IAC-FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03384/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 August 2018	**On 25 September 2018**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[S]
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Ms S F Mardner, instructed by Aldgate Immigration

DETERMINATION AND REASONS

1. Following a hearing on 6 June 2018 I found an error of law in the decision by the First-tier Tribunal promulgated on 23 March 2018, in which the judge allowed S 's appeal under Article 8 of the European Convention on Human Rights. A copy of my decision on the error of law issue is attached to this determination. In my decision I concluded that the judge had erred, as indeed was common ground, in misstating the provisions of paragraph

399 of HC 395 and therefore applied the wrong test with regard to S's three children under the age of 18. The judge applied a reasonableness test whereas in fact the correct test is one of undue harshness. Accordingly, the matter required to be redetermined, on the basis of the judge's unchallenged findings of fact.

2. In her submissions, Ms Mardner argued that on the basis of the facts as found by the judge the undue harshness test was met. It would be unduly harsh for the children to be sent to St Lucia or for them to be separated from the appellant on his deportation to St Lucia if that took place. The Secretary of State had said that the mother had control of the children and the children can go back to St Lucia and contact can be maintained with the appellant via Skype etc. To send them back would be unduly harsh as they spend a lot of time with their father and he provided financial and psychological support. Their mother relied on him. In particular, she relied on him to look after them while she was at work. The children were in court today to show their support. Modern families did not always live together in the typical way of the past and were maintained in different circumstances and this was such a case. He was actively involved in their lives and the mother cooperated.

3. The appellant's offences were not at the level of, for example, in MM (Uganda) [2016] EWCA Civ 617. His offences were not at a level such that it was in the public interest to deport him. His most recent offence had led to six months' imprisonment, in 2017, and that had triggered the deportation. He had been convicted of possession of a bladed article in public. He was a painter and decorator and was stopped at 2am outside his own home. The judge had noted the long spells of non-convictions. The judge had had in mind when considering the circumstances the children's situation and impliedly took into consideration the absence of their father from their lives. It was argued that the judge had in fact appreciated the undue harshness criteria. All the witnesses had been found to be credible and it was found that the appellant had a close relationship with his children both financially and physically. The children had never lived in St Lucia. He saw them every day, and trying to maintain the relationship via Skype was not a possibility and it would amount to a serious interference in the family life. There was no substitute for physical presence. He should succeed under the undue harshness test.

4. In his submissions, Mr Wilding relied on the refusal letter. Some of the issues had been resolved, for example, with regard to the appellant's relationship with his children, which the judge had found to be genuine and subsisting. It was not argued that the children should go to St Lucia, so it was a question whether it would be unduly harsh for them to be separated from the appellant on his deportation. This was a separation case.

5. It was unclear whether the judge's finding as to the effect of the appellant's removal was preserved as it seemed to be a conclusion rather than a finding of fact. The notion of "undue harshness" was essentially a proportionality assessment. The judge had failed to factor in other elements. It was difficult to see from the evidence before the judge and the lack of updating evidence as to the consequences for the children. The appellant pointed to his concerns about his former partner, L, bringing the children up but it was difficult to see where that took the case as there was limited evidence as to the consequences of his deportation.

6. The refusal letter referred to a pattern of offending which although it was low level comprised a number of offences over a period of time and on behalf of the respondent it was argued that he was a persistent offender and placed a weighty public interest on the side of the scales against the appellant. The consequences of deportation are a fact and the consequence of his own behaviour and it was clear, as it had been said in a number of cases, that deportation separated families and the fact that that would occur was not a reason for the appeal to succeed. The law sought to balance the nature and strength of the family unit and the disruption to it as part of the balance. It was not made out in this case. There had been interference and disruption but it did not cross the threshold and the threshold factored in the public interest, as was said in MM (Uganda). This was not an automatic deportation case but that did not reduce the weight to be given to the public interest. No private life or issues other than undue harshness had been argued. The appeal could not succeed on a very compelling circumstances basis in any event. The appeal should be dismissed.

