



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: PA 11361 2017

THE IMMIGRATION ACTS

Heard At **Field House**
On **17.09.2018**

Decision and Reasons Promulgated
On 20.09.2018

Before:

Upper Tribunal Judge
John FREEMAN

Between:

HERA [M]
(ANONYMITY DIRECTION NOT MADE)

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Peter Jorro* (counsel instructed by Londonium)

For the respondent: Mr D Lindsay

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Reidy Flynn), sitting at Taylor House on 18 May, to allow a deportation appeal by a citizen of Bangladesh, born 1985. The appellant had come here on a family reunion visa with his father in 2003, and been given indefinite leave to remain in 2005. Following two convictions for simple possession of class 'A' and 'B' drugs in 2011 and 2012, on 30 August 2012 he was sentenced to 4 months' imprisonment for assault occasioning actual bodily harm [ABH] on his wife, and 8 months' consecutively for threatening to kill her. This appeal turns on the judge's treatment of the public interest in his removal.

HISTORY

2. The facts are set out in the sentencing judge's remarks, of which there is no trace in the first-tier decision. The appellant was high on heroin at the time, and their two children under four were present. He demanded money from his wife, slapped her repeatedly, pinned

*NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.*

her to the floor and sat on her, trying to throttle her as he did so, and only letting go when the children screamed. He now went to the bathroom, and came back with what the judge described as a 'pointed serrated knife with two forks on it'. The appellant held this to his wife's back, and threatened to kill her: the marks could be seen between her shoulders. Later he went to sleep: when he woke up, he demanded more money from his wife, and punched her again, cutting her lip. The next morning she went and called 999 from a shop and the police came: he told them a lie about finding her with another man. Despite all this, the appellant's wife told the judge she wanted to get back together with him. As the judge said, this was no doubt because she wanted to stay in this country, with their children.

3. The appellant's sentence did not attract automatic deportation, since it was made up of two separate terms; but on 21 December 2012 he was served with a decision to deport him, on the basis that this would be for the public good (see paragraph 398 (c) of the Rules), since his offending had caused serious harm. Judge Flynn made no comment on this; but clearly it was a conclusion which was fully open to the respondent. The appellant had a right of appeal against the decision, and his appeal was finally dismissed by a first-tier panel on 23 October 2013. The judge had that decision before her, but mentions only (at 81) that there had been a significant change in the appellant's circumstances since then.
4. What had happened was this. Shortly after his appeal was dismissed, on 29 October 2013 the appellant failed to report as required, and remained at large. On 4 November a deportation order was signed, though in the circumstances it could not be served. On 2 April 2014 he or his representatives made submissions which were treated as an application to revoke the deportation order, and on 25 June 2015 that was refused, with no right of appeal.
5. Next, on 11 February 2016, the appellant was arrested by the police for immigration offences, and the next day served with the decisions made against him. That resulted in further submissions on 1 March, refused under paragraph 353 of the Rules as not raising a fresh claim with any realistic prospect of success on a further appeal. An application for judicial review was refused as totally without merit on 7 June: the appellant applied for permission to appeal to the Court of Appeal, refused by the Upper Tribunal on the 27th. There is nothing to suggest that any further application to the Court of Appeal was granted. Further submissions made on 3 May were once again refused under paragraph 353.
6. On 13 July 2016, two days before the appellant was due to be removed, and after no less than 13 years in this country, he claimed asylum. On 21 September that was refused, apparently as clearly unfounded, though the decision itself is not before me. Once again the appellant challenged that on judicial review, and not only was his removal deferred, but on 1 November he was released on bail, whether on the order of a judge or of a chief immigration officer is not clear. In 2017, following the decision in *Kiarie and Byndloss* [2017] UKSC 42, the respondent agreed to reconsider the appellant's claim. Once again, on 13 October 2017, it was refused; but this time he was given a fresh right of appeal.
7. Judge Flynn dismissed the asylum appeal, so there is no more to be said about that. On the deportation side, the present decision under appeal declined to accept that the appellant had re-established a family life with his wife, following his release and the birth to them of a third child. On this the judge found for the appellant, for detailed reasons on which she was

clearly entitled to rely. She concluded that the effect of his deportation would now be unduly harsh. So far as she dealt with the public interest, it was at 112:

The best interests of a child are not determinative of an appeal, but represent a primary consideration. They must be balanced against the respondent's important public duties of maintaining an effective system of immigration control, the deportation of foreign criminal, preventing crime, expressing public revulsion at wrongdoing and protecting the public.

