Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12975/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 23 August 2019	**On 15 January 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

H S
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Vokes, Counsel instructed by Super Immigration Services Ltd
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Appellant or any of the children mentioned in this decision. Breach of this order can be punished as a contempt of court. I make this order because the children are entitled to privacy.

2. I see no reason for, and do not make, any order restricting publicity about this appeal.

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3. This is an appeal against the decision of the First-tier Tribunal, by a Designated Judge, dismissing the appeal of the appellant against the decision of the respondent on 8 June 2018 refusing him leave to remain on human rights grounds. The appellant is subject to a deportation order. In the Decision to Refuse a Human Rights Claim dated 8 June 2018 the respondent makes it clear that, in her opinion, "deportation is conducive to the public good and in the public interest because you have been convicted of an offence which has caused serious harm". The Secretary of State then explained her decision with reference with paragraphs 398, 399 and 399A of HC 395.

4. The appeal against the decision to refuse leave on human rights grounds was heard on 2 November 2018. The Designated Judge, appropriately, considered the Immigration Rules and decided that the appellant did not satisfy the requirements of any of the Rules to be allowed to remain. I describe this as "appropriate" because the application of the Rules is generally a very good guide to determining the public interest in any Article 8 balancing exercise but, as the Designated Judge was very aware, he was not deciding an appeal under the Rules.

5. The judge's decision to dismiss the appeal with reference to the Rules is criticised in the grounds but I see no justification for the criticisms.

6. There is a particular element to this case. The judge said at paragraph 15:

> "Since the beginning of the appeal, the parties agreed that the appellant was not a foreign criminal for the purposes of S.117C and that the appeal should proceed by adopting the reasons given by the Upper Tribunal in ***Andell* (foreign criminal – para 398)** **[2018] UKUT 198**, when considering the issues under S.117B(1). I will need to have regard to the respondent's assessment that the appellant's deportation is conducive to the public good because of his offending, and will have to have regard to paragraphs 399 and 399A of the Immigration Rules."

7. The decision in **Andell** confirms, as is plainly the case, that although the phrase "foreign criminal" appears both in the Immigration Rules (that the Secretary of State has to apply) and Part 5A of the Nationality, Immigration and Asylum Act 2002 (that judges have to apply) when considering an appeal relying on Article 8 of the European Convention on Human Rights the phrase "foreign criminal" is not defined in the Rules but there is a definition in the Act giving its meaning for the purposes of part 5A.

8. The statutory definition appears at Section 117D(2). It can be summarised as a person who is not a British citizen and who has been convicted of a criminal offence in the United Kingdom and who has been sentenced to a period of imprisonment of at least twelve months or convicted of an offence that has caused serious harm or is a persistent offender or, presumably, some combination of the last three qualifications. In the absence of anything to the contrary it must be assumed that a "foreign criminal" for the purposes of the Immigration Rules has the wider meaning of being a person who is not a British citizen who has committed a criminal offence. There is no reason to infer any of the additional requirements necessary to satisfy the definition that applies in the Act. Whilst there may be room to argue over the precise definition when

that is necessary it was never suggested that the appellant in this case is other than a "foreign criminal" for the purposes of the Immigration Rules.

9. It is quite clear from the judge's decision and reasons that the case proceeded on the false premise that the appellant was not a foreign criminal as defined in part 5A of the Act. The appellant was not someone sentenced to at least twelve months' imprisonment. The possibility that he might be a foreign criminal by another route, in this case by his having caused serious harm, according to the judge, was overlooked by the parties. Having recognised that possible error it was open to the judge to reconstitute the hearing and hear further submissions. The judge decided not to do that. Essentially he decided that the appeal had to be dismissed in any event with regard to the Immigration Rules and so returning to consider the effect of part 5A would have been an entirely academic exercise. The judge decided that it was so apparent that the appellant had committed an offence that caused serious harm that there was no need to permit argument specifically on the point. I do not think it controversial to describe this approach as "bold" but it was made openly by an experienced judge and could be right.

