Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number EA/03919/2019 (V)**

THE IMMIGRATION ACTS

Heard by "*Microsoft Teams*"	**Decision & Reasons Promulgated**
On the 28th July 2021	**On the 03rd August 2021**

Before

UT JUDGE MACLEMAN

Between

A L

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Gray & Co, Solicitors
For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Morocco, aged 39. The respondent refused his application for a family permit under the Immigration (European Economic Area) Regulations, 2016/1052, for reasons given in her decision dated 1 July 2019.

2. FtT Judge Connal dismissed the appellant's appeal for reasons given in her decision promulgated on 27 January 2021.

3. The appellant appeals to the UT on grounds, in summary, as follows:

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(i) Failure to address human rights grounds.

(ii) Failure to address the long period of time since the appellant's offence.

(iii) Leaving out of account that no additional sentence was imposed on the appellant for failing to return to prison after an authorised period of release.

(iv) Contradictory findings on the appellant's explanation for failing to return to prison.

(v) In assessing the appellant's attitude to his offence, leaving out of account that it occurred over a decade ago.

(vi) In the "balance sheet" at [37 – 38], leaving out of account [unspecified] matters in the appellant's favour.

(vii) [Repeats iii]

(viii) Leaving out of account that the offence was "a one-off incident …. that should properly have been viewed as an aberration".

(ix) In giving reasons for finding the appellant to pose a threat, leaving out of account the "protective factors" that he would be living in the UK with the sponsor and their child.

(x) [Rounds off]

Submissions for the appellant.

4. On ground (i), the judge engaged in "no proper consideration" of article 8, in absence of any reference to section 117B(vi) of the 2002 Act. This was not a deportation case, so the public interest would not require removal, where it was not reasonable to expect the child to leave. The sub-section was to be "narrowly construed".

5. There was an overlap with the EU Directive on free movement which provided for a right of recourse on material change of circumstances in an article 3 expulsion case. The UK regulations differed from the Directive in that they had not required the state to check after 2 years whether there had been any material change of circumstances, but the Directive applied in Spain. In this case there had been significant positive changes – relationships with a partner and child, and no "bad behaviour", apart from not returning to prison, which the appellant put right voluntarily, and 10 years had gone by since conviction. It was significant that the regulation 34 had provided for revocation of a deportation order on material change of circumstances.

6. It had to be accepted that the appellant's denial of guilt was a factor against him, but the judge very specifically found that the public interest factor was the threat of further offending, and she did not strike the article 8 balance.

7. On ground (ii), the judge did not refer to the fact that the offence appeared to have taken place significantly over a decade ago, and gave "no proper consideration" to the appellant's crime-free life before and after the offence.

8. On ground (iii), it was accepted that the judge was entitled to give some adverse significance to the appellant's failure to return to prison after temporary release, but it was also important to note that no additional sentence was imposed.

9. There had been evidence from Spain showing no criminal record to the date of disclosure. The judge did not accept that was because there had been a successful appeal. Rehabilitation of offenders was a matter of domestic law. If Spain, where the offence was committed, showed no conviction on record, it was up to the respondent to explain that.

10. On ground (iv), the judge's attitude to the appellant's non-return to prison was confused. She failed to explain why his accounts were mutually exclusive.

11. It was accepted that ground (v) does not add to (ii).

12. Ground (vi) was abandoned, because the criticism is erroneously aimed at part of the record of submissions, not at the judge's decision-making.

13. On ground (vii), the submission was like ground (iii). The attitude of the country where the offence was committed was a matter of domestic law, and it was wrong to "re-categorise" that in Scotland.

14. On ground (viii), on a "proper reading" of the evidence, the judge should have found the offence to be a single aberration from the appellant's normal conduct. Her decision failed to reflect that.

15. On ground (ix), the judge should have considered the appellant's situation if admitted, when he would be living in relationships with his partner and child.

16. Ground (x) adds nothing.

17. The decision of the FtT should be set aside. The case should be retained in the UT for a fresh decision after updating the evidence.

<u>Submissions for the respondent</u>.

18. The judge was entitled to find at [44] "a significant risk" that the appellant "will re-offend" and that he posed "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, namely protecting the public".

19. Those conclusions were well considered, leaving out nothing which was relevant. The offence was serious. The appellant showed no remorse and took no responsibility. There was no error in the finding that he failed to show that he was the victim of a miscarriage of justice.

20. There was no self-contradiction in the findings about the appellant not returning to custody. Any contradictions were in his account. The judge's

point was that he gave no good explanation. She was entitled to find that his protracted failure to return was adverse to his case.

21. The judge was well aware of the appellant's relationships, which she accepted. No more needed to be said. The consideration of article 8 at [45] might be brief, but it was legally all that was required.

22. No error was shown, and the decision should stand.

<u>Reply for the appellant</u>.

23. It was telling that the respondent glossed over the appellant's "clean decade", the vital point on which the judge went wrong, and which showed the difficulty in defending the decision.

24. The judge at [45] was dealing with proportionality not in terms of article 8, but of EU law. In terms of part 5A of the 2002 Act, the decision contained "simply no justification which bears analysis". The question whether it was proportionate to prevent the husband and father of the family from joining his wife and child was "invisible".

25. The judge failed to recognise that this was a public policy case where the onus was on the SSHD, and wrongly placed the onus on the appellant.

<u>Decision</u>.

26. The FtT's findings did not turn on which party had the onus. They were based on all the evidence which both parties chose to lead.

27. The appellant's case in the FtT was not that his crime was a unique aberration. He asked the FtT to find that he did not offend, and was the victim of malicious lies from his former partner; brutality and perversion of justice by the Spanish police; and incompetence of his lawyers.

28. The appellant was convicted in Spain of the permanent disfigurement of his ex-partner and sentenced to 5 years imprisonment. The judge at [40] declined to accept his case on miscarriage of justice, on a successful appeal, or on his conviction being spent. The grounds do not challenge those findings; and even if the submissions veered faintly in that direction, there is no reason to set them aside.

29. The reason for absence of mention in the decision of section 117B(vi) of the 2002 Act, of any EU Directive, or of regulation 34 is, no doubt, that the judge was not asked to give those any direct consideration.

30. I accept that although section 117B(vi) does not apply directly, its principle might be relevant. However, the appellant not to develop any case that it would not be reasonable to expect the child to leave the UK. There was no reason for the judge to take this as a feature which led to the appeal being granted.

31. The appellant's relationships, the impact of the decision upon them, the lapse of time, and the absence of further offending were all obvious facts, and changes of circumstances, at the heart of the case. The appellant disagrees on the weight attached, but none of those matters was left out of account.

32. The grounds about failure to return to prison show no self-contradiction by the judge. As the presenting officer submitted, the significant point was that the appellant had no good explanation – see [43]. There is no error of law in that finding.

33. The grounds and submissions do not show that the judge's conclusions at [44] on threat posed by the appellant, or at [45] on proportionality, should be set aside for having involved the making of any error on a point of law.

34. The decision of the FtT shall stand.

35. An anonymity direction is in place.

Hugh Macleman

28 July 2021
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.