



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06719/2017

THE IMMIGRATION ACTS

Heard at Field House
On 12 June 2018

Decision & Reasons Promulgated
On 01 August 2018

Before

THE HONOURABLE MRS JUSTICE YIP, DBE
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WU YAN WAN
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr C Lam, Counsel

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, we continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of China, born in 1983. Having entered the UK on 15 October 2010 as a student and having subsequently been granted leave to remain as a Tier 1 dependant, he was made subject to a deportation order on 5 June 2013 following his conviction on 23 May 2012 in the Crown Court at Chichester for an offence of being knowingly concerned in the fraudulent evasion of duty on chargeable goods. For that offence he received a sentence of 17 months' imprisonment on 23 May 2012.
3. On 10 October 2016 an application was made for revocation of the deportation order. That application was refused by the respondent in a decision dated 31 May 2017, characterised as a decision to refuse a human rights claim. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge S Taylor ("the FtJ") at a hearing on 12 February 2018 whereby his appeal was allowed.

The FtJ's decision

4. In his conclusions from [20] of his decision, the FtJ referred to the appellant's case being focused on the change of circumstances since the making of the deportation order. The change of circumstances contended for on behalf of the appellant was the passage of time since the deportation order was made and the change in the appellant's family's circumstances. The FtJ noted that the appellant left the UK "voluntarily" on 18 June 2013, having agreed to be deported under the Facilitated Returns Scheme.
5. He referred to there being unchallenged evidence that at the time of his deportation the appellant's wife was not a UK citizen, she having become a UK citizen on 22 July 2014. Although the respondent's decision gives that date as 2 July 2015, her certificate of registration has the former date. The FtJ also noted that at the time of deportation the appellant and his wife had one child who was not at that time a British citizen. The eldest child had since been granted British citizenship and was issued with a British passport on 26 February 2016. They now have a second child who was born on 19 February 2015, after the appellant's wife gained her citizenship. That child is also a British citizen and was issued with a British passport on 29 September 2015.
6. At [21] the FtJ said that he was satisfied that there had been a significant change of circumstances since the appellant was served with the deportation order in 2013. He said that at the time of the deportation order the appellant had no relatives who were UK citizens or who had a permanent right of residence in the UK and that therefore, "On that basis he did not appeal the deportation order and left the UK voluntarily". Since then, the appellant's wife had gained British citizenship as had her two children. Although in the decision the respondent did not accept that the appellant's wife and children were living in the UK, that was a matter that was conceded at the hearing before the FtJ.
7. The FtJ referred to paragraphs 390-391A of the Immigration Rules ("the Rules") and summarised them. He noted that the ECHR had to be taken into account, and that the passage of time since a person was deported may in itself amount to a change of circumstances such as to warrant revocation.

8. The FtJ accepted that the appellant has a genuine and subsisting relationship with his wife and children and there is no challenge by the respondent to his conclusions in that respect.
9. Referring to s.117B-C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") he referred to the appellant working and earning well as a translator in China and concluded that there was no reason to believe that he would not be able to find similar work in the UK, such that he would not be a burden on the taxpayer. Likewise, that indicated that he had a good standard of English, another relevant consideration under those provisions of the 2002 Act.
10. He then stated that the appellant's two children are both qualifying children for the purposes of s. 117B(6) "such that it would not be in the public interest to continue to remove the appellant, as he has a genuine and subsisting relationship with them".
11. He noted the submission made on behalf of the appellant to the effect that a sentence of 17 months is far closer to the 12 month threshold than the four year threshold and concluded that the public interest in deportation had to be considered accordingly.
12. He thus concluded that Exception 2 applied (s. 117C(5) - genuine and subsisting relationship with a qualifying partner or child; deportation unduly harsh on partner or child).
13. With reference to para 399 of the Rules he concluded that applying the decisions in *Sanade and others (British Children-Zambrano-Derici)* [2012] UKUT 48 (IAC) and *Ruiz Zambrano* [2011] All ER (EC) 491, as EEA citizens the appellant's wife and children could not be expected to leave the UK to live with the appellant elsewhere. He stated that the only remaining question was whether it would be unduly harsh to expect the appellant's wife and children to remain in the UK without the appellant.
14. At [25] he said that there was no dispute in the appeal but that the appellant was currently almost five years into the ten year duration of his deportation order which was in June 2013 and which related to a conviction in May 2012. Thus, the appellant was coming up to six years from the date of conviction and had served part of his sentence in the UK.
15. He referred to the appellant having found regular employment in China to the extent that he was able to send financial support back to the UK for his wife and children. He said that although the passage of time may not of itself warrant revocation, it had considerable weight when considered with the family life of his wife and children who had gained British citizenship after the date of the order.
16. He found that they could not be expected to leave the UK, and his two young daughters had already experienced years without the presence of their father. He said that the continued deportation order inevitably resulted in the separation of the family, which was an interference with family life under Article 8.

