.
4. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Flynn (hereinafter "the judge") at Taylor House on 5 September 2016. The judge allowed the appeal, concluding that there were very compelling circumstances over and above those set out in paragraphs 399 and 399A of the Immigration Rules which outweigh the public interest in the appellant's deportation from the UK.
5. The respondent appealed and the matter came before Upper Tribunal Judge Freeman. In a decision promulgated on 13 July 2017 Judge Freeman found that the judge had undertaken a comprehensive and careful analysis of the facts and that the judge's findings of fact should stand. However, he stated at paragraph 7:

"The judge made findings of fact which it is not suggested would not have entitled her to come to the conclusion she did if that had been properly explained. Equally I do not think it could reasonably have been suggested that this would have been the inevitable result of doing so. None of the judge's findings of fact were unreasonable or irrelevant but the Secretary of State and the public were entitled to specific consideration of the over and above requirements."
6. At paragraph 8 Judge Freeman concluded that:

"There needs to be a reasoned conclusion about what was over and above [the unduly harsh effect of the appellant's deportation on his partner and family] on the basis set out in *NA (Pakistan)* for a lawful decision in a case of this kind."
7. Judge Freeman remitted the appeal to the judge. The appeal was heard for a second time by the judge on 9 March 2018. In a decision promulgated on 10 April 2018 she allowed the appeal. It is this decision (hereinafter "the decision") that is now being appealed by the Secretary of State.

The Decision of the First tier Tribunal

8. At paragraph 15 of the decision the judge stated:

"The Upper Tribunal preserved my findings that it would be unduly harsh for the appellant's children to leave the UK and also unduly harsh for his wife to leave the UK. However it required me to provide more detailed reasons for my conclusion that their circumstances were very compelling, not merely that it would be unduly harsh for them to be separated from their father and husband."

9. At paragraph 52 the judge concluded:

“Looking at the evidence as a whole, I find that the appellant’s family circumstances, particularly his genuine and subsisting relationships with his wife and four younger children, the physical and mental conditions that affect his wife and P [a child of the appellant who is 16 years old] cumulatively amount to very compelling circumstances.”

10. The reasons the judge gave for finding “very compelling circumstances” include:

- (a) Deportation of the appellant would be “very upsetting” for his children and would disrupt their education which is at a “critical stage for the elder children”. (paragraph 17)
- (b) The appellant’s incarceration has had a “highly detrimental impact in the children” and a “very negative impact on their mother”. (paragraph 18)
- (c) The appellant’s wife has a diagnosis of anterior uveitis and joint symptoms dating from 2013 and 2014 but she has been less troubled by her symptoms since the appellant was released from prison. (paragraph 21)
- (d) The presence of the appellant has led to significant improvements in his wife’s health and that his absence would result in a relapse. (paragraph 22)
- (e) The appellant’s eldest son had to postpone university studies to assist his mother and siblings. (paragraph 22)
- (f) One of the appellant’s children (referred to by the First-tier Tribunal as P) was diagnosed with adjustment reaction, prolonged depressive reaction and moderate depressive episode which was precipitated by the appellant’s imprisonment and the evidence of a psychotherapist is that P’s symptoms improved with the prospect of the appellant’s imminent release, and that the return of the appellant to the family has led to an improvement in all family members. (paragraphs 23-25)
- (g) A letter from a psychologist Dr Deborah Kemp confirmed that P had been referred again for family consultation in light of the appellant’s impending deportation (paragraph 26) and a social worker report found that P could be at increased risk if the appellant were deported. (paragraph 27)
- (h) All the children rely on the appellant and are close to him and he is a crucial part of the family and their support mechanisms. (paragraph 29)
- (i) It is in the best interests of the children to have regular daily contact with their father and his deportation would have a strong negative impact on his wife’s mental and physical health which in turn would affect each of the children adversely. (paragraphs 31 and 32)

- (j) The children are “more vulnerable than most and would fail to thrive if they were to lose the direct daily support, assistance and encouragement from their father”. (paragraph 33)
- (k) The family’s “particular vulnerabilities would seriously jeopardise the welfare of the children”. (paragraph 34)
- (l) The separation will cause the children serious distress and the family is likely to split “permanently and probably irreparably”. (paragraph 37)
- (m) None of the offences the appellant committed involved drugs, sex or violence (paragraph 45) and the appellant regrets his crimes and has “now learnt his lesson”. (paragraph 39)

