Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07787/2019

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal on 18 March 2020	**Decision & Reasons Promulgated On 28 April 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

HAMID DIAF
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Woodhouse of SH Solicitors LTD
For the Respondent: Mr A McVeety Senior Home Office Presenting Officer.

DECISION AND REASONS

1. On 29 November 2019 the Upper Tribunal found a judge of the First-Tier Tribunal had erred in law in a manner material to the decision to allow the appeal and set aside that decision. Directions were given to enable the Upper Tribunal to rehear the appeal with a view to substituting a decision to either allow or dismiss the appeal.

Background

2. The appellant has filed an up-to-date witness statement dated 14 January 2020 in which he confirmed he arrived in the United Kingdom in 2001 and claims not to have returned to Algeria since.
3. The appellant has a wife whom he married in an Islamic ceremony in 2008 and they have three young children, twins aged 11 and one aged 7 at the date of the signing of the statement. The two older children were registered as British citizens on 15 October 2019.
4. The appellant has provided a marriage certificate confirming registration of the marriage pursuant to the Marriage Act 1949 on 2 September 2011.
5. The appellant claims it will be unduly harsh for him to have to leave the United Kingdom especially as he served his prison sentence and because the original offence took place over 10 years ago with no evidence of reoffending in the interim.
6. The appellant claims to be a reformed character who now has three young children to look after whom he wishes to be a positive role model for. The appellant claims to have a "genuine and subsisting relationship" with the children. The appellant claims that it is disproportionate and unjust for the respondent to remove him from the United Kingdom or to expect the children to leave the United Kingdom and move to a foreign country.
7. The appellant claims he is an essential figure in the lives of his children whom he loves, cares for, and provides emotional and psychological support to. The appellant claims the children need him in their lives. The appellant refers to routines, traditions, and habits enjoyed within the family.
8. The two older children are due to start secondary school in September which the appellant claims will be a stressful and difficult time for them when they will need security at home that he will provide by supporting them during this transition. The appellant claims the boys also need a male figure in their life to guide them and who they can relate to them, support them, and understand them.
9. The appellant confirms his wife, who at the date of the hearing before the First-tier Tribunal was at college, has now found employment as a Care Worker from December 2019 which enables them to improve the family's standard of living. The appellant claims if he is removed it will set his wife back considerably as she will have to stop focusing on her career and carry out the tasks the appellant does at home which may well mean having to give up her job.
10. The appellant claims if deported the consequences will be "excruciatingly unbearable" for his wife and children as his wife will not be able to continue with her job as she will not have childcare, will have to run the house by herself as well as earning a living and meet all the expenses. The appellant claims that the pressure and burden will cause his wife to fall into depression.

11. The appellant asserts that his human rights will be breached if he is removed and separated from his wife and children in addition to breaching their rights too.
12. The appellant's wife has also provided an updated statement dated 14 January 2020 confirming her circumstances have not changed materially since the last statement. The latest statement confirms the comments made by the appellant regarding marriage and registration of marriage, composition of family, and that as a result of the appellant's immigration status which prevents him from working she has studied in order to obtain employment to support the family financially.
13. The appellant's wife states her husband looks after the children, takes them to school and collects them, and supported her to allow her to complete her studies and work. They have distributed their responsibilities and if removed from the United Kingdom there will be a huge burden placed upon her to continue working whilst looking after the three children.
14. The appellant's wife confirms her husband is a positive role model for the children and an amazing father and that the children rely upon him on a daily basis. Her husband loves cooking and the children help him to cook.
15. The appellant's wife confirms she commenced a job as a care worker in December 2019 and is excited at the prospects of having a career. She states she shall be unable to continue working without her husband's support.
16. The appellant's wife also confirms all the children are boys who can be loud and boisterous and have a lot of energy and claims she shall not be able to cope and looking after them by herself.
17. The marriage certificate states the appellant's occupation is a chef and his wife is a full-time mother.
18. In his witness statement of 24 June 2019 the appellant stated that in addition to Level I and 2 Diploma qualifications as a chef he also has a qualification in barbering and IT and will be able to work and support his family if he is allowed to stay.
19. There is also within the bundle copies of the appellant's wife's certificates of achievement and a copy of statement of main terms of employment from Sandwell Care Services, which is a zero hours contract, showing her rate of pay per hour. Documents have also been provided confirming tax credit paid to the appellant's wife.

