Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00599/2014

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 7 October 2014	**On 16 October 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AAM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr G Hodgetts instructed by South West Law

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge A Cresswell and Mr M E Olszewski JP) allowing AAM's appeal against the Secretary of State's decision on 19 March 2014 that s.32(5) of the UK Borders Act 2007 applied and that AAM was subject to automatic deportation under the 2007 Act. The First-tier Tribunal allowed the appeal under Article 8 of the ECHR but dismissed the appeal on humanitarian protection grounds and under the Immigration Rules.

3. For convenience, although this appeal is brought by the Secretary of State, I will for convenience refer to the parties as they appeared before the First-tier Tribunal.

Background

4. The appellant is a citizen of Somalia who was born on 15 June 1977. He left Somalia in June 2008. He travelled to Ethiopia where he remained until August 2009 when he travelled to Holland via Turkey. He remained in Holland for approximately 3 months before travelling to Germany from which he travelled to the UK.

5. On 3 February 2010, the appellant pleaded guilty at Manchester Crown Court to the offence of knowing possession of false identity documents with intent and was sentenced to 12 months' imprisonment. On 23 April 2013, the Secretary of State wrote to the appellant inviting him to put forward any claim that he was not subject to deportation under the automatic deportation provisions in the UK Borders Act 2007 as a foreign criminal. In response, the appellant claimed asylum and relied upon his human rights. As regards the former, he claimed that he was at risk on return to Somalia from Al Shabaab. As regards the latter, the appellant relied upon the fact that his former wife was in the UK with their son MAAM who was 13 years of age. The appellant's ex-wife had been granted refugee status in the UK previously.

6. In her decision letters dated 12 February 2014 and 19 March 2014 the Secretary of State rejected the appellant's claim to asylum, humanitarian protection and under Article 3 of the ECHR and his claim based upon his relationship with his son under the Immigration Rules and Article 8 of the ECHR.

7. The appellant appealed to the First-tier Tribunal. The Tribunal dismissed the appellant's appeal based upon any risk to him on return to Somalia. In addition, the Tribunal concluded that the appellant could not meet the requirements of paras 399 and 399A of the Rules based upon his "parental relationship" with his son , who is a British citizen, in the UK or under the Rules based on his private life in the UK. However, the Tribunal allowed the appellant's appeal under Article 8 of the ECHR on the basis that his removal would be a disproportionate interference with his family and private life in the UK, in particular his relationship with his son aged 13.

8. The Secretary of State sought permission to appeal to the Upper Tribunal on a number of grounds which challenged the decision to allow the appeal under Art 8.

On 25 July 2014, the First-tier Tribunal (Judge Fisher) granted the Secretary of State permission to appeal. Thus, the appeal came before me.

The Secretary of State's Grounds

9. Mr Richards, on behalf of the Secretary of State adopted the grounds of appeal. The Secretary of State argues that the First-tier Tribunal erred in law in the following respects.

10. First, the Tribunal failed to identify why the appellant's circumstances were "exceptional" given that he could not meet the requirements of the Immigration Rules, in particular para 399. There are no factors which set the appellant's claim apart from "an ordinary family life claim". There was no evidence that the appellant's child could not be cared for by his mother and no reason why the appellant could not return to Somalia and maintain contact with his son in this country.

11. Secondly, the Tribunal erred in law when carrying out the proportionality assessment under Article 8. It took into account 'Exception 2' in s.117C of the Immigration Act 2014 which was not in force at the date of the Tribunal's decision. In relation to s.117C there was no evidence that it would be "unduly harsh" on the appellant's son if the appellant were deported. Further, the Tribunal had failed to give adequate consideration to the public interest in favour of the appellant's deportation having regard to any risk of reoffending, society's revulsion at the commission of serious crime and the deterrence of foreign criminals from committing such crimes. Even if there was no risk of the appellant reoffending, the remaining facets of the public interest had not been adequately taken into account.

12. In addition, Mr Richards supplemented this latter argument by submitting that the Tribunal had only considered the legitimate aim of "fair immigration control" when a wider public interest including the need for "national security" given the nature of the appellant's offending was engaged.