Grounds of Appeal and Submission

11. In the grounds of appeal the Secretary of State makes a number of arguments. Firstly, it is submitted that the outcome of the decision of the First-tier Tribunal was predetermined. This submission is made on the basis of the wording used by the judge at paragraph 15 of the decision, as quoted above at paragraph 8.
12. The remainder of the submissions in the grounds of appeal are essentially arguing that the reasons given by the judge are insufficient to justify the conclusion that there are “very compelling circumstances” outweighing the public interest in deportation “over and above” undue harshness and that the judge’s findings fall far short of meeting the very high threshold required.
13. The grounds contrast the factual circumstances in this appeal to those of the appellant *MY* in *NA (Pakistan)* and submit that the level of dependency in *MY*, where the criminality was of a lower level, was far greater than that in this appeal.
14. Mr Deller reiterated the points made in the grounds. He stressed that it is not sufficient to show that the appellant’s removal would be unduly harsh for his wife and children and that there needed to be something more. He argued that the reasoning given by the judge simply does not establish that there was this “something more”. He also submitted that the judge failed to have proper regard to recent case law which emphasises the strength of the public interest in deportation of a serious criminal.
15. Ms Allen’s response was that, read as a whole, it is apparent that the decision was not predetermined and that the judge understood she was required to remake the decision and not simply explain a decision already made. Ms Allen submitted that the judge had correctly identified the law, including the relevant and up-to-date case law, and had considered all of the material evidence, before reaching a conclusion that was open to her based on that evidence. She maintained that the judge took into account a range of factors and that, taken together, it was open to the judge to treat these as amounting to compelling circumstances.

Analysis

16. Although the wording of paragraph 15 of the decision (as cited above) may give the impression that the judge saw her task as merely to provide reasons to justify a decision that she had already made, it is apparent from reviewing the decision as a whole that the judge, in accordance with the direction of Judge Flynn, has re-looked at the preserved findings of fact in order to determine whether there were “very compelling circumstances” to outweigh the public interest in deportation. I therefore do not accept the Secretary of State’s contention that the outcome of the appeal was “predetermined”.
17. I also reject the submission that the decision is unsafe because of insufficient or inadequate reasons. The judge, after correctly identifying the law and undertaking a thorough fact-finding, gave a range of reasons, as summarised above in paragraph 10, which explain why she reached the conclusion she did. These reasons leave the reader of the decision in no doubt as to the approach the judge has taken and the factors she considered to be sufficient to outweigh the public interest in deportation. The reasoning is therefore sufficient and does not give rise to an error of law.
18. Where Mr Deller is on stronger ground is in his contention that the judge’s findings about the detriment to the appellant’s family that would arise from his deportation are insufficient, on any legitimate view, to justify the conclusion that his deportation would be disproportionate.
19. The Supreme Court in *Hesham Ali (Iraq)* [2016] UKSC 60 and the Court of Appeal in several cases (including, for example, *NA (Pakistan)*[2016] EWCA Civ 662) has been unequivocal that where a foreign criminal has received a sentence of over four years great weight should be given to the public interest in deportation, such that the public interest will almost always outweigh countervailing considerations of private and family life.
20. As summarised above at paragraph 10, the judge has given a range of reasons which she found, taken together, outweigh the public interest in deportation. Given the weight that must be attached to the public interest in deportation, I have no doubt that many other judges, interpreting the same factual matrix, would not have concluded that the criteria in paragraphs 399 and 399A of the Immigration Rules were met, let alone that there were very compelling circumstances over and above these. However, the issue before me is whether the judge reached a decision that was open to her on the evidence, not whether I (or another judge) would have reached the same conclusion based on that evidence.
21. This is an appeal where it is clear that the judge understood and applied the correct legal test and appreciated the weight she was required to give to the public interest in deporting the appellant. It is also clear that the judge has engaged in thorough and comprehensive fact finding where proper regard has been had to all relevant considerations. The facts, as found by the judge, include that one of the appellant’s children may face a serious risk to her mental health in the event of the appellant being deported. Taking this together with the other (unchallenged) factual findings,

including the funding that the impact on the other children would be “highly detrimental”, I am satisfied that the judge’s conclusion that the public interest in deportation is outweighed by the appellant’s family circumstances, although one that many other judges would undoubtedly not have reached, was (just) open to her on the evidence. I therefore dismiss the appeal.

Decision

The appeal is dismissed.

The decision of the First-tier Tribunal does not contain a material error of law and shall stand.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 3 October 2018