Neutral Citation Number: [2020] EWCA Civ 858

Case No: C9/2019/2337

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
The Hon Mr Justice Morris and
Deputy Upper Tribunal Judge Chamberlain
(Appeal Number: DA/00253/2015)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2020

Before :

LORD JUSTICE FULFORD
(Vice President of the Court of Appeal, Criminal Division)
LADY JUSTICE NICOLA DAVIES
and
SIR STEPHEN RICHARDS

- -

Between :

A	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

David Jones and **Tim Baldwin** (instructed by **Irving & Co**) for the **Appellant**
David Blundell QC and **Will Hays** (instructed by the **Government Legal Department**) for the **Respondent**

Hearing dates : 9-10 June 2020

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Approved Open Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10am on Thursday 9 July 2020.

Sir Stephen Richards :

1. On 16 June 2015 the Secretary of State for the Home Department decided to make a deportation order against the appellant ("A"). A appealed successfully to the First-tier Tribunal ("the FTT") against that decision. On a further appeal by the Secretary of State, however, the Upper Tribunal ("the UT") set aside the FTT's decision and subsequently re-made it, deciding on this occasion in favour of the Secretary of State and dismissing A's original appeal against the decision to deport him. A now appeals to this court against the UT's decision on the re-making of the FTT decision. The setting aside of the FTT's decision itself is not challenged.

2. In the course of the re-making procedure, after the conclusion of the main oral hearing, the UT had its attention drawn to further, confidential matters. In the event the matters raised prior to that stage were addressed in an open decision ("the Main Decision") whilst the confidential matters were the subject of a closed decision ("the Confidential Decision"). Since the grounds of appeal to this court relate both to the Main Decision and to the Confidential Decision, it was necessary for the hearing of the appeal before us to be in private. This open judgment deals with the issues raised in the appeal so far as that can be done without harm to the public interest in the protection of confidentiality. The remaining matters are the subject of a separate closed judgment. An anonymity order also applies to the proceedings.

Background

3. A is a foreign national but is the spouse of an EEA national resident in the United Kingdom and at the material time had acquired a permanent right of residence in the United Kingdom pursuant to regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). By regulations 19(3) and 21(3) of the 2006 Regulations, a decision to remove such a person from the United Kingdom may not be taken except on "serious grounds of public policy or public security". Where a decision is taken on grounds of public policy or public security it must be taken in accordance with the principles set out in regulation 21(5), which include that (a) the decision must comply with the principle of proportionality, (b) it must be based exclusively on the personal conduct of the person concerned, and (c) such personal conduct "must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". (The 2006 Regulations have since been revoked and replaced by the Immigration (European Economic Area) Regulations 2016.)

4. The Secretary of State took the decision to deport A on the ground that he was the head of an Organised Crime Group ("the A OCG" or "the OCG") and that his removal would be in accordance with the relevant provisions of the 2006 Regulations.

5. The UT stated that the issue on the appeal before it was "whether the Appellant is the head of the A OCG or was in the past the head of the A OCG and has the ability to revive the OCG", which involved two questions: "(1) whether the OCG continued to exist at the relevant time and (2) the Appellant's involvement in the OCG" (Main Decision §10).

6. The UT made an express finding, and it was accepted by A, that the OCG existed in the past, at least up to and including 2014 (Main Decision §§24 and 76(1)). The UT

considered that it was not necessary to make a clear finding one way or the other as to whether the OCG still existed at the time of the decision to deport or at the time of the FTT or UT decision: it was sufficient that the A had, as he was found to have, the ability to revive the OCG (Main Decision §§23-24 and 76(3)).

7. As to A's involvement in the OCG, the UT considered various strands of evidence set out in its Main Decision. Based on its findings, taken together and cumulatively, in relation to those matters, it concluded that A was the head of the OCG (Main Decision §§76(2) and 77-78).

8. The UT concluded that "the Appellant's position as head of the OCG represents a genuine, present and sufficiently serious threat to the requirements of public policy or public security within the meaning of Regulation 19(3) and 21(3)" (Main Decision §79): as indicated above, the requirement of a "genuine, present and sufficiently serious threat" is in fact contained in regulation 21(5), with which regulation 21(3) must be read.