7. By way of reply, Ms Mardner argued that the most recent offence had triggered the deportation. With regard to the drugs cases there had been no intention to supply and there had been no convictions between 2001 and 2011 and then a two year gap and then nothing between 2013 and 2017. Mr Wilding had argued that this made him a persistent offender, but he would hardly be seen as such in the criminal courts and that should not be subject to a higher test here. Deportation would be disproportionate when balanced against the rights of his children. Even on a basic level a six month conviction should not have triggered his separation from his children. He had been in the United Kingdom for 29 years. He had no family in St Lucia, no hope of employment and was he in a mature stage of his life. He would be placed in unduly harsh circumstances. As regards to public interest, he paid his taxes and contributed to society. The possession of cannabis had been for his own use. His son needed his father's presence, which he had at the moment. There would be a significant interference and the consequences would be unduly harsh.

8. I reserved my determination.

9. Paragraph 399 is set out at paragraph 22 of my error of law decision. It is clear that the relevant part of this is paragraph 399(a)(ii)(b) which is the paragraph applicable that it would be unduly harsh for the child to remain in the United Kingdom without the person who is to be deported. I have to evaluate the appeal on the facts as found by the judge in the context of that legal test.

10. The judge found the witnesses all to be credible. Among other things this led the judge to conclude that the appellant has a genuine and subsisting relationship with his children, and that finding has not been challenged. The evidence was accepted that he had been making financial contribution for his children, even from detention, and that by looking after them while their mother was at work he had been making emotional and indirect financial contribution to their welfare.

11. The judge accepted the evidence of three witnesses that the effect on the lives of the three children had been nothing less than devastating and this would be much worse if the appellant were to be deported. This is a reference to how the children were affected by the appellant's most recent incarceration as well as the impact on them of his removal. Whether or not there is a specific finding there or a conclusion, the judge clearly found at the end of paragraph 49 that the children needed their father to be physically with them at this crucial time in their lives.

12. It is clear from MM (Uganda) that with regard to the phrase "unduly harsh" it was said that what was due or undue depended on all the circumstances, not merely the impact on the child or partner in the given case and this must therefore include the potential deportee's immigration and criminal history. In this regard it is clear, as summed up at paragraphs 7 to 14 of the decision letter, that the appellant has a number of convictions. He has convictions from August 2001, August 2011, June 2013 and June 2017 of possessing a controlled drug, but there is no suggestion that this was for other than personal use. He was also convicted in August 2011 of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence, and in September 2013 of possession of an offensive weapon in a public place and having a counterfeit currency note. He was convicted in November 2013 of battery. The most recent conviction is that of November 2017 when he was convicted for having a blade and/or an article sharply pointed in a public place and that was the most recent offence and the one for which he received a sentence of imprisonment which was a term of six months.

13. As regards his immigration history, he was granted indefinite leave to remain in May 1991. He had come to the United Kingdom in 1989 and after an interview on 10 July that year he was granted six months' leave to remain in the United Kingdom as a visitor, subsequent to which the respondent was informed that he was married and his leave was varied on

19 February 1990 and extended to 15 February 1991 and the grant of indefinite leave to remain came some three months thereafter.

14. As Ms Mardner argued, there have been significant periods when the appellant did not offend. In particular, there is the period between 2001 and 2011, and again between 2013 and 2017. Clearly, as the judge noted, any criminal offence is inexcusable, but equally, as he also pointed out, there is a difference between serious and minor criminal offences. I bear in mind the finding of the judge that the children need their father to be physically with them at this crucial time in their lives and taking account of the evidence of the witnesses before the judge of the impact on the children of the appellant's absence. All the circumstances must be taken into account, and in particular the criminal history and immigration history as set out above and the weight that that has on the public interest side of deportation and on the other side the impact on the children of the appellant being removed to St Lucia in light of the judge's findings. I have concluded on balance that the evidence is such as to show that it would be unduly harsh for the children to remain in the United Kingdom without the appellant. As a consequence, his appeal is allowed on human rights grounds.

Notice of Decision

The appeal is allowed on human rights grounds.

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.

Signed Date 30 August 2018

Upper Tribunal Judge Allen