ARGUMENT

8. The judge's decision was challenged on the basis of *MM (Uganda) & another* [2016] EWCA Civ 450 and *IT (Jamaica)* [2016] EWCA Civ 932. *MM* (see paragraph 24) made it clear beyond argument that the 'unduly harsh' question must involve consideration of the criminal's immigration and criminal history. *IT* (see 56) decided that, on an application for revocation of a deportation order, whatever the date, 'very compelling reasons' must be shown, in considering the 'unduly harsh' test, to displace the public interest in deportation. Mr Lindsay made it clear that the Home Office case was very much based on the appellant's immigration history since he absconded in late 2013, and not simply on his original crime.
9. Mr Jorro argued first that the Home Office had put their case in the decision under appeal on the lack of any current family life between the appellant and his wife and children, and the judge had found against them on this. Next, he pointed out that the judge's account of the presenting officer's submissions at 67 showed that she had done no more than refer to the 'unduly harsh' test, without further elaboration of what it involved. Finally, he suggested that what the appellant had done in 2012 was directed at his wife and children, rather than at the wider public, so that their present interests in having him here with them might legitimately be regarded as displacing the wider public interest in his removal.

CONCLUSIONS

10. The suggestion that a judge is entitled to take the law from an advocate's submissions, without further consideration, is wholly misconceived. It would certainly have been helpful if the presenting officer had referred the judge to *MM* and *IT*; but that does not alter the judge's own obligation to inform herself about leading decisions of the Court of Appeal, both in the public domain nearly two years before the date of the hearing. It was clearly necessary for the judge to consider whether there were 'very compelling reasons' why this appellant should not be deported.
11. It is arguable that such reasons might have been found in the appellant's renewed family life; but that needed to be balanced against the public interest in a very much more meaningful way than the judge's recital of the formula she used at 112. Although the appellant's crime had taken place in his former matrimonial home, and was directed at his wife, and the two elder children as innocent, and clearly distressed bystanders, not even that meant it engaged their interests alone. In this country there is a strong public interest in men not ill-treating their families: partly this is a question of public morality, but there is also the potential effect of society having to support the families as a result. I do not accept Mr Jorro's argument that the judge's decision can be justified on this basis, though, if the

circumstances of the appellant's crimes had been all there was against him, the decision might have stood on very much stronger ground than it does.

12. The really significant point against the appellant in this case is on what he, or his advisers on his behalf, did following the dismissal of his previous appeal in October 2013. First he absconded from his reporting obligations; further submissions were made and refused while he was unlawfully at large. It was only following his arrest by the police in February 2016 that he did anything more to regularize his position, though that ended with an application for judicial review found to be totally without merit.
13. Yet further submissions were also refused, and it was only two days before the appellant was due to be removed that he claimed asylum in 2016, after 13 years in this country. Although this was refused, it resulted in the appellant's being granted bail, a decision most politely described as somewhat inexplicable. It was this decision which resulted in the re-establishment of his family life, and the whole basis for his success before the judge in this case. If the asylum claim was refused as clearly unfounded, the decision in *Kiarie* had nothing to do with it; but it still resulted in the appellant's being given a fresh right of appeal.
14. What this adds up to is the picture of an appellant, and his advisers, making every possible effort, by legitimate or illegitimate means, to circumvent the previous panel's decision on the merits of his case. Permission to appeal that decision was refused by a first-tier judge, and there is nothing to show any renewed application to the Upper Tribunal. This is the aspect of the appellant's immigration history which most strongly engaged the public interest in having an orderly system of immigration control, with proper respect for independent judicial decisions.
15. What the judge needed to consider was whether the appellant's renewed family life provided 'very compelling reasons' why that course of action should be allowed to succeed. This will require detailed re-examination of the case on both sides, for which the best forum is a fresh hearing before the First-tier Tribunal. Who that comes before will be for the resident judge at Taylor House to decide; but, in view of the history of this case, it might well involve an experienced full-time judge, or a panel.

**Home Office appeal allowed: first-tier decision set aside
Fresh hearing at Taylor House, not before Judge Flynn**

A handwritten signature in black ink, appearing to be 'JLR', written in a cursive style.

(a judge of the Upper Tribunal)

dated 18 September 2018