9. The material considered in the Confidential Decision did not, in the UT's view, undermine the findings in the Main Decision. On the basis of all the material before it, and for reasons given in the Confidential Decision, the UT went on to reach its ultimate conclusion (summarised at Main Decision §80) that A's removal was justified and proportionate and that A's appeal against the deportation decision should be dismissed.

10. Before this court there are three grounds of appeal against the UT's decision:

    (1) Ground 1 relates exclusively to issues of procedural fairness in respect of confidential matters and is discussed in the closed judgment alone.

    (2) Ground 2 contends that the UT's approach to the question whether A was the head of the OCG was flawed and that its conclusion on that issue was irrational. The arguments relate mainly to the UT's analysis in the Main Decision and to that extent can be considered in this open judgment.

    (3) Ground 3 contends that the UT erred in concluding that the requirements of regulation 21(5) of the 2006 Regulations were satisfied on the basis of a limited finding that A had the "ability" to revive the OCG. The issue arises out of the Main Decision and can be considered in this open judgment.

11. In the event, for reasons given in the closed judgment, the appeal succeeds on ground 1 and the case will in consequence be remitted to the UT for re-hearing. Counsel were agreed that if the appeal succeeded on that ground, it would be unnecessary to give separate consideration to grounds 2 and 3. For completeness, however, and because they provide further background to the issues considered in the closed judgment, I propose to deal with them briefly here – far more briefly than if they had still been live issues.

12. For that purpose I need first to summarise the UT's relevant reasoning in the Main Decision.

The reasoning in the Main Decision

13. On its approach to the re-making the UT said this:

> "12. We have before us the documentary evidence that was before the FTT. We have not heard further oral evidence. With one exception … the evidence before us is the same as the evidence that was before the FTT ….
>
> 13. It is common ground that whilst we are not bound by the findings of fact made by the FTT, where, as here, the FTT has heard the oral evidence and reached conclusions, we can and should accept those findings, unless there is good reason not to do so ….
>
> 14. In general our approach on this re-making is, in principle and ultimately, to make our own findings. Nevertheless we will adopt the FTT's findings – particularly findings of primary fact – unless there is good reason not to do so. Of course, since we have already concluded that the FTT erred in law in certain important respects, and in particular in relation to its ultimate findings of fact, we make our own findings, both on those matters, and in relation to matters relevant to those findings."

14. After summarising the parties' submissions and relevant legal principles, the UT moved to its discussion and analysis. First, it found that the OCG existed in the past, at least up to and including 2014 (§§24 and 76(1)). I need say nothing further about that.

15. The second and principal part of the discussion related to A's involvement in the OCG. It examined (at §§25-75) a number of strands of evidence that had been set out in greater detail in the FTT's decision. The UT's ultimate finding that A was the head of the OCG (§76(2)) was based on its findings, taken together and cumulatively, in relation to nine of those matters (§77) and was considered to be consistent with two further matters (§78). Those various matters were in summary as follows:

    (1) In a recorded conversation in January 2014, A and B discussed the possibility of a listening device having been installed in B's car. This was said to be highly significant: "[w]hilst this may not be direct and clear evidence of the Appellant operating as the head of an OCG, the fact that they were discussing such a listening device, and that that came as no surprise to them, are further facts which are consistent with, and supportive of, such a conclusion" (§25).

    (2) At a meeting with D in January 2014, in the presence of B and others, A gave D a "severe roasting" and showed that he had given instructions to others not to harm D. In the UT's view, "[t]his is supportive of the conclusion that the Appellant was a man with considerable power over others and, whilst not of itself conclusive as to his position, is consistent with him being the head of the OCG and exercising his power as such over D" (§29).

(3) There was evidence that A was seeking to trace D and find a way to "encounter him" after D had fled in March 2014. The UT said that "[t]he steps taken to trace D, in the context of the extreme verbal intimidation and the enlisting of the support of unsavoury characters, including B … supports a finding that the Appellant was a man with very substantial power, and is consistent with him acting as the head of the OCG" (§30).

(4) In a recorded conversation with B in February 2014, A's sister-in-law referred without distinction to the activities of A and of AB3, who had been heavily involved in organised crime and was the head of the OCG before his arrest for offences for which he was then serving a long sentence of imprisonment. The UT said that it was to be inferred that the sister-in-law believed that A had been involved in criminal activities of the same kind as AB3 and that those were connected with organised crime and the OCG and that they arose from his position as head of the OCG; and that "[t]his is a further finding which, taken with others, is supportive of the conclusion that the Appellant was at the time, after AB3 had been imprisoned, the head of the OCG" (§32).