Submissions

20. There was no factual dispute between the parties and in accordance with the directions given at the error of law hearing the parties witness statements stood as their evidence in chief. There was no cross-examination by Mr McVeety enabling the matter to proceed by way of submissions only.
21. The relevant immigration history showed that the appellant entered the United Kingdom on 9 November 2001 and was served with papers as an illegal entrant although he failed to maintain contact with the immigration authorities and absconded. The appellant was next

encountered when arrested by the police in 2003 for being drunk and disorderly but was not prosecuted remained in the UK thereafter illegally.

22. On 18 November 2005 at the City of London Magistrates Court, the appellant was convicted of battery, assaulting a constable and possessing a listed false instrument. On 2 February 2006 the appellant was sentenced to a total of 6 months imprisonment.
23. On 30 November 2005, the appellant claimed asylum which was refused by the Secretary of State. The appellant's attempt to challenge the decision by way of statutory appeal was unsuccessful and on 18 May 2006 the appellant became appeal rights exhausted, although remained in the United Kingdom illegally thereafter.
24. The appellant next came to the attention of the immigration authorities on 14 November 2006 when the appellant was arrested by the police at a money exchange where he was attempting to cash a cheque using a false French ID document. The appellant admitted to the police using that document in order to work in the United Kingdom illegally following which he was served with illegal entry papers as an illegal entrant working in breach of working restrictions and released on bail pending his trial.
25. On 12 March 2008 the appellant married a Moroccan national in an Islamic ceremony in London although at that time both were in the United Kingdom illegally and neither had applied for a certificate of approval from the UK Border Agency prior to their marriage.
26. On 6 January 2009 the appellant's wife gave birth to twin boys.
27. On 9 February 2009 at Snaresbrook Crown Court the appellant was convicted of knowingly possessing a false/improperly obtained/another's ID document and breach of conditions and, on 16 February 2009, was sentenced to 12 months imprisonment for false documents and 11 days for breach of licence. The appellant did not appeal against either conviction or sentence.
28. On 11 November 2009 the appellant was served with a signed Deportation Order and reasons for deportation notice. The appellant appealed against the decision to deport him on 16 December 2009. The appeal was dismissed on 23 December 2009 and an application for a High Court Review refused on 18 January 2010.
29. On 1 April 2010 further representations were made on the appellant's behalf said to constitute a fresh application for asylum and on human rights grounds which were refused, and the appellant issued with a refusal to revoke the Deportation Order decision on 4 May 2011. The refusal was certified pursuant to section 94(2) of the 2002 Act.
30. On 18 August 2011 the appellant challenged the certification by way of an application for Judicial Review which was refused on 15 September 2011 as the case was considered to be 'totally without merit' and the order no bar to removal.
31. On 18 October 2011 the Home Officer was advised that the Algerian Embassy in London had agreed to issue the appellant with an Emergency Travel Document following which he was detained on 24 October 2011 to affect his removal from the United Kingdom.