17. The FtJ concluded that the separation was for a lawful purpose and was proportionate at the time of the making of the deportation order, given the severity of the offence and that his family members were not UK citizens. He then concluded that given the passage of time and that the appellant had been separated from his family for almost five years, as well as serving six months of his sentence, the continued separation by not revoking the order would not be proportionate to the initial reasons for the making of the deportation order. He then referred to s. 55 of the Borders, Citizenship and Immigration Act 2009, stating that the starting point for consideration is that it is in a child's best interests to be brought up in the presence of both parents.
18. He thus concluded that the deportation order should be revoked which would allow the appellant to make an application for re-entry to the UK as a spouse.

The grounds of appeal and submissions

19. The respondent's grounds contend that the FtJ erred in law in concluding that the appellant's wife and children could not be expected to leave the UK. Whilst they could not be compelled to leave the UK, it was a matter of choice as to whether they did so. It is asserted that the FtJ had failed to address the question of whether it would be unduly harsh for his wife and children to follow him to China.
20. In the alternative to the assertion that the FtJ had failed to address the issue of undue harshness, it is also contended that the FtJ had failed to give clear reasons as to why it would be unduly harsh for the appellant's wife and children to live in China with him. It is pointed out that the appellant's wife was born in China, and that the children speak Chinese. Given that they are both under 7 years of age it is contended that they would be able to adapt to life in China. A further relevant factor relied on is the appellant's employment in China.
21. It is also argued that although the FtJ relied on *Sanade*, in *Secretary of State for the Home Department v VM (Jamaica)* [2017] EWCA Civ 255, it was said that the concession made in *Sanade* (in relation to the proportionality of the family unit moving abroad with an appellant) was wrongly made.
22. In addition, it is said that the FtJ had failed to give clear reasons as to why it would be unduly harsh for the appellant to remain in China and family life to continue as it has since 2013. The passage of time does not dilute the public interest in deportation, which includes the deterrent effect of a deportation order being enforced for the full term. There was no suggestion that the appellant's children were not currently cared for or that they have any medical or special requirements that require the appellant's presence. That the family may wish to live together does not make the continuance of the deportation order unduly harsh. The best interests of the children are not determinative.
23. In submissions, Mr Avery relied on the grounds. As to the contention now advanced on behalf of the appellant that China does not recognise dual nationality for any Chinese national, it was submitted that at the time that the appellant was removed it

was the children's parents' choice for his wife and child not to join him in China. The fact that his wife and children are now naturalised British citizens makes no material difference. It had already been decided at the time of the deportation order that the family would not go to China with him. The choice had been made to adopt British citizenship knowing that dual nationality was not recognised in China.