(5) In relation to a recorded conversation between B and E in February 2014, the UT found that the conversation demonstrated that A and B were united in an enterprise of some description, that B's description of A demonstrated that A was a superior to B, that A and AB1 (who had been the head of the OCG) were being discussed in one and the same context of a power struggle, and that A had no answer to the significance of the conversation. It was clear evidence supporting a link between A and the OCG. The UT said that "this finding provides the strongest support that the Appellant was head of the OCG" (§37).

(6) There was a recorded conversation between A and B in February 2014 in which A said he had managed to distance himself from "centralisation". The UT found that "it is more likely than not that in this conversation, the Appellant was explaining his approach to running an organisation, how he directed others and that amongst those others he was directing was B and how, in line with that likely approach, he distanced himself to avoid detection" (§40).

(7) In a recorded conversation between B and C in March 2014 the two men appeared to be talking about the remuneration they received from someone called "Abi". The UT found that on the balance of probabilities they were talking about A and referring to him as 'Abi', and that the conversation "provides further support for the existence of an 'organisation' and … one in which the Appellant is high in the hierarchy" (§44). In a second recorded conversation in March 2014 between B and C, B talked about a previous conversation between himself and D in terms which the UT found to be clear evidence of B taking instruction from Abi and acknowledging that Abi was his superior; and the reference to Abi was again found on the balance of probabilities to be a reference to A. Accordingly, this was found to be "evidence of the Appellant being superior to B in the hierarchy" (§48-49).

(8) There were two recorded conversations between B and A in May 2014, in B's armoured car, in which B passed on news to A of a shooting at Z Road. The UT found that the proper interpretation of the conversations was that A gave B

permission for retaliatory action to be taken against those involved. The fact that it was permission, and not an order, to retaliate did not of itself indicate that A could not have been acting as head of an OCG. Further, the entirety of the conversations and their context established that A was familiar with weapons and with people who carry weapons and was giving advice about what should be done with weapons. The passing on of information to him was deliberate. That this was done in the circumstances "is evidence supporting the Appellant's position as the head of an OCG" (§55).

(9) In its conclusion on A's relationship with B, the UT referred to detailed factual findings of the FTT as strong evidence that not only did B act subserviently to A in a troubling and close relationship with him, but further that B was indeed A's subordinate within an OCG. Those findings called for a response but A had not put forward any alternative explanation for his close association and involvement with B. "We find that B, a violent career criminal and drug dealer, was the Appellant's subordinate. This supports the conclusion that the Appellant was head of the OCG" (§73).

(10) The UT was not satisfied on the balance of probabilities that A had hidden his wealth, though it said that his lack of transparency on the issue and his inability to explain things did provide some limited support for the Secretary of State's case (§63). In its conclusions, however, it said that this matter did not provide direct evidence that A was head of the OCG but was "consistent with" such a finding (§78).

(11) Prison visits to A when he was on remand in custody were found to be further evidence of A having close associations with a substantial number of people with criminal records, some of whom had been in involved in very serious crime. Whilst this was not of itself conclusive evidence of the Appellant's position as head of the OCG, the UT said that "it is entirely consistent with the other strands of evidence which support that conclusion" (§75).

16. In addition to finding that the OCG had existed in the past and that A was head of the OCG, the UT made this further finding: "Even if the OCG is no longer operative (or was not operative at the time of the decision to deport) the Appellant had, as at the time of the deportation decision, and continues to have, the capacity to revive the A OCG. There is no evidence to suggest to the contrary" (§76(3)). To the same effect, the UT had found at §§23-24 that A had the "ability" or "capability" to revive the OCG.

17. On that basis the UT concluded that "the Appellant's position as head of the OCG represents a genuine, present and sufficiently serious threat to the requirements of public policy or public security" (§79).