32. On 31 October 2011, following service of the removal direction, the appellant's solicitors submitted further representations and contacted the Algerian Consulate in an attempt to stop them issuing a travel document to the appellant. The respondent was advised on 3 November 2011 that the Consulate would not issue a travel document as they stated they had been advised there were representations outstanding.
33. The further representations were treated as an application to revoke the Deportation Order and refused on 7 November 2011. The appellant's solicitors stated they were planning to lodge an appeal against the decision to refuse to revoke the Deportation Order, even though there was no such right of appeal, which changed to an application for judicial review which was submitted on 23 November 2011. Permission was refused on 24 January 2012 as the application was considered to be 'totally without merit'.
34. On 2 May 2012 and 13 July 2012 further representations were received and on 8 May 2012 the appellant granted bail and released with reporting restrictions.
35. On 7 December 2012, the further representations were rejected pursuant to paragraph 353 Immigration Rules as not amounting to a fresh claim.
36. Further submissions then followed dated 4 February 2015, 1 December 2015, 20 July 2016, and 9 February 2017, which were rejected on 18 August 2017 pursuant to paragraph 353. An application for judicial review on 23 November 2017 challenging the fresh claim decision was lodged although permission refused on 2 May 2018 on the papers.
37. On 27 September 2018, at a renewed oral permission hearing, the Upper Tribunal was advised there had been a significant change in the appellants circumstances as his partner and three children had been granted Residence Permits confirming a right to remain in the United Kingdom until 19 January 2021 as a result of which the Home Office was ordered to reconsider the decision of 18 August 2017, rendering the judicial review claim academic.
38. The further representations were considered in the impugned decision of 16 April 2019 which refused the human rights claim made by the appellant as an exception to his deportation from the United Kingdom, in which is the decision appealed to the First-Tier Tribunal.
39. Mr McVeety's position was that although the evidence established the appellant's removal would be harsh upon the family who remained in the United Kingdom it will not be 'unduly harsh'. It was not doubted that the children will be upset and that their lives will change but that was the impact of the deportation of the appellant as a result of his criminality.
40. It is not disputed that the appellant has not reoffended since the index offence, but it cannot be challenged that the appellant is a foreign national criminal subject to a Deportation Order in relation to which there is no limitation period upon when the same can be enforced.
41. Mr McVeety submitted there was no evidence such as from a medical professional or Social Worker highlighting particular difficulties within the family unit or that they had needs beyond the norm. In particular,

there was no evidence of any adverse impact upon the children if the appellant were to be removed.

42. Mr McVeety submitted that as the appellant could not establish his removal will be 'unduly harsh' under the Rules it was necessary to consider whether he could succeed outside the Rules pursuant to article 8 ECHR although, as the appellant cannot satisfy the Rules, more will be required which was not shown to exist in this appeal.
43. Mr McVeety submitted the public interest required the appellant's deportation from the United Kingdom and it was not made out that the public interest should be reduced for the reasons relied upon by the appellant. The severity of the offence did not tail off over time and the evidence relied upon by the appellant was not sufficient to warrant the appeal being allowed.
44. On behalf of the appellant Mr Woodhouse submitted that the tribunal had evidence from the parents even if there was nothing from a Social Worker or medical professional.
45. It was submitted the quality of the relationship between the child and the appellant is relevant and that the appellant's wife, the children's mother, would not be able to work if the appellant was removed. It was argued the bond between the children in this case is unique and that the appellants removal will be 'unduly harsh' on all members of the family.
46. Mr Woodhouse submitted that even if the appellant failed under the Immigration Rules he can succeed outside the rules pursuant to article 8 ECHR for the reasons set out at [9] of the skeleton argument. That paragraph referred to the decision of the Court of Appeal in Akinyemi [2019] EWCA Civ 2098 which held the public interest in deportation is not fixed and has a movable quality. It was argued Section 117C of the 2002 Act does not change this. Mr Woodhouse submitted the public interest in deportation has been reduced as a result of the passage of time since the offence was committed and the fact the appellant has not offended further, and that when balancing the appellant's case against the public interest it was not proportionate for the appellant to be removed.
47. Mr Woodhouse submitted the passage of time did make a difference warranting weight being given in the appellant's favour, especially as it was in the best interests of the children for them to be able to remain in the UK.
48. It was further submitted the Strasbourg case law did not impose a test of "undue harshness" on an appellant in cases such as this.

The law

49. The legal framework

When a person who is not a British citizen is convicted in the UK of an offence for which he is sentenced to a period of imprisonment of at least 12 months, section 32(5) of the UK Borders Act 2007 requires the Secretary of State to make a deportation order in respect of that person (referred to in the legislation as a "foreign criminal"), subject to section

33. Section 33 of the Act establishes certain exceptions, one of which is that "removal of the foreign criminal in pursuance of the deportation order would breach... a person's Convention rights": see section 33(2)(a).

