Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07305/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 April 2019	**On 10 April 2019**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GEOVANNY [T]
(NO ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr J Plowright, instructed by Duncan Lewis Solicitors

DECISION AND REASONS

1. This decision is a remaking of the appeal of Mr [T] against the Secretary of State's decision to deport him dated 12 July 2016 and the refusal of his asylum and human rights claim, those decision being dated 24 July 2017. The appeal requires re-making following an error of law decision dated 25 January 2019 of the Upper Tribunal which set aside the decision of First-Tier Tribunal Judge Beach which had allowed the appeal against deportation on Article 8 ECHR grounds.

2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Mr [T] as the appellant,

reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Ecuador, born on 11 January 1991. He came to the UK in 1998 at the age of 7 years old. He was subsequently granted indefinite leave to remain (ILR) in 2005 as the dependant of his mother. It is undisputed that he returned to Ecuador on a family visit for approximately two months in 2009.

4. It is also undisputed that the appellant has a very significant criminal history. On 6 September 2008 he was convicted of robbery and given a six month referral order. On 31 May 2011 he was convicted of manslaughter and robbery and was sentenced to ten years' imprisonment for each offence, to run concurrently.

5. On 24 August 2011 the appellant was served with a liability to removal notice, to which he responded. On 14 February 2014 he stated that he feared persecution and that was treated as an asylum claim. On 4 September 2015 the appellant was served with a decision to deport in which the respondent invited him to seek to rebut the presumption under Section 72 of the Nationality, Immigration and Asylum Act 2002 that he had been convicted of a particularly serious crime and constituted a danger to the community. The appellant responded on 16 September 2015, referring to his private and family life in the UK and asserting that his deportation would breach his Article 8 human rights.

6. On 12 July 2016 the respondent refused the appellant's protection and human rights claims and certified the claims under Section 94 and Section 94B of the Nationality, Immigration and Asylum Act 2002. On 22 July 2016 the respondent made a deportation order against the appellant under Section 32(5) of the UK Borders Act 2007. Following litigation in the higher courts, the respondent withdrew the decision on certification and made a fresh, non-certified decision refusing the appellant's protection and human rights claims on 24 July 2017.

7. The appellant appealed against deportation on asylum and human rights grounds to the First-tier Tribunal. His case came before First-tier Tribunal Judge Beach on 23 May 2018. The decision allowing the appeal on "very compelling circumstances" grounds was issued on 27 June 2018.

8. The respondent was granted permission to appeal against the decision of Judge Beach on 12 November 2018. The error of law hearing was heard on 15 January 2019 before Mrs Justice Farbey sitting as an Upper Tribunal Judge and Upper Tribunal Judge Kebede. Their decision, issued on 25 January 2019, found that the decision of the First-tier Tribunal disclosed an error of law. The decision was set aside to be remade in the Upper Tribunal. The decision was not remade at the same hearing as it was considered appropriate to allow the appellant to adduce further evidence concerning cohabitation with his partner and their child.

9. The decision of the Upper Tribunal finding an error of law was clear as to the scope of the remaking required. The First-tier Tribunal did not find that the appellant could meet the provisions of paragraphs 399 or 399A of the Immigration Rules. It would not be unduly harsh for the appellant's partner or child if he were to be deported. The appellant has not been in the UK lawfully for most of his life and the First-Tier Tribunal found that he could not show very significant obstacles to re-integration in Ecuador. The Upper Tribunal stated in paragraph 22 of the error of law decision that "We see no reason, however, to disturb the judge's findings under paragraphs 399 and 399A". These findings stand, therefore, and must form part of the "very compelling circumstances" assessment" that must be re-made where it was found at paragraphs 19 onwards of the Upper Tribunal decision that the material before the First-Tier Tribunal had not permitted the conclusion that there were "very compelling circumstances".

10. It was also my clear view that the provisions of paragraphs 399 and 399A were not met even taking into account the new material concerning the strength of the family life that the appellant has with his partner and their child. It was not disputed that the appellant has cohabited with his partner and child for nearly a year and that their family life together would have become stronger during that period.

11. The "unduly harsh" test remains that approved in K**O (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53** at [27] from the case of **MK (Sierra Leone) v SSHD [2015] UKUT 223 (IAC)**:

> "Unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antipathy of pleasant or comfortable. Furthermore, the addition of the verb 'unduly' raises an already elevated standard still higher."

12. Lord Carnwath indicated in **KO** that:

> "The expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under Section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further, the word 'unduly' implies an element of comparison … One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent."

13. Following **KO**, the appellant's offending behaviour plays no part in the "unduly harsh" assessment. It remains the case that the evidence here cannot show "a degree of harshness going beyond what would necessarily be involved for any child faced with a deportation of a parent". The distress the family will experience, movingly expressed by the appellant's partner in her evidence, is that which any family with the normal, close bonds would face on the deportation of a loving father. The "unduly

harsh" test set by Parliament, as elaborated by the higher courts, cannot be met here.