Ground 2

18. Ground 2 is a challenge to the UT's conclusion that A was the head of the OCG. Mr Jones submitted, by reference to *Bah v Secretary of State for the Home Department* [2012] UKUT 196 (IAC) and *Farquharson v Secretary of State for the Home Department* [2013] UKUT 146 (IAC) that a particularly stringent approach is required

to the assessment of evidence in a case of this kind. He placed particular emphasis on what was said in *Farquharson* at §27:

> "We are astute to the need to avoid speculation. If the material renders itself capable of more than one interpretation we should only draw one adverse to the appellant if on the balance of probabilities there is no other reasonable explanation on the material before us".

Mr Jones reminded us more generally of what are now well established principles concerning the application of the civil standard of proof on the balance of probabilities. He submitted that the UT in this case failed to apply a sufficiently rigorous approach. It engaged in impermissible speculation and made findings adverse to A where another reasonable explanation was available. In elaborate submissions, Mr Jones made numerous specific criticisms of the individual strands in the UT's reasoning and advanced a number of considerations that in his submission the UT failed to factor into its overall assessment. He submitted in summary that the UT erred in its approach to the evidence, failed to have regard to relevant considerations and reached a conclusion that was not reasonably open to it.

19. In response, Mr Blundell submitted on behalf of the Secretary of State that A's detailed submissions dissolved ultimately into a dispute about the weighing of the evidence, which was quintessentially for the UT as fact-finder, and that the conclusion reached by the UT was rationally open to it. The conclusion was based on circumstantial evidence. Applying the rope analogy in *R v Exall* (1866) 176 ER 850 at 853, the strands in the rope were mutually supportive and A had failed to show that the rope was frayed.

20. In the circumstances I do not propose to embark upon a detailed discussion of Mr Jones's criticisms of the UT's reasoning. It suffices to say that I have considered all the matters raised but have concluded that the UT did not err in any of the respects contended for by him. This was a classic exercise in the evaluation of circumstantial evidence, in which the UT examined the various strands of evidence, assessed whether and to what extent each strand was supportive of or consistent with the proposition that A was the head of the OCG, and found that in the aggregate they warranted the conclusion that A was indeed, on the balance of probabilities, the head of the OCG. The UT did not engage in impermissible speculation or make adverse findings when on the balance of probabilities an alternative explanation was possible. Nor did it fail to take relevant considerations into account. The conclusion it reached was one reasonably open to it on the evidence before it. I would therefore dismiss ground 2 of the appeal.

Ground 3

21. A's case on ground 3 starts from the proposition that to satisfy regulation 21(3) and (5) there must be a sufficiently serious *present* threat to public policy or public security, which in general requires a finding of *propensity* to act in a way that amounts to such a threat: see *R v Bouchereau* [1978] 1 QB 732 at §§28-30; see also *Straszewski v Secretary of State for the Home Department* [2015] EWCA Civ 1245, [2016] 1 WLR 1173, §25. In an exceptional case past conduct alone may be sufficient for the purpose, but in this case the UT made clear it was not founding its

decision on past conduct alone. It relied on its finding that A had the "ability" to revive the OCG. Mr Jones submitted that that was an insufficient basis on which to find the requisite present threat: it was necessary to establish not just an ability but also a propensity to revive the OCG, and there were many reasons why A should have been found not to have such a propensity.

22. Mr Jones's argument founders on a concession clearly made on A's behalf before the UT. It was recorded in these terms at §23 of the Main Decision:

> "As Mr O'Callaghan [counsel appearing at the relevant time for A] accepted in argument, the issue for us is the question of 'risk' to public policy and public security at the time that we re-make the decision and that risk will be present, not only if the Appellant is head of the OCG as it exists, but also if he has the ability to revive it."

23. It is plain that the UT's approach to the issue of present threat was conditioned by the concession. It explains why the UT found it unnecessary to make a clear finding one way or the other as to whether the OCG still existed, and why it considered it sufficient to find that the OCG existed in the past and that A had the ability to revive it. In any event, in the light of the concession, those findings were dispositive of the issue of present threat. The UT cannot be said to have erred in law by proceeding on that basis. Accordingly, there is in my view no substance to ground 3 of the appeal.

Conclusion

24. I would dismiss grounds 2 and 3 but, for reasons given in the closed judgment, I would allow the appeal under ground 1 and would remit the case for re-hearing by a differently constituted panel of the UT.

Lady Justice Nicola Davies :

25. I agree.

Lord Justice Fulford :

26. I also agree.