Appeal Number: UI-2021-001031

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

On Appeal From The First-tier Tribunal (IAC): Judge O'Rourke (HU/02387/2021)

THE IMMIGRATION ACTS

Heard at Cardiff CJC
On the 20 October 2022

Decision & Reasons Promulgated
On the 23 November 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IPT (JAMAICA)
(ANONYMITY ORDERED)

Respondent

Representation:
For the Appellant: Sian Rushforth, Senior Presenting Officer
For the Respondent: Evaristo Da Dilva, Solicitor of Fountain Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals, with permission of the Upper Tribunal (Judge Kamara) against the decision of First-tier Tribunal Judge O'Rourke, who allowed IPT's appeal against the Secretary of State's decision to refuse to revoke a deportation order.

2. To avoid confusion, I shall refer to the parties as they were before the FtT: IPT as the appellant and the Secretary of State as the respondent.

Background

3. The appellant is a Jamaican national who was born in 1966. He entered the UK as a visitor in 1988 and his leave was subsequently extended until 28 March 2002. On 2 December 2000, the appellant married a British citizen. She had three children from a previous relationship. In September 2002, the appellant and his wife had a son. He has special educational needs as a result of a condition with which he was born, namely microcephaly.

4. On 23 January 2009, the appellant was convicted at Bristol Crown Court of four offences of supplying a drug of class A (cocaine) and he was sentenced shortly thereafter to a term of imprisonment of 42 months. The respondent subsequently made a deportation order against him. The appellant appealed against that order but he was unsuccesfful in that appeal and, on 21 July 2010, he was deported to Jamaica.

5. The applicant sought revocation of the order on 23 September 2013. The application was refused in March the following year. The appellant appealed against that decision and his appeal was allowed by the FtT in September 2014. The respondent appealed to the Upper Tribunal, but her appeal was dismissed. She then appealed to the Court of Appeal, however, and her appeal was allowed on 2 September 2016: [2016] EWCA Civ 932. The Court of Appeal ordered that the appeal be remitted to the Upper Tribunal. The appellant then appealed to the Supreme Court. His was one of the three appeals heard alongside KO (Nigeria) v SSHD [2018] UKSC 53. His appeal was dismissed but the Supreme Court confirmed the Court of Appeal's order that the appeal should be remitted to the Upper Tribunal.

6. The remitted appeal came before Upper Tribunal Judge Grubb on 29 March 2019. In a decision which was issued on 29 April 2019, Judge Grubb proceeded on the basis, as agreed between the parties, that the only relevant issue before him was whether the maintenance of the deportation order was unduly harsh on the appellant's wife or his son, who was at that stage still a child. For reasons he gave at [43]-[61] of his decision, Judge Grubb concluded that the impact of maintaining the deportation order was not unduly harsh on the appellant's wife or child and he dismissed the appeal accordingly. The appellant did not pursue a further appeal to the Court of Appeal.

7. On 13 and 30 July 2020, the appellant made a further application to revoke the deportation order. That application was refused on 9 February 2021. It was against that decision that the appellant appealed to the First-tier Tribunal.

Proceedings on Appeal

8. The judge allowed the appeal, finding that the point had come, after eleven years of separation from his wife and child, that it was unduly harsh for the appellant's deportation order not to be revoked and that it would be disproportionate to maintain the order.

9. The respondent sought permission to appeal, contending that the judge had failed to consider whether there had been a change of circumstances since Judge Grubb's dismissal of the appeal in 2019. That had been the starting point, per Devaseelan [2003] Imm AR 1, contrary to the approach adopted by the judge.

10. In her decision granting permission to appeal, Judge Kamara observed that the judge had arguably failed to identify any new circumstances which provided adequate reasons for departing from Judge Grubb's decision.

11. Mr Da Silva was able to produce at my request a copy of the skeleton argument he had relied upon in the FtT. Having had an opportunity to consider that skeleton argument, I heard briefly from the advocates.

12. Ms Rushforth contended that the judge's error was clear, in that he had failed to take Judge Grubb's decision as his starting point when assessing whether the effect on the appellant's wife was unduly harsh and whether the maintenance of the deportation order was the proper course.