14. As set out in **NA (Pakistan) v Secretary of State for the Home Department and Others [2016] EWCA Civ 662**, the failure to meet paragraphs 399 and 399A (and the equivalent provisions in section 117C), forms part of the "very compelling circumstances" assessment.

15. I must also apply the approach set out in the Supreme Court case of **Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60, i**n particular, paragraph 46:

> "46. These observations apply *a fortiori* to tribunals hearing appeals against deportation decisions. The special feature in that context is that the decision under review has involved the application of rules which have been made by the Secretary of State in the exercise of a responsibility entrusted to her by Parliament, and which Parliament has approved. It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law. But, where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, they should attach **considerable weight** to that assessment: in particular, that **a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life**; that great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than 12 months; and that, where the circumstances do not fall within rules 399 or 399A, the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling, as explained in paras 37-38 above. (my emphasis)"

16. The case of **Olarewaju** confirms that, having made a finding that the provisions of paragraphs 399 and 399A are not met, there is a requirement for a holistic assessment of whether "very compelling circumstances, over and above those described in paragraphs 399 and 399A" capable of outweighing the public interest are shown.

17. I therefore considered the factors weighing on the appellant's side of the balance in order to assess if they could meet the "considerable" weight of the appellant's ten year convictions where a sentence of even four years or more "almost always" outweighs family and private life considerations.

18. I have indicated that the appellant's family life will have strengthened in the last year as he has been cohabiting with his partner and their child. There was agreement that a number of other positive findings remained extant from the paragraphs 57 to 64 of the First-Tier Tribunal decision. The appellant has significant family ties in the UK with both of his parents,

aunts and uncles and his siblings and their children. At the hearing before me, as at other hearings, these relatives attended to show their support for the appellant and his partner.

19. It was also accepted that the appellant's mother is suffering from mental health issues but that she has other children in the UK who could provide support were he to be deported. It is accepted, however, that her mental health issues are exacerbated by her anxiety about the appellant's potential deportation.

20. There is also no dispute that the appellant came to the UK when he was aged 7, was granted ILR in 2005 and has lived in the UK for over twenty years. Given the amount of time that he has been absent from the Ecuador and his having had only one visit there, it was agreed that his ties to the country are minimal but that he retained some ties as he had some relatives still there, a paternal aunt and his maternal grandmother as well as having family friends of his father there. His father has also visited the country as recently as 2017.

21. The appellant's partner spoke of her personal antipathy to going to Ecuador because of traumatic experiences she had there when a child and of the very significant expense involved. She indicated that she would not wish to expose her own child to the same risks and that it would be very difficult to afford to go there even once a year. I take all of that into account at its highest.

22. The respondent also accepted that at the time of the initial OASys assessment the appellant was assessed at low risk of reoffending and considered to be at low risk of serious harm whilst in custody but as high risk of serious harm to the public in the community. In October 2016 this level of risk of harm was reduced from high to medium. A letter from Probation Services dated 6 February 2018 commented on his insight into his offending behaviour, the fact that he has distanced himself from antisocial peers, spends most of his time being an active father and had shown willingness to comply with the terms of his licence. There was no issue concerning reoffending or any adverse involvement with the authorities since his release from detention. I should point out, however, that this is the behaviour to be expected from an offender and not a factor that could reduce the very high public interest in deportation to any material degree.

23. I placed in the balance all of the positive aspects of the appellant's case as set out above. It remains my judgment that the factors weighing on the appellant's side of the balance, even weighed cumulatively and holistically, are not capable of outweighing the public interest in deportation where the appellant has received a ten year conviction for manslaughter and a concurrent ten year sentence for robbery. As in paragraph 46 of **Hesham Ali**, Parliament has decided that "a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always

outweighs countervailing considerations of private or family life". The appellant's offending is of a much higher magnitude than four years and the factors weighing in his favour are clearly not capable of meeting the very high public interest in deportation here.

24. I make this decision aware that that it will bring great distress to the appellant, his partner, his child and his wider family. All those concerned will be affected, in particular the appellant's partner and child who may well not feel able to visit him in Ecuador or be able to afford to do so. It remains the case that the approach set down by Parliament and clarified by the higher courts affords of only one outcome on the evidence presented here, that there are not very compelling circumstances capable of outweighing the public interest in the appellant's deportation.

25. For these reasons, therefore, I remake this appeal as refused.

Notice of Decision

26. The decision of the First-tier Tribunal disclosed an error on a point of law and was set aside to be remade.

27. I remake the appeal as refused.

Signed:  Date: 8 April 2019

Upper Tribunal Judge Pitt