10. Against that explanation I look at the decision the judge made *without* regard to part 5A.

11. The judge accepted that the appellant entered the United Kingdom in May 2011 with entry clearance as a student migrant. His leave was due to expire in August 2012 but immediately before that leave expired he applied for leave to remain as a husband. The application was successful and he was given leave until 27 September 2015. Shortly before that leave expired he made a further application for leave as a husband but the application was refused. He was deemed to be "unsuitable" because he was identified as someone who had obtained an English language certificate of competence by deception. That decision was not appealed. In August 2016 he was notified that he was liable to removal as an overstayer and in December 2016 he applied again for leave as a spouse. This was treated as a "human rights" claim but it was not decided until the outcome of criminal proceedings was known.

12. On 25 September 2017 the appellant was convicted on three counts of an indictment relating to the assault, ill-treatment, neglect or abandonment of a child or young person in circumstances likely to cause unnecessary suffering or injury. These are not the children with whom he lives in a nuclear family. The appellant was sentenced to nine months' imprisonment and made the subject of a restraining order for five years. The offences were committed against children, to some extent in his care, and they were the subject of the protection and restraining orders. It was this conviction that led to the finding that his deportation was in the public good.

13. The appellant was married to one KK a British citizen who lived all her life in the United Kingdom. They married in July 2012 and had two children; the children were born in November 2012 and April 2015 respectively. They too are British citizens. The Secretary of State conceded that the appellant had a genuine and subsisting relationship with his wife and genuine and subsisting parental relationship with his two children. Nevertheless, the Secretary of State, having regard to paragraph 399 of HC 395, decided it would not be unduly harsh for

the appellant's wife and children to relocate to India with him or alternatively it would not be unduly harsh to remain in the United Kingdom without him after he had been deported.

14. The First-tier Tribunal looked at the Rules. The facts suggested that the Appellant might have been entitled to leave to remain as a partner but the Secretary of State found that someone who, in her opinion, had caused serious harm, was not a suitable person.

15. The Designated Judge agreed. He had regard to the nature of the offences and the sentence and the judge's sentencing remark, including the observation that the offences were "so serious that an only an immediate custodial sentence can be justified for them."

16. The judge was satisfied that the appellant could not succeed under the partner route because he was not suitable.

17. The judge then looked at the Rules relating to deportation. The Rules provide exceptions to the normal provisions that deportation follows convictions of certain kinds and certainly where deportation is deemed to be in the public good. The judge particularly looked at paragraph 399(a) which applies an exception to deportation where, as here, there is a genuine and subsisting parental relationship with a minor child who is a British citizen and where it would be "unduly harsh" for the child to live in the country to which the appellant would be deported or it would be "unduly harsh" for the child to remain in the United Kingdom without the person who was to be deported. Similar provisions remain when the effect would be unduly harsh on a partner.

18. As far as the children were concerned the judge noted that the older child suffers from coeliac disease and is treated with a gluten free diet. She also has a vitamin D deficiency which is treated with supplements prescribed by a medical practitioner. There were no relevant diagnoses in the case of the younger child. The evidence was that the mother ensured that her daughter took her prescribed medication. The judge acknowledged there was evidence that the mother had difficulties and considered them later in the Decision and Reasons.

19. The children were the subject of a "Child in Need" plan and the main reason for that was that Social Services monitored the appellant's behaviour because of his criminal activity. There were visits from social workers to the family home.

20. The judge decided that he had, broadly, been told the truth about those visits and accepted there was Social Service involvement in the lives of the family, although the independent evidence for that was rather thin. The judge concluded, unremarkably, that it would be unduly harsh for the children to go to India. The judge felt they needed the safeguards provided by Social Service involvement. The judge also considered expressly the consequences on the children of the deportation of their father. Nevertheless, the judge found that it would be unduly harsh to expect them to relocate in India with their father. The appellant had not been detained in prison for very long after his sentence. It seemed it was reduced to eight or nine weeks and the additional time being made up of periods on bail subject to electronic monitoring. The judge accepted that the appellant's wife had been supported during her husband's

absence by friends. The evidence was that the daughter's behaviour had changed adversely when her father was away. There was some communication permitted by telephone. The children were not aware of their father being in prison. The judge noted there was no independent evidence. There was nothing external to go on to indicate anything about the relationship. The judge concluded at paragraph 40:

> "Taking this evidence and findings into consideration, even though the appellant provides for his children, including ensuring his daughter keeps to her diet, the evidence is insufficient to show that it would be unduly harsh for the children to remain in the UK without the appellant. The high threshold is not met on the evidence provided."