13. For the appellant, Mr Da Silva was constrained to accept that the judge had fallen into error. He accepted that the only relevant focus for the FtT – when considering whether the maintenance of the deportation order was unduly harsh – was on the position of the appellant's wife. He accepted that the FtT had therefore fallen into error at [31](v), in importing an extraneous consideration (the extent of the public interest in the maintenance of the order) into its assessment of undue harshness. Given that the sole focus of the undue harshness assessment was on the position of the appellant's wife, Mr Da Silva accepted that the judge had fallen into error in failing to take Judge Grubb's findings on that question as his starting point. Those findings had been mentioned but there had been no assessment of what, if anything had changed. Mr Da Silva nevertheless invited me to uphold the FtT's decision on the basis that the maintenance of the deportation order was contrary to Article 8 ECHR because the public interest in deportation had fallen away after a decade of exclusion.

14. Ms Rushforth did not wish to reply. I reserved my decision on the materiality of the FtT's accepted error and the relief which should follow in the event that I set aside the FtT's decision.

Analysis

15. In order to understand the error into which the FtT is accepted by Mr Da Silva to have fallen, it is first necessary to consider the approach which the judge was required to take. This case is obviously one concerning the revocation of a deportation order but the structured approach required by authorities such as NA (Pakistan) v SSHD [2016] EWCA Civ 662; [2017] Imm AR 1 is nevertheless applicable. Pursuant to that approach, the judge was required to consider, firstly, whether the maintenance of the order was unduly harsh on the appellant's wife. In the event that he answered that question in the affirmative, the appeal was to be allowed on Article 8 ECHR grounds. In the event that

the judge concluded that the effect on the appellant's wife was not unduly harsh, he was required to consider, secondly, whether there were exceptional circumstances which rendered the maintenance of the order disproportionate.

16. The structured approach which I have outlined above is the approach required by the Immigration Rules. Paragraphs 390-392 of those Rules sets out the consideration which is to be undertaken by the Secretary of State when she is assessing whether to revoke a deportation order. Paragraph 390A is the paragraph which provides the structure for the enquiry, requiring that where paragraph 398 applies (due to reliance on Article 8 ECHR), the Secretary of State will consider whether paragraph 399 or paragraph 399A apply and, if they do not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors. Paragraph 399A is of no relevance to this case. Paragraph 399 is the paragraph which requires the Secretary of State to consider whether the making or maintenance of a deportation order gives rise to unduly harsh consequences for a relevant partner or minor child.

17. In CI (Nigeria) v SSHD [2019] EWCA Civ 2027; [2020] Imm AR 503, the Court of Appeal (Leggatt LJ (as he then was), Hickinbottom and Ryder LJJ) stated that it would generally be unnecessary in a case such as the present to refer to the Immigration Rules as it was the primary legislation in Part 5A of the Nationality, Immigration and Asylum Act 2002 which directly governed decision making in this context. I have made reference to the Immigration Rules nevertheless, because there is no express reference in Part 5A to the revocation of deportation orders. It has nevertheless been common ground throughout this case that s117C applies, so that the deportation order would be revoked if its retention is determined to be unduly harsh. That was noted to be the case at [41] of the Supreme Court's decision in this appeal. It was also noted to be common ground before Judge Grubb in 2019: his judgment refers, at [21]-[29]. Mr Da Silva maintained that stance in the current appeal, as is clear section D of his skeleton argument before the FtT.

18. The first question, therefore, was whether the maintenance of the deportation order was unduly harsh on the appellant's wife. (That question no longer fell to be considered in respect of the appellant's son, who attained his majority in September 2000.) As Mr Da Silva quite properly accepted before me, the sole focus of the FtT, when answering that question, should have been on the position of the appellant's wife. So much is clear from [32] of the Supreme Court's decision. It was an error of law, therefore, for the judge in the FtT to attempt to 'calibrate' the extent of the public interest in the maintenance of the deportation order *at this stage of his enquiry.* In just the same way as it was an error of law for Judge Southern to have imported consideration of the seriousness of the appellant's offence in KO (Nigeria), it was an error in this case for the judge to consider *at this stage of his enquiry* the extent to which the public interest in deportation might have diminished as a result of the fact that the appellant has spent ten years outside the United Kingdom.

19. Unfortunately, the judge seems to have fallen into this error because of something said by Arden LJ (as she then was) when this case was in the Court of Appeal. In a passage of her judgment which was reproduced at [15] of Mr Da Silva's skeleton argument for the FtT, Arden LJ spoke of the need for the FtT to assess the weight to be attached to the public interest when undertaking an undue harshness assessment. That was the approach taken by the Court of Appeal in MM (Uganda) v SSHD [2016] EWCA Civ 617; [2016] Imm AR 954 but it was precisely that approach which was disapproved by the Supreme Court when KO (Nigeria) and this case reached the Supreme Court. In assessing the question of undue harshness, therefore, the sole focus was on the position of the appellant's wife, and the reference to the Court of Appeal's judgment in this case might well have served to distract him from that focus.