The right protected by article 8 is a qualified right with which interference may be justified on the basis of various legitimate aims which include the prevention of disorder or crime. The way in which the question of justification should be approached where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches article 8 is governed by Part 5A (sections 117A-117D) of the Nationality, Immigration and Asylum Act 2002 (inserted by amendment in 2014).

Section 117B lists certain public interest considerations to which the court or tribunal must have regard in all such cases. These include the considerations that:

> "(1) The maintenance of effective immigrations controls is in the public interest.
>
> ...
>
> (4) Little weight should be given to –
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> ..."

Section 117C lists additional considerations to which the court or tribunal must have regard in cases involving "foreign criminals" (defined in a similar way to the 2007 Act). These considerations are:

> "(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.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

"Foreign criminals" who fall within section 117C(3) because they have been sentenced to a period of imprisonment of at least 12 months but less than four years have been referred to in the case law as "medium offenders" – in contrast to those with a sentence of four years or more, who are described as "serious offenders".

50. In CI (Nigeria) [2019] EWCA Civ 2027 at [20-21] it was found:

> “20 Paragraphs 398-399A of the Immigration Rules state the practice to be followed by Home Office officials in assessing a claim that the deportation of a foreign criminal would be contrary to article 8. Paragraphs 398-399A are in very similar terms to section 117C(3)-(6) of the 2002 Act. However, as the Court of Appeal pointed out in *NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239, para 14, although the Immigration Rules are relevant because they reflect the responsible minister's assessment, endorsed by Parliament, of the general public interest, they are not legislation; by contrast, Part 5A of the 2002 Act is primary legislation which directly governs decision-making by courts and tribunals in cases where a decision made by the Secretary of State under the Immigration Acts is challenged on article 8 grounds. The provisions of Part 5A, taken together, are intended to provide for a structured approach to the application of article 8 which produces in all cases a final result compatible with article 8: see *NE-A (Nigeria)*, para 14; *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536, para 36. Further, if in applying section 117C(3) or (6) the conclusion is reached that the public interest "requires" deportation, that conclusion is one to which the tribunal is bound by law to give effect: see *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803; [2016] 1 WLR 4204, para 50; *NE-A (Nigeria)*, para 14. In such a case there is no room for any further assessment of proportionality under article 8(2) because these statutory

provisions determine the way in which the assessment is to be carried out in accordance with UK law.

21 In these circumstances it seems to me that it is generally unnecessary for a tribunal or court in a case in which a decision to deport a "foreign criminal" is challenged on article 8 grounds to refer to paragraphs 398-399A of the Immigration Rules, as they have no additional part to play in the analysis."

Discussion

51. The First-tier Tribunal erred in law in failing to consider and follow the guidance provided by the Senior Courts when assessing the merits of the appeal.
52. A further recent authority from the Court of Appeal, handed down on the 22 November 2019, is SSHD v KF (Nigeria) [2019] EWCA Civ 2051 which confirmed the current position at [31] in which Lord Justice Baker, when giving the lead judgement, stated:

> "31. For those lawyers, like my Lord and myself, who have spent many years practising in the family jurisdiction, this is not a comfortable interpretation to apply. But that is what Parliament has decided, and it is important to bear in mind the observations of Hickinbottom LJ in PG (Jamaica) at paragraph 46:
>
> > "When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with the other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are 'unduly harsh' will deportation be constrained. That is entirely consistent with Article 8 of ECHR. It is important that decision-makers and, when the decisions are challenged, tribunals and courts honour that expression of Parliamentary will."