21. The judge then directed his mind expressly to the impact on the appellant's wife that would flow from the appellant being deported. The judge had in mind paragraph 399(b) of HC 395. The judge was rather surprised that the Secretary of State had conceded that there was a genuine and subsisting marital relationship formed at a time when the appellant was in the United Kingdom unlawfully. That appeared a surprising concession in the view of the way the facts were presented but it was made unequivocally and the judge did not feel able to go behind it. It seems that the appellant had leave as a student which did not give any basis for thinking that he was entitled to remain. The appellant's wife suffers from a condition that had led to epileptic seizures on occasions which can be managed by medication. When the case was before the judge the last seizure had been within a fortnight before the hearing. She also suffers serious migraines and headaches which can last for two days. The judge found that the appellant's wife had significant difficulty caring for the children on her own. The judge had regard to the high tests set out in Appendix FM referring to "compelling circumstances over and above those described in EX.2 of Appendix FM". The judge regarded this test as "virtually impossible" to satisfy. The judge said:

> "On the facts of this appeal, the medical evidence, although showing the appellant's wife would face very serious hardship in India because of the loss of access to high levels of medical care provided by her current medical team the evidence does not demonstrate a compelling circumstance over and above that level. The appellant has not provided evidence to show his wife would not have access to suitable medical care in India."

22. However, the judge found that it would be unduly harsh to expect the children to relocate. The judge was clearly of the view that it would not be unduly harsh for the appellant's wife to remain in the United Kingdom without him. This conclusion was reached after recognising the part he played in helping her manage her health but also the judge's findings that other people were involved in that process and she did not *need* her husband to do it for her.

23. Having decided that the appellant could not benefit from the Rules the judge then also considered Section 117B(1) and 117B(2) to (6). The judge decided that the appellant's alleged misconduct in obtaining an English language certificate of competence was neutral in this case. It had not been relied upon by the Secretary of State as an aggravating factor and the judge did not see why he should rely on it either. The appellant had proved his competence in

using the English language by later passing an examination and that pass was not doubted.

24. However the appellant had become an "overstayer" by not leaving after his unsatisfactory test result came to light and thereafter he could not satisfy the rules.

25. The judge considered Section 117B(6) but mainly to discount it; it applies to a person not liable to deportation (this appellant *is* liable to deportation) and assists such an appellant when it would "not be reasonable to expect the child to leave the United Kingdom". However, this appellant is subject to deportation and that status is not dependent upon his being a foreign criminal under part 5A of the Act. The judge found nothing in Section 117C that assisted the appellant or supported the decision that he remain in the United Kingdom.

26. The judge did not expressly have regard to the requirement that deportation is in the public interest as provided by part 5A of the Act when he conducted his balancing exercise but I do not see how the most energetic consideration could have assisted the appellant.

27. The judge found that the appellant enjoyed family life with his wife and their two children. The family received support from Social Services because of safeguarding and other issues and the appellant's wife and daughter had medical conditions which required particular support. The judge also accepted that the appellant had difficulty caring for the children on her own. The judge found it unduly harsh to expect the children to live in India with the appellant but also found the appellant would not be entitled to remain under any Rules and the deportation was proportionate and he dismissed the appeal.

28. This decision was challenged. In the first ground he complains that the judge should not have decided that the appellant had caused serious harm because it had been agreed that he had not. This ground relies on Home Office guidance in Article 8 cases which asserts that it is "at the discretion of the Secretary of State whether she considers an offence to cause serious harm". This of course is appropriate when the Secretary of State is considering the Rules. The Secretary of State cannot be the determinative authority on whether or not there is serious harm for the purposes of the Act which, according to the terms of the Act, is to be considered by "a court or Tribunal" determining a claim based on Article 8. It would only be in the face of the clearest possible statutory terms (and no such terms exist here) that the plain meaning of the Act could be subject to an extrajudicial interpretation in this way. It was plainly a matter for the judge to decide if there was serious harm for the purposes of part 5A and the judge made his finding rationally have regard to the sentence of imprisonment and the sentencing remarks.

