



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/12176/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 14 January 2020**

**Decision & Reasons Promulgated
On 21 January 2020**

Before

**THE HONOURABLE MRS JUSTICE MOULDER
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KEBEDE**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDOOL GAFFOOL GIBRAN AUCKBURALLY

Respondent

Representation:

For the Appellant: Mr Lindsay for the Secretary of State for the Home Department

For the Respondent: Mr Auckburally represented himself

DECISION AND REASONS

1. This is an appeal against the decision of first-tier Tribunal judge Malcolm dated 10 September 2019. The solicitors, Asher & Tomar, are no longer representing the appellant who appeared in person. Leave was granted by Upper Tribunal Judge Gill on 1 November 2019.

Background

2. The background to this matter in brief is that the appellant arrived in the UK in 2006 on a tourist Visa. On 26 May 2017 the appellant was sentenced to 4 years imprisonment for conspiracy to commit robbery. The appellant met his partner in 2008 and they have three children.

Grounds

3. The grounds relied upon by the appellant are as follows:
 - (1) A failure by the first-tier Tribunal judge to consider the best interests of the three children.
 - (2) A failure to consider the article 8 rights of all affected by the appellant's removal including the family life rights of his partner of 10 years.
4. Upper Tribunal Judge Gill stated that it was arguable that the judge of the first-tier Tribunal may have erred in law, by:
 - (1) failing to consider the impact of removal on the appellant's partner and reaching a finding as to whether it would be unduly harsh for her to enjoy family life with the appellant in Mauritius and whether it would be unduly harsh for her to remain in the United Kingdom without him
 - (2) failing to reach any findings as to whether it would be unduly harsh for the appellant's children to enjoy family life with him in Mauritius and whether it would be unduly harsh for them to remain in the United Kingdom without him.

Relevant law

5. The relevant law is set out [92] and [93] of the judgment of the First-tier Tribunal Judge. In particular section 117 C of the Nationality Immigration and Asylum Act 2002 provides:
 - (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 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.

Submissions

6. It was submitted by the appellant that he has made a positive impact on his children since his release from prison in November 2019 and he produced a letter from the children's school in support. He also produced a letter from social services and submitted that he was working with social services and would love to support his family.
7. It was submitted for the Secretary of State that the First-tier Tribunal Judge had not failed to make a finding on the best interests of the children. At [104] the judge noted the submission that the "crux" of the matter was the emotional impact on the children.
8. Further it was submitted for the Secretary of State that the judge had not failed to engage with respect to family life under Article 8, he had carefully considered the documents listed at page 3 of the judgement, he considered the appellant's relationship with his partner and concluded at [85] that whilst there may be indications of difficulties in the relationship, the appellant and his partner do have three children and "it is clear that there is family life".
9. In his conclusion at [117] the judge stated that the decision was "proportionate" and it was submitted that this demonstrated that he had carried out the requisite balancing exercise, taking into account the public interest in deportation [115] and balancing this against the appellant's family life of which the children were key.
10. In relation to the issue raised by Upper Tribunal Judge Gill it was submitted that there was no legal requirement to consider the exceptions in section 117(C) before assessing whether there were very compelling circumstances. The strength of the relationship with the appellant's partner was assessed as was the emotional impact of the children but this did not amount to "very compelling circumstances".

Discussion

11. It may be inherent in subsection (6) that, in order to determine whether there are very compelling circumstances over and above the exceptions, the court has to have regard to the exceptions but that does not mean that the court has to make express findings in relation to the exceptions. The relevant test in this case is whether or not there are very compelling circumstances over and above the exceptions and it is clear that the judge applied the appropriate statutory test to the evidence before him. The conclusion that there were not “very compelling circumstances” was a decision which was open to the judge on the evidence.
12. The judge referred to the circumstances of the crime at [51]. It involved a vulnerable victim (70-year-old man) who was restrained with duct tape. In fact the sentencing remarks indicate that the circumstances of the offence were that the appellant threatened the victim with a knife and tied him up so he could not speak or see and then held him down while others searched the house. Further the judge did not accept his remorse saying that the appellant pleaded guilty just before trial when the CCTV showed his face.
13. As to the position of his family, the first instance Judge considered this and at [102] concluded that:

“it seemed clear from the evidence of the appellant that if he is required to leave the UK that his family would not move to be with him.”
14. The relevant parts of the judgment read:

“[106] It is well recognised that removal of the parent will generally have an adverse impact on the well-being of a child with whom there is a subsisting relationship, that in itself does not meet the test of very compelling circumstances...”

[107] I have given very careful consideration to the information in the report from Ormiston Families. It is clear that the position in which their father finds himself has had an effect on the children, however there is support available to them which support has been provided and it is to be assumed will be able to continue to be provided...

[109] The effect of separation on all three children has to be weighed against the public interest.

[110] The appellant has been convicted of a serious crime...”
15. The judge clearly engaged with Article 8 and the interests of the children but concluded that the statutory test of “very compelling circumstances” had not been met.
16. As stated above, there was no need for the judge to make express findings in relation to the exceptions in order to reach a conclusion on

whether the test of “very compelling circumstances” was met. It can properly be inferred in our view from the judgement that he correctly applied the relevant test and there was therefore no error of law.

Conclusion

17. For the reasons set out above, the appeal is dismissed.

Signed

Date 17 January 2020

Mrs Justice Moulder
Sitting as a Judge of the Upper Tribunal