24. Even if dual nationality is not recognised, that would not prevent the appellant's wife and children going to live with him in China. It appeared that his wife had been to China to visit him several times.
25. On behalf of the appellant the skeleton argument was relied on. It was acknowledged that the appellant had committed a serious offence and that his deportation was in the public interest. It was however submitted that his sentence of 17 months was not at the highest end of the bracket of sentencing.
26. In relation to the submission made on behalf of the respondent to the effect that a choice was made for the appellant's wife and children to remain behind, it was asserted that the children themselves could not make that choice, although it was acknowledged that it was at least their mother's choice.
27. It was submitted that if the appellant's wife and children went back to China to join the appellant, they would lose their British citizenship and, so it was said, would not be able to regain it until they were 18. The issue of undue harshness had to be looked at in all the circumstances.
28. In response to our questions, Mr Lam submitted that the family's inability to maintain dual citizenship meant that they would not be able to live in China with the appellant as British nationals. Furthermore, it was very much in the children's best interests to remain in the UK.
29. It was argued that the choice in 2013 at the time that the appellant was deported was rather a limited choice because the factor of British citizenship was not in play.

Assessment and Conclusions

30. Paragraphs 390-391A of the Rules provide as follows:

"Revocation of deportation order

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of an effective immigration control;

(iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:

(a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or

(b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order."

31. Further relevant provisions of the Rules are paras 398 and 399. They are as follows:

"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.”

32. Finally, it is necessary to refer to s. 117C(1)-(5) of the 2002 Act which states as follows:

“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."

- 33. At the conclusion of the hearing before us, we announced that we were satisfied that the decision of the FtJ involved the making of an error on a point of law such as to require his decision to be set aside, and for the decision to be re-made in the Upper Tribunal. The following are our reasons for finding an error of law and our decision on the re-making.
- 34. The parties accepted that our re-making of the decision could take place on the basis of the evidence and submissions before the FtJ, and the further submissions and evidence put before us. That further evidence, we should say, was limited to one page of information headed "Nationality Law of the People's Republic of China" dated 13 December 2017. The source identified at the top of the page is 'Gov HK: Nationality Law of the People's Republic of China'. Further information was provided from the People's Republic of China's Embassy in the USA in relation to China's nationality law, to the same effect as the document previously referred to.
- 35. We deal firstly with our reasons for concluding that the FtJ erred in law in his decision. We accept that the FtJ was entitled to conclude that there was a change of circumstances since the appellant's deportation. In this he plainly had in mind para 391A of the Rules. However, that paragraph states that revocation of the order will not normally be authorised unless the situation has been "materially" altered. We shall return to that issue later in this decision because we consider that it makes sense to explain our reasons applying the Rules in sequence.
- 36. The respondent's challenge to the FtJ's decision does not in terms contend that the FtJ failed to apply paragraph 390, although there is plainly overlap in that respect with the FtJ's consideration of the Rules otherwise.
- 37. Para 398 plainly applies given that the appellant received a sentence of at least 12 months' imprisonment. Consideration therefore needed to have been given to para 399, which is what the FtJ did. The area of dispute in this respect is in terms of the FtJ's conclusion that it would be unduly harsh for the appellant's wife and children to live in China with the appellant and, conversely, unduly harsh for them to live in the UK without him.