29. The grounds then complain that the judge erred by not giving the appellant an opportunity to say why there was not serious harm or how the application of part 5A might have affected the outcome. These grounds suffer from failing to explain the materiality of the complaint; they content themselves with saying it was unfair.

30. Next is the complaint that the judge should not have found the effects on the family other than “unduly harsh”. The grounds complain in effect the judge had not explained why he concluded that the appellant’s wife would be able to manage the children on her own and why, possibly independently of that point, it was not unduly harsh for the children to remain in the UK without their father. The grounds assert that it was clearly unreasonable to assume that support for the nine weeks or so when the father was away could be assumed to be available throughout the minorities of the children. In short the decision was irrational.

31. Permission was refused by the First-tier Tribunal and granted by a Deputy Upper Tribunal Judge on renewal.

32. The Secretary of State, by Mr David Mills, a Senior Home Office Presenting Officer, produced a Rule 24 notice.

33. This was concerned to emphasise that there had not been a concession that the appellant was not a “foreign criminal”. I do not understand the Appellant to disagree. He has not been sentenced to at least 12 months imprisonment and the other ways of being a “foreign criminal” were overlooked at the hearing. The parties cannot agree the law and the appellant’s status as “foreign criminal” is a matter of law. The judge was not bound by any such “concession” and the appellant has shown no material error in the judge’s decision to apply the Act that he was required to apply.

34. I agree with Mr Mills that “it is clear that the Presenting Officer relied on the SSHD’s decision letter, which very clearly treats the appellant as being subject to deportation.” That is not in dispute. The argument is whether the appellant was a “foreign criminal” for the purposes of part 5A. The grounds also assert that it had been the Secretary of State’s consistent position that the appellant had been convicted of an offence that had caused serious harm. That much at least is right although that plainly does not prevent the judge taking a different view.

35. I find that there is no material error in the decision to apply part 5A or in the decision to do that without taking further submissions or in the conclusion that there was serious harm.

36. There is one point that concerns me. Mr Vokes went straight to and I have had to reflect on it. The suggestion is that the finding that it would be not unduly harsh for the children to do without their father or indeed the spouse to do without the father does not have proper regard for their particular circumstances, especially their mother’s illness. I can see immediately how this *could* be the kind of argument which *could* lead to an appeal being allowed. If it were then, as is almost always the case in appeals where deportation is involved, the decision would not be for the benefit of the person about to be deported but for those who depend on him in the United Kingdom. The Designated Judge understood the point and ruled in the way that he did. I cannot say that that is perverse. It was a permissible conclusion that he reached on the evidence. Clearly some extra help and input is going to be needed if the appellant is deported. Clearly such help came from the neighbours when the appellant was away. The point featured strongly in Mr Vokes’ skeleton argument before the First-tier Tribunal and it is an argument

that did not succeed. I have also looked at the evidence that was before the First-tier Tribunal. In his witness statement supporting his evidence in the First-tier Tribunal the appellant said, “my children cannot live without me nor is K fit enough to care for them on her own” but the point was not developed and in particular it was not asserted in any detail, if at all, that help would not be available if he were not there. I make a similar point about the witness statement from the appellant’s wife. She writes appreciatively of his support and makes the comment that “without him I’m lost” but the evidence is not particularised in way that would support a finding that she could not manage without him. The Designated Judge was entitled to reach the decision that he did on the evidence that was before him for the reasons that he gave.

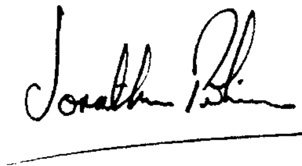
37. It is trite law, although something that must never be forgotten, that deporting a person often breaks up nuclear families and is a sad business. It is not necessarily unduly harsh.

38. In short no material error of law has been established.

Notice of Decision

39. The appeal is dismissed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 13 January 2020