



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06730/2017

THE IMMIGRATION ACTS

Heard at Field House
On 18 July 2018

Decision & Reasons Promulgated
On 29 August 2018

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TPC
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer

For the Respondent: Mr J Collins instructed by Chatham Chambers

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a Judge of the First-tier Tribunal who allowed the respondent's appeal against the Secretary of State's decision of 5 June refusing his human rights claim and refusing to revoke a decision to deport him from the United Kingdom made on 5 October 2016. I shall hereafter refer to the Secretary of State as the respondent, as he was before the judge, and to C as the appellant, as he was before the judge.

2. The decision to deport the appellant came about as a consequence of his conviction at Guildford Crown Court for sexual assault on a female by penetration. His initial sentence of three years' community order was replaced by the Court of Appeal on a sentence of three years' imprisonment.
3. The respondent accepted that the appellant had a genuine and subsisting parental relationship with his children. However, he would only be able to visit his ex-partner's residence by invitation. The couple separated on 12 July 2015 and he had not been living as part of the family unit since then. He was no longer in a relationship with his partner.
4. The judge identified the relevant legal principles. It was common ground that the appellant was a foreign criminal as defined in section 117D(2) of the Nationality, Immigration and Asylum Act 2002. He had no partner in the United Kingdom and there would not be very significant obstacles to his reintegration into Australia, of which country he is a national. The focus of the submissions was on paragraph 399(a) of the Immigration Rules. The issue was further narrowed down on behalf of the respondent by the concession that it was not argued that the couple's two children should go and live in Australia with the appellant and it was accepted that they had a UK mother and family network. It was argued however on behalf of the respondent that it would not be unduly harsh for the children to remain in the United Kingdom without the appellant. Though the genuineness and subsistence of the relationship with the children was accepted, his relationship with them since incarceration had been sporadic and it was considered that day-to-day care could continue in his absence. His ex-partner had been managing on her own without the assistance of Social Services and family members and his relationship was restricted and dependent on Social Services evaluations.
5. On behalf of the appellant it was argued by Mr Collins that it would be unduly harsh for the children to remain in the United Kingdom without the appellant. He urged the use of the Hesham Ali balance sheet approach to the question, acknowledging that the immigration history and criminal history had to be assessed as part of this process, and arguing that it would be unduly harsh on the children to remain in the United Kingdom without the appellant.
6. The judge went on to set out the relevant factors in the balance sheet approach. The appellant's immigration history was unexceptional. He had been in the United Kingdom since 2000 when he was aged 17, and he had been granted indefinite leave to remain on 23 March 2005. No immigration offence had ever been recorded against him.
7. As regards his criminal history he had a caution beside the index offence, that caution being for battery against his partner's mother. It was given on 13 September 2007. The judge found that this caution had no great weight in the balancing exercise, noting that the offence would now be spent under the Rehabilitation of Offenders Act, and the evidence of the partner's mother was that they were now reconciled.

8. The index offence, as noted above, was in respect of sexual assault on a female by penetration. This arose in circumstances where the appellant was caring for the couple's children in July 2015, the relationship between him and his ex-partner having ended. He had noticed her using a vibrator and asked her if she wanted any help and he had used it on her and there was no complaint about that. He subsequently inserted two fingers into her and filmed this using his mobile phone. There was no suggestion that this was done for any reason other than his own private use but his ex-partner was unaware of what he had done. She subsequently suspected that not all was right, managed to borrow his phone, found the film and the matter was reported to the police. She was satisfied with the decision of the Crown Court Judge. Her evidence was that if she had known that by reporting the offence it would result in the children losing their father via custodial sentence or deportation she would never have reported the crime.
9. As regards the children, the judge noted that the appellant's daughter T suffered from autistic spectrum disorder and that the appellant's absence had impacted severely on her behaviour. The ex-partner was finding it difficult to cope without his assistance with the children, especially their daughter. There was evidence to show that the appellant had done most of the caring for T when she was young, and the social worker had concluded that it would have a significant detrimental effect on both T and the couple's son A were the appellant to be deported.
10. The judge considered the relevant case law concerning the best interests of the children, noting that the daughter T was now aged 9 and the son A 7 and that both were British citizens. The judge concluded that on the evidence the best interests of the children lay in the appellant remaining in the United Kingdom. I note that this point is conceded in the grounds of appeal.
11. The judge went on to remark that the best interests of the children did not however "trump" all of the other relevant considerations in assessing the public interest. He set out the balancing exercise as prescribed in MM (Uganda) and in Hesham Ali. As noted above, he referred to the immigration history and the criminal history. With regard to the latter, he referred to what he described as the unusual effects of the offence and found that the appellant did not pose a risk of future offending either against the victim or the community at large. There was not an OASys Report into future risk but the judge formed his own conclusions based on all the evidence before him. He considered that the appellant could not be regarded as any danger to the wider community. He quoted from the sentencing judge's remarks. He said that the fact that the Court of Appeal considered that the judge was wrong in the sentence (the sentence he passed of a three year community order was replaced in the Court of Appeal by a sentence of three years' imprisonment) did not mean he was wrong on his interpretation of the facts or indeed the family situation. The judge had said there were complex aspects to the case which he did not feel could ever have been in the contemplation of the sentences involved in the Sentencing Council's recommendations on guidelines.