The Appellant's Submissions

13. On behalf of the appellant, Mr Hodgetts adopted his detailed Rule 24 reply. In essence, he argued that the Tribunal had identified a number of features of the appellant's case which were "exceptional". The Tribunal had correctly directed itself on the proper approach to the balancing exercise including taking into account all facets of the public interest including national security. Finally, he submitted that the Tribunal, especially at paragraph 46, had undertaken a fair and balanced assessment of the factors weighing in favour of deportation against those weighing against it and had reached a conclusion, namely that the appellant's deportation would be disproportionate, which was not irrational. Indeed, Mr Hodgetts pointed out that it was not suggested in the grounds directly that the decision was irrational.

Discussion

14. The determination of the First-tier Tribunal is very detailed running to some 49 paragraphs over 26 pages.

15. For the following reasons I reject the Secretary of State's submissions that the First-tier Tribunal erred in law in allowing the appellant's appeal under Article 8.

16. First, in paragraph 28 the Tribunal accepted that the appellant could not meet the requirements of the relevant Immigration Rules dealing with deportation in paras 399 and 399A. Although the Tribunal accepted that the appellant had a "genuine and subsisting relationship" with his son in the UK who is under 18 and a British citizen, he was looked after by his mother and therefore the requirement in para 399(b) was not satisfied, namely that "there is no other family member who is able to care for the child in the UK". His mother, I should add, having initially been recognised as a refugee was by the time of the appeal a British citizen. In paragraph 28, the Tribunal then went on to correctly address the relevant issue that:

> "[t]here is in this case a clear need to consider whether there are exceptional circumstances such that the public interest in deportation could be outweighed by other factors." (my emphasis)

17. That reflects the requirement in paragraph 398(b) that where an individual has been sentenced to at least 12 months (the appellant had been sentenced to 12 months' imprisonment), and where paragraphs 399 or 399A do not apply, "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".

18. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal recognised that the requirement of "exceptional circumstances" in para 399 entailed as part of a "complete code":

> "the balancing exercise [involved in] the application of a proportionality test as required by the Strasbourg jurisprudence." (at [44]).

19. In Haleemudeen v SSHD [2014] EWCA Civ 558, Beatson LJ at [47] noted that:

> "I do not consider that it is necessary to use the term 'exceptional' or 'compelling' to describe the circumstances, and it will suffice if that can be said to be the substance of the Tribunal's decision."

20. Consequently, I reject the submission that the First-tier Tribunal did not properly direct itself, in a case where the appellant could not meet the requirements of the Immigration Rules, and correctly searched for "exceptional circumstances".

21. At paras 29-38 and 40 the Tribunal set out the relevant case law including Razgar [2004] UKHL 27, EB (Kosovo) [2008] UKHL 41 and Huang [2007] 2WLR 581 together with the leading Strasbourg case law including Üner v Switzerland (2007) 45 EHRR 14. The Tribunal clearly had well in mind the proper approach in applying Article 8 and, in particular, in determining proportionality in a deportation case.

22. Secondly, I accept Mr Hodgetts' submission that the Tribunal did identify a number of features of the appellant's case which amounted to "exceptional circumstances" so as to make the appellant's deportation disproportionate.

23. First, at para 21(xi) the Tribunal found (and this is not challenged) that there existed family life between the appellant and his son. This family life had been re-established in the UK when the appellant came and joined his family here. The Tribunal went on to recognise:

> "it is not difficult to imagine the feelings of a 14-year old boy in re-finding his father at the age of 10 nor to imagine his feelings if his father was then required to leave the UK. [M] is British and cannot be expected to leave the UK (even if his mother was willing for that to happen, which appears most unlikely)."

The Tribunal also noted in para 21(xi) that the appellant had family life with his mother in the UK as a result of him returning effectively to live with her because of his depressive state.

24. At paragraph 44, the Tribunal assessed the best interests of the appellant's son and concluded that it was in his interests for him to be brought up by both parents even if he spent most of his time with his mother but having regular contact with the appellant. The Tribunal continued:

> "The only real choice offered by the respondent in facing the appellant is to go to Somalia, effectively breaking the relationship with his young British son forever. Just when the child has achieved a settled life while the respondent delayed making a decision, the child will be placed in a situation worse than before the appellant came to the UK, with his father snatched away from him when he had built bonds. The child is British, so can expect to enjoy the benefits of a British education and access to the NHS. It would not be reasonable (or practicable) to expect him to go to Somalia for any number of obvious reasons."

25. Second, at paragraph 28 the Tribunal recognised that the appellant's deportation would result in the family life being "effectively fractured".