38. There is no challenge to the FtJ's conclusion that the appellant has a genuine and subsisting relationship with his wife and children. Although not specifically with reference to the Rules but with reference to s. 117B(6) of the 2002 Act, the FtJ said that the appellant's two children are both qualifying children for the purposes of that provision "such that it would not be in the public interest to continue to remove the appellant, as he has a genuine and subsisting relationship with them".
39. However, s. 117B(6) is expressly stated as relating to the case of a person who is *not liable to deportation*, which plainly is not an applicable provision here. If the FtJ intended to mean that merely because the appellant has a genuine and subsisting parental relationship with qualifying children the public interest does not require his (continued) deportation, that is simply in error. On the face of the FtJ's decision, that is exactly what he meant.
40. The FtJ did then go on to refer to the correct provision under the 2002 Act, namely s.117C(5). Here again however, in our judgment he fell into error. He said that "I am satisfied that Exception 2 applies as the appellant has a genuine and subsisting relationship with both a qualifying partner and qualifying children". That Exception under the 2002 Act does not equate qualifying relationships with disproportionately in deportation. Deportation in terms of its effects on a partner or child needs to be "unduly harsh", as it does under the Rules.
41. Then, when considering para 399 the FtJ said that he accepted the submission that given that the appellant's wife and children are UK citizens they cannot be expected to leave the UK to live with the appellant elsewhere. However, we consider that there is merit in the complaint made about that aspect of the FtJ's decision in terms of its lack of recognition of the matter of choice of the appellant and his partner in terms of where the partner and the children should live. They would not be forced to leave the UK to live with the appellant in China. The FtJ failed to have regard to the element of choice that the appellant and his wife have, and had, in that regard. In this we are also satisfied that the FtJ erred in law.
42. In terms of the question of whether it would be unduly harsh to expect the appellant's wife and children to remain in the UK without the appellant, the FtJ referred to para 391A, stating that he may consider a change of circumstances and that the passage of time in itself may amount to such a change. He again deployed his earlier reasoning to the effect that the appellant's wife and children could not be expected to leave the UK, but we have found that in that respect the FtJ erred.
43. Further, the FtJ failed to explain why the deportation order should not run its normal course of ten years before revocation. The mere fact of the appellant's relationship with his wife and children cannot logically or rationally reveal a circumstance which displaces the plain words of para 391 which is to the effect that the continuation of the deportation order (in this case) will be the proper course unless ten years have elapsed. The mere existence of family life plainly, under the deportation framework within the Rules and the 2002 Act, cannot by itself mean that a deportation order should not continue.

44. Nowhere in the FtJ's decision is there any reasoned assessment of why it would be unduly harsh for the separation to continue. The issue of undue harshness must be considered in context (see *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617). In our judgment the FtJ's decision signally fails to recognise the public interest that existed at the time of the appellant's deportation and continues to exist through the maintenance of the deportation order for the duration of its term.
45. We do not consider that the mere fact of the appellant having served six months of his 17 months' sentence, a sentence of imprisonment that he was required to and had no choice but to serve, or the fact of his separation for half of the required ten year period, could rationally be said to amount to circumstances that were unduly harsh.
46. Nor could it be said that the (now) British citizenship of the appellant's wife and two children have much, if indeed any, purchase on the issue of undue harshness. One only has to reflect on whether those circumstances could at the time of the deportation order, or if it were made now, have resulted in the conclusion that deportation was unduly harsh by reason of separation. The 'qualifying' status of the appellant's partner and children is self-evidently, under the Rules and under the 2002 Act, not a sufficient basis upon which it could be concluded that deportation would amount to a breach of Article 8. Neither their British citizen status alone, nor in combination with the appellant having served a portion of the sentence that he was required to serve, and having been excluded from the UK for a portion of the required period, could rationally be said to come close to revealing circumstances of undue harshness. In concluding otherwise, we are satisfied that the FtJ further erred in law.
47. The FtJ's reference to the best interests of the appellant's children is undoubtedly appropriate in the sense that their best interests are a primary consideration. However, again, the best interests of the children cannot convert what is otherwise a proportionate decision on deportation, into a disproportionate one under Article 8. Nor does it have that effect in combination with the other circumstances which the FtJ reasoned made the continued separation of the family disproportionate.
48. In our judgment, the FtJ's decision is fundamentally flawed because when one looks at the decision overall, it reveals only that the FtJ concluded that the family should no longer be separated because the appellant has a close relationship with his partner and child. However, as has been emphasised time and again, deportation inevitably results in separation; that is its effect.
49. We are satisfied that the errors of law in the FtJ's decision are such as require his decision to be set aside, for the decision to be re-made. The parties agreed that any re-making can be done on the basis of the evidence and submissions presently before us.