12. The judge noted favourable factors including the appellant's knowledge of English and financial independence. There was external support from both the senior social worker and the Social Services assessment that the ex-partner's mental health was suffering in the appellant's absence and this was adversely affecting the children. The judge referred again to the particular circumstances of the case which led him to consider that the immigration and criminal history should be given a lesser weight in the proportionality exercise than such a history would usually suggest. The public interest in the appellant's removal was much less pressing than the conviction of the offence of sexual penetration would normally suggest, there being no future risk to the victim or the general community and indeed the victim herself being amongst the clearest voices calling for him to be allowed to remain. The judge considered that the element of deterrence had to be seen in this context and found it was lessened in weight as a consequence. Significant weight was attached to the autism diagnosis of T as a feature taking the case out of the ordinary and weight was placed on the view of the senior social worker that her development was likely to be damaged if the appellant was deported. She was dependent on him to a greater extent than a normal child and would be very adversely affected by his deportation. The appeal was accordingly allowed on the basis that paragraph 399(b)(ii)(b) applied and the appeal was allowed on human rights grounds.
13. The Secretary of State argued in his grounds of appeal that the judge had made a misdirection in law by finding the weight to be attached to the offending to be less than it would usually be. It was argued that this was the wrong approach and that the weight of offending was determined by the sentence of three years' imprisonment and as such there was a strong public interest in the appellant's deportation and the scales heavily weighed in favour of his deportation which should not be lessened by the unusual circumstances of the offence but considered against the sentence imposed. The point was made that the appellant was no longer part of the nuclear family before imprisonment and no longer resided at the matrimonial home and the deportation of the appellant would not meet the high threshold of being unduly harsh. T's autism diagnosis did not elevate the situation to that of being unduly harsh. Assistance could be sought from Social Services and should not be downplayed. There might be distress and upheaval if he was deported but that did not amount to undue harshness.
14. In his submissions before me Mr Bramble relied on the grounds.
15. Mr Collins referred in particular to a decision of the Court of Appeal in Secretary of State for the Home Department v Barry [2018] EWCA Civ 790 which involved a sentence of three years, and also contained significant concessions regarding the relationships between the respondent and his wife and his children, the Secretary of State accepting that removal of the father was not in the children's best interests and that they could not be expected to accompany their father to Guinea. The challenge of the Secretary of State to the First-tier Tribunal's decision was on the basis that the First-tier Tribunal had placed insufficient weight on the seriousness of the offence and the weighing up their exceptional circumstances outweighing the public interest in

deportation. The challenge was one of irrationality. The appeal was dismissed and the Upper Tribunal's decision was challenged in the Court of Appeal. There it was said at paragraph 57 that the First-tier Tribunal's approach was not impermissible as a matter of law. The Court of Appeal did not agree that questions of mitigation were totally irrelevant to the balancing exercise which the First-tier Tribunal had to perform. It was said that the most serious category applies to any offender who has been sentenced to a sentence of imprisonment of at least four years but that that can cover a wide range of cases. The court said:

“Although they are all serious, they can vary in degrees of seriousness. The criminal courts in this country come across some examples of the most heinous kind, which would be towards the top end of the range envisaged by category 1. However, in an appropriate case, I can see no reason in principle why either aggravating factors or mitigating factors might not be taken into account by the FtT in assessing the seriousness of the offence in question and, accordingly, the strength of the public interest in deportation. Similarly, in a case such as the present, which falls into the intermediate category of seriousness, because the sentence passed was between twelve months and four years' imprisonment, I can see no reason in principle why aggravating or mitigating factors may not be taken into account by the FtT”.

16. Mr Collins also placed reliance on the fact that the judge had properly adopted the balance sheet approach and noted the unusual facts and bore in mind the social worker report and the school reports.
17. By way of reply Mr Bramble argued that at paragraphs 49 and 53 the judge had downplayed the seriousness of the offence and this had affected the balancing exercise particularly with regard to the elder child. That was the thrust of the grounds. He noted that the Tribunal now had Barry before it and could not disagree with the relevance of paragraph 57 of that decision.
18. I reserved my decision.
19. I am satisfied that the decision of the judge does not contain an error of law. It is sufficiently clear from Barry that the judge was entitled to take the view he did of the unusual nature of the offence in this case in his consideration of the public interest. The reasoning in Barry, in particular at paragraph 57, seems to me to be very much on point. As a consequence, it does not seem to me that the judge undervalued or underweighed the force of the public interest in this case. He was clearly aware of the seriousness of the offence and the fact of the three year sentence, but he was entitled to find that the criminal history in the particular circumstances of the case should be given a lesser weight in the proportionality exercise than such a history would usually suggest. I consider the reasoning at paragraph 53 and elsewhere to be sound. As a consequence, I find no error of law in the judge's decision, and his decision allowing the appeal on human rights grounds is maintained.

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

17 August 2018

Upper Tribunal Judge Allen