26. Third, at paragraph 28 the Tribunal also recognised:

> "The fact that the Rules do not cater for the return to a place of considerable disorder of a person being treated for a stress illness."

27. The Tribunal also made reference to the appellant returning to a "very stressful environment" and that he was being treated for a "depressive disorder" at para 46 of its determination.

28. It is clear to me that the Tribunal did identify factors which led it to conclude that there were "exceptional circumstances" and that the appellant's deportation was disproportionate. I therefore reject the Secretary of State's argument in the grounds that the Tribunal failed to identify any exceptional circumstances or factors which "set it apart from an ordinary family life claim". The Tribunal did identify such factors in my judgement.

29. Thirdly, in assessing proportionality it is clear on any reading of the Tribunal's determination that it fully took into account the public interest reflected in the appellant's criminality.

30. Whilst Mr Richards was right to point out that in certain passages in the determination at (paras 32 and 45) the Tribunal refers to the "need to maintain firm yet fair immigration control", those references have to be seen in the context of the Tribunal's copious reference to the wider public interest in deportation cases. At paragraph 42, the Tribunal set out the guidance of the Court of Appeal in OH (Serbia) v SSHD [2008] EWCA Civ 694 and N (Kenya) v SSHD [2004] EWCA Civ 1094 setting out the three facets of the public interest, namely the risk of reoffending, deterrence of foreign criminals from committing serious crimes and deportation being an expression of society's revulsion at serious crimes. The importance of the respondent's view as to the public interest is also referred to by the Tribunal. At paragraph 29 the Tribunal set out the Upper Tribunal's guidance concerning the public interest from Masih (Deportation – Public Interest – Basic Principles) Pakistan [2012] UKUT 00046 (IAC). At paragraphs 109 and 41 respectively the Tribunal set out at length the correct approach to the issue of proportionality in deportation cases set out in the decisions in the Court of Appeal of RU (Bangladesh) v SSHD [2011] EWCA Civ 651 and SS (Nigeria) v SSHD [2013] EWCA Civ 550 and, in particular, in regard to the latter decision that the pressing nature of the public interest as a result of Parliament's expressed declaration that the public interest is injured if a criminal's deportation is not effective meant that only a "very strong claim indeed" would justify finding that Article 8 of the ECHR was breached.

31. Also, contrary to Mr Richards' submission, the Tribunal plainly referred to, and took into account (at para 25), in assessing the seriousness of the appellant's offending the 'public security' aspects of offences involving using false IDs in the "heightened security situation" in which we now live.

32. In short, therefore, there is simply no substance in the argument that the First-tier Tribunal did not fully take into account the public interest in the deportation of foreign criminals. The Tribunal expressly took the facets of the public interest recognised in the case law into account and found that there was no risk of the appellant further offending; a finding which is not challenged in the grounds.

33. Equally, I reject any argument that the Tribunal failed properly to carry out the balancing exercise required in assessing proportionality. As I have already stated, the public interest was demonstrably taken into account by the Tribunal. The lengthy determination of the Tribunal sets out a number of findings as the determination develops including the impact upon the appellant's son of the appellant's deportation, the existence of family life between the appellant and his son and with the appellant's mother. The Tribunal also found, as I have already noted, that the appellant's continued presence in the UK to maintain regular contact was in the best interests of his son and that it would not be reasonable, given that he is a British citizen with a British citizen mother to expect him to go to Somalia. The

culmination of the Tribunal's assessment or proportionality is in paragraph 46 of its determination as follows:

> "We find that this is an Appellant who came to the UK without any hope of staying, who has obtained benefits from his stay whilst building his family and private life, but who has built that family and private list in the knowledge that there was a real likelihood he would not to be able to remain. The delay in the Respondent's decision making has enabled the Appellant to cement his family life with his son and mother and his private life with his sister **(EB Kosovo)**). The Respondent took a rather curious approach here because the Appellant made an application for asylum at the time of his arrival in the UK and yet that claim was not resolved for a number of years and then resulted in a decision to deport. He has committed a serious offence and has presented a dishonest asylum claim. He would be returning to a country whose culture he was familiar with and, in every likelihood, to family, given our findings. On the other side of the balance, he has re-developed his relationship with his young son, who would clearly be devastated by his removal. His offence was serious, but not at the upper level of offending and there has been no offending other than by the single offence of presenting the travel document on arrival. He is being treated