IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002262
First-tier Tribunal No:
PA/52528/2021
IA/06461/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

RM
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARMENT

Respondent

Representation:
For the Appellant: Mr N Ahmed, Counsel, instructed by Peer & Co
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer.

Heard at Field House on 6 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. I preserve the anonymity direction previously made in this appeal.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Moan dated 22/12/2021, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 13/06/1981 and is a national of Jamaica. The appellant came to the UK (as a child) with his mother in 1991.

4. On 21/09/2006 a deportation order was made against the appellant, and he was deported to Jamaica on 15/03/2007.

5. In 2007 the appellant used a false passport to return to the UK. He was discovered and sentenced to 15 months custody for using a false document. Whilst in custody he made an asylum claim, which he then withdrew. He then applied for leave to remain on article 8 ECHR grounds. That application was refused, and the appellant was removed to Jamaica on 13/11/2008.

6. The appellant re-entered the UK illegally. He came to the attention of the police in 2019. On 20/07/2019 the appellant lodged a human rights claim as an application for revocation of a deportation order. On 18/05/2021, the respondent refused that application.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Moan ("the Judge") dismissed the appeal against the Respondent's decision.

8. Grounds of appeal were lodged, and on 3 February 2022 Judge Pickering gave permission to appeal stating

> 1. The Judge gave adequate reasons why the section 72 certificate was upheld [para26-31]. The Judge made alternative findings explaining why they did not accept the basis of the appellant's asylum claim [para32-36] which are not challenged. Therefore ground 3 is not arguable.
>
> 2. However, it is arguable in light of Binaku (s.11 TCEA: s.117C NIAA; para 399D)[2021]UKUT 34 (IAC) the Judge appears not to have directed themselves to 117C in the assessment of proportionality as this provides a complete code.

3. Permission to appeal is granted on the remaining grounds.

The Hearing

9. For the appellant, Mr Ahmed moved the grounds of appeal. Mr Ahmed reminded me that there are four grounds of appeal. Permission was not granted for ground 3, and so the asylum decision & the decision in relation to section 72 of the 2002 Act go without challenge.

10. Mr Ahmed told me that the Judge failed to take account of paragraph 391 & 391A of the immigration rules. He told me that, there, the respondent's policy in relation to revocation of deportation orders can be found, and failure to consider those paragraphs of the immigration rules amounts to a material error in the Judge's proportionality assessment of article 8 ECHR grounds of appeal.

11. Moving to the second ground of appeal, Mr Ahmed took me to [46] of the Judge's decision. He reminded me that the offence which led to the deportation order was committed in 2004. He told me that the Judge failed to take account of the 15 years which passed between the date of conviction at the date of the Judge's decision. He told me that such a significant passage of time is a change of circumstances capable of warranting revocation of a deportation order, in terms of paragraph 391A of the rules.

12. Turning to ground of appeal 4, Mr Ahmed adopted the terms of the grounds of appeal and told me that the Judge failed to consider the length of time since the appellant's conviction in 2004, the rehabilitation over the prescribed period of more than 10 years, and the impact on the appellant's partner and children that separation will have. He told me that failure to take account of those factors clearly demonstrates that the Judge's proportionality balancing exercise is flawed.

13. Mr Ahmed asked me to set the Judge's decision aside and remit this case to the First-tier Tribunal to be determined on article 8 ECHR grounds of new.

14. For the respondent, Mr Walker told me that the decision does not contain errors of law material or otherwise. He relied on the respondent's rule24 note dated 24 February 2022. He succinctly summarised the respondent's position by saying that the appellant did not establish either family or private life within the meaning of article 8 of the 1950 convention. The answer to the first of the Razgar questions was therefore "*No*", and no further reasoning was required by the Judge.

15. Mr Walker asked me to dismiss the appeal.

Analysis

16. Between [38] and [44] the Judge considers article 8 ECHR grounds of appeal. At [43] the Judge makes findings about the quality of the relationship between the appellant and his children, between the appellant and his ex-wife, and between the appellant and his partner.

17. Between [38] and [44] the Judge makes findings which can be fairly interpreted as findings that article 8 family life exist. Those findings undermined the logic employed by the respondent in the appeal before me.

18. In Binaku (s.11 TCEA; s.117C NIAA; para. 399D) [2021] UKUT 00034 (IAC) the Upper Tribunal gave the following guidance

> (4) By virtue of section 117A(1) of the 2002 Act, a tribunal is bound to apply the provisions of primary legislation, as set out in sections 117B and 117C, when determining an appeal concerning Article 8.
>
> (5) In cases concerning the deportation of foreign criminals (as defined), it is clear from section 117A(2)(b) of the 2002 Act that the core legislative provisions are those set out in section 117C. It is now well-established that these provisions provide a structured approach to the application of Article 8 which will produce in all cases a final result compatible with protected rights.
>
> (6) It is the structured approach set out in section 117C of the 2002 Act which governs the task to be undertaken by the tribunal, not the provisions of the Rules.
>
> (7) A foreign criminal who has re-entered the United Kingdom in breach of an extant deportation order is subject to the same deportation regime as those who have yet to be removed or who have been removed and are seeking a revocation of a deportation order from abroad. The phrases “cases concerning the deportation of foreign criminals” in section 117A(2) and “a decision to deport a foreign criminal” in section 117C(7) are to be interpreted accordingly.
>
> (8) Paragraph 399D of the Rules has no relevance to the application of the statutory criteria set out in section 117C(4), (5) and (6);
>
> (9) It follows that the structured approach to be undertaken by a tribunal considering an Article 8 appeal in the context of deportation begins and ends with Part 5A of the 2002 Act.

19. What is missing from the Judge’s decision is the structured approach found in section 117C of the 2002 Act.

20. Section 117C of the 2002 Act says

> 117CArticle 8: additional considerations in cases involving foreign criminals

(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.

21. The Judge makes no reference to section 117C of the 2002 Act, and a fair reading of the decision makes it clear that the Judge does not consider whether or not removal would have unduly harsh consequences for the appellant's partner & children. The Judge does not consider whether there are exceptional circumstances over and above those described in exceptions 1 and 2 (of s117C).

22. Failure to consider section 117C of the 2002 Act is a material error of law.

23. Because there is a material error of law in the Judge's article 8 ECHR assessment, I set the decision in the article 8 ECHR appeal aside.

24. For the avoidance of doubt, there is no appeal before me directed at the Judge's decision on the appellant's protection appeal. The Judge's decision to

dismiss the appellant's appeal on asylum, humanitarian protection, and article 2 & 3 ECHR grounds stands.

Remittal to First-Tier Tribunal

25. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

26. I have determined that the case should be remitted because a new fact-finding exercise on article 8 ECHR grounds only is required. None of the findings of fact relating to article 8 ECHR grounds of appeal are to stand and a complete re hearing is necessary.

27. I remit the matter to the First-tier Tribunal sitting at Birmingham to be heard before any First-tier Judge other than Judge Moan.

Decision

The decision of the First-tier Tribunal is tainted by a material error of law.

The Judge's decision on article 8 ECHR grounds dated on 22 December 2021 is set aside.

The appeal is remitted to the First-tier Tribunal to be determined on article 8 ECHR grounds only of new.

Signed Paul Doyle Date 6 September 2023
Deputy Upper Tribunal Judge Doyle