20. The judge cited other authorities as well. He made reference to ZP (India) v SSHD [2015] EWCA Civ 1197 and to SSHD v Ullah [2017] EWCA Civ 1069. He summarised the effect of *obiter dicta* in the latter case accurately at [10] of his decision, noting that there was no presumption in favour or against the maintenance of a deportation order after ten years had elapsed. I note that those *dicta* were subsequently held to represent the law in EYF (Turkey) v SSHD [2019] EWCA Civ 592; [2019] Imm AR 1117. In so holding, the Court of Appeal disagreed with what had been said by UTJ Canavan in Smith [2017] UKUT 166 (IAC), which was that a creation in favour of discharging the order came about after ten years had elapsed. Not one of those Court of Appeal decisions suggests that the passage of time is relevant to the assessment of undue harshness, however, and it is notable that neither the word 'unduly' nor the word 'harsh' appears in any of those judgments. Whilst the passage of time and the possible diminution of the public interest in deportation is relevant to the wider Article 8 ECHR assessment, therefore, it cannot be relevant to the assessment of undue harshness and there is nothing in the authorities to suggest that it is.

21. If, as was clearly the case, the judge was required to focus on the position of the appellant's wife when he was considering undue harshness, he was required to take Judge Grubb's comparatively recent assessment of that question as his starting point. There can be no doubt that he failed to do so, as Mr Da Silva was constrained to accept. He failed to conduct any analysis of the basis upon which Judge Grubb had concluded that it would not be unduly harsh for the appellant's wife (and child) to remain in the UK without him, and he failed to consider, critically, whether there had been any change of circumstances. He might well have concluded that their lives had become more difficult in the two years since the Upper Tribunal's judgment and that the point had been reached *because of their circumstances* at which the maintenance of the order was unduly harsh. That was not the basis on which the judge reached his undue harshness conclusion, which rested, instead, on the diminution of the public interest in the order, and not on any change of circumstances which there might or might not have been.

22. It follows that there was a fundamental error of law on the part of the FtT. Having accepted that to be the case, Mr Da Silva nevertheless sought to submit that the error was not material because the judge could only have arrived at one proper conclusion in the event that he had performed his task correctly. I am unable to accept that submission. There are no adequate findings on the current situation faced by the appellant's wife and son and it was clearly contended by the respondent before the FtT that matters were no worse than they had been when Judge Grubb considered the appeal in 2019. It is not possible to assume that the facts permitted of only one proper answer in respect of the undue harshness part of the Tribunal's analysis.

23. The more difficult question, it seems to me, is whether the only proper conclusion which the FtT could have reached was that the maintenance of the order was no longer proportionate in the wider Article 8 ECHR analysis. In that respect, Mr Da Silva is certainly entitled to submit that the public interest in the appellant's deportation is no longer what it was during the decade after he was deported; that he has 'served his time' and that the scales of proportionality must now be held to have tipped in the appellant's favour. I am unable to accept that submission. A necessary component of any such balancing exercise is a conclusion on the question of whether the maintenance of the order is unduly harsh on the appellant's wife. Without a proper assessment of that question, there is no structured foundation on which to consider the wider question posed by Article 8 ECHR. Another necessary component of the Article 8 ECHR assessment is a lawful consideration of the strength of the public interest in the appellant's deportation. That component is also missing from the FtT's analysis. The judge is not at fault in that regard, since he was not directed by either party to the Court of Appeal's decision in EYF (Turkey) v SSHD, in which the proper approach was considered.

24. In the circumstances, I am unable to accept the submission that this appeal fell inevitably to be allowed and that the decision of the FtT should be upheld despite its accepted failings. I therefore set aside the decision in full.

25. Given the absence of relevant findings of fact and given the passage of time since the judge issued his decision in October 2021, the proper course is to remit the appeal to the FtT for rehearing afresh. It is to be hoped that the rehearing can take place comparatively swiftly but that is a matter for the Resident Judge in the FtT.

Notice of Decision

The decision of the FtT involved the making of an error on a point of law and that decision is set aside in full. The appeal is remitted to the FtT for hearing afresh, before a judge other than Judge O'Rourke.

Order Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The appellant and his family members have previously been granted anonymity and that order continues in force.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or his family. Failure to comply with this order could amount to a contempt of court.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 November 2022