53. It was not disputed by Mr McVeety that the appellants children, if deprived of the appellants company during their formative years, may be at risk of suffering some form of emotional harm but to be 'unduly harsh' it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances. The evidence provided did not show this threshold had been met, let alone crossed.
54. As found in KF at [30]

> "… Looking at the facts as found by the First-tier Tribunal that led to the conclusion that family would suffer adverse consequences as a result of the deportation, and in particular the consequences for the respondent's son separated from his father, it is difficult to identify anything which distinguishes this case from other cases where a family is separated. The First-tier Tribunal judge found that the

> respondent's son would be deprived of his father at a crucial time in his life. His view that "there is no substitute for the emotional and developmental benefits for a three-year-old child that are associated with being brought up by both parents during its formative years" is indisputable. But those benefits are enjoyed by all three-year-old children in the care of both parents. The judge observed that it was a "fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child" and that he was entitled to take judicial notice of that fact. But the "fact" of which he was taking "judicial notice" is likely to arise in every case where a child is deprived of a parent. All children should, where possible, be brought up with a close relationship with both parents. All children deprived of a parent's company during their formative years will be at risk of suffering harm. Given the changes to the law introduced by the amendments to 2002 Act, as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances.

55. Whilst the appellant's deportation will have a considerable impact upon his wife it is not established that the consequences will be 'unduly harsh' on her either. Although the appellant's wife clearly wishes her husband to be able to remain in the United Kingdom and for their family unit to continue to move forward, the reality of the appellant's deportation is that she will become a single parent as are many women in this country. It may mean the appellant's wife will have to make alternative arrangements for childcare and may have to give up her job and become dependent upon the State until such time as alternative arrangements enabling her to return to work can be made. Whilst the appellant's wife should be commended for the effort she has made to date that is not the determinative factor. The appellants wife, who is on a zero hours contract, may able be able to work whilst the children are at school, hence maintaining her career and income (supplemented by tax credits).
56. The evidence, again, fails to establish that the consequences for the appellant's wife will be other than those normally flowing from the effect of the appellant's deportation. It is not made out the appellant's wife will be unable to care for the children or meet the children's needs, both emotionally and physically. It is not made out that any personal trauma or difficulty she may experience will be such as to create a real risk of harm to the children or create a situation that can be properly categorised, in law, as being 'unduly harsh'.
57. It is accepted the best interests of the children are to be able to remain in the United Kingdom with both their parents but that is not been shown to be the determinative factor.
58. Whilst Mr Woodhouse submitted Strasbourg case law does not specifically referred to an 'unduly harsh' test it does refer to the need for a balancing exercise and provides a margin of appreciation to the Higher Contracted States as to how that is interpreted. The United Kingdom has brought into force section 117 C of the 2002 Act

containing how it believes the question of whether it is proportionate to remove an individual subject to a deportation order should be assessed. I was not referred to any authority showing those statutory provisions have been found to be contrary to ECHR, despite numerous challenges being made on that basis. It is within the margin of appreciation for the United Kingdom to find that unless a person establishes their deportation will be 'unduly harsh' upon either their children or partner with whom they have the requisite degree of relationship, their removal will be proportionate. It must be borne in mind that the legitimate aim relied upon in deportation proceedings to justify removal is different from that in any non-deportation appeal.

59. Despite the strength of the heartfelt plea that the appellant be allowed to remain in the United Kingdom, insufficient evidence has been provided to establish the appellant's deportation will have 'unduly harsh' consequences upon those he loves.
60. The immigration history above shows the appellant has never had lawful leave to remain in the United Kingdom and, therefore, any protected right he is seeking to rely upon has been developed during a time his immigration history has been precarious, warranting little weight being attached to it under both domestic legislation and Strasbourg jurisprudence.
61. There is simply not the evidence on which this tribunal, properly directed as to the law, can conclude that the deportation of the appellant will lead to his partner and children suffering a degree of harshness beyond what would necessarily be involved for any partner or children of a foreign criminal facing deportation. The evidence does not provide a basis upon which the appellant can establish Exception 2 under s.117C(5) of the 2002 Act and paragraph 399 of the Immigration Rules, and accordingly under s.117C(3) the public interest requires that he be deported.
62. Exception 1 was not pleaded and cannot be satisfied on the facts in any event.

Decision

63. **I remake the decision as follows. This appeal is dismissed.**

Anonymity.

64. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 24 March 2020