Re-making the decision

50. All of the observations we have made in relation to the errors made by the FtJ in his assessment are apposite in respect of our re-making of the decision. We have taken into account all the matters that we are required to take into account under para 390. The grounds on which the order was made are evident from the conviction and sentence and from the sentencing remarks, as well as the respondent's original decision to deport.
51. As to the offence, the appellant pleaded guilty to fraudulently evading excise duty in relation to 1.1 tonnes of hand rolling tobacco, intercepted by the UK Border Agency on 18 July 2011. The amount of excise duty that was avoided was just under £166,000. The appellant is said to have played an active and integral part in the shipping of the goods from China. He used his management company in order to meet shipping import requirements. Amongst other things, he arranged for delivery of the goods and arranged for payments to be made to China.
52. The representations in support of revocation are evident from our summary of the arguments in favour of the appellant. The interests of the community are reflected in the public interest in deportation of foreign criminals who have committed serious offences, as this appellant has. The interests of the appellant, including any compassionate circumstances, are again to be found in the representations made on his behalf, and reflecting the wish of the appellant and his partner to be together as a family, as well as the general desirability of children being brought up by both parents.
53. The only additional material relied on on behalf of the appellant is the contention that the appellant's wife and children would not be able to retain their British citizenship because under Article 3 of the Chinese Nationality Law, as reflected in the documents to which we have referred, China does not recognise dual nationality for any Chinese national. We have considered this in the context of the issue of undue harshness.
54. It will be evident from our earlier observations, that the fact of the appellant's wife and children's British nationality does not of itself reveal undue harshness in the maintenance of the deportation order. Notwithstanding our pressing Mr Lam on this issue, he was unable to provide any support for the contention that the appellant's wife and children could not live in China as British citizens. That China does not recognise dual nationality does not as a necessary corollary mean that no foreign national, or British national in particular, is able to live in China with a Chinese spouse. It is not established therefore, that the appellant's wife and children would not be able to live in China.
55. We accept that the appellant and his wife would prefer that she and the children remain in the UK exercising their rights as British citizens, and being afforded the privileges of British citizenship. However, that is as Mr Avery suggested a matter of choice between the appellant and his wife. We note that the children are still very young, having been born on 3 August 2012 and 19 February 2015. There is no reason to suppose, and certainly no evidence was produced to suggest, that at that age they

would not be able to adapt to life in China. Their British citizenship does not mandate a conclusion that it would be unduly harsh to expect them to live in China with their father.

56. Even accepting that China does not accept dual nationality, there is no reason as to why the appellant's wife and children would have to renounce their British citizenship if they wanted to live in China. No evidence to that effect was put before us.
57. We are not satisfied that the fact that the appellant served part of the 17 months' sentence, or that he left the UK "voluntarily", add anything to the appellant's arguments in terms of undue harshness. The appellant was required to serve a sentence of imprisonment and he served part of it. He was required to leave the UK in any event. Furthermore, the fact that the family have been separated since June 2013 does not add much to the debate either. That period of separation in pursuance of the deportation order is a natural consequence of it. The appellant would have to show more than the ordinary consequences of deportation to be able to establish undue harshness in its continued operation.
58. We cannot see that there is anything in the material before us which indicates that with reference to paragraph 398(c) there are very compelling circumstances over and above those described in paragraph 399 outweighing the public interest in deportation. Similarly, in terms of 399(b)(ii) in terms of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM (insurmountable obstacles to family life between the appellant and his partner continuing outside the UK).
59. In all these circumstances, we are not satisfied that the respondent's decision amounts to a disproportionate interference with the appellant's Article 8 rights in any respect. The continuance of the deportation order is a proportionate response to the legitimate aim expressed through the deportation order.

Decision

60. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made dismissing the appeal.

Upper Tribunal Judge Kopieczek

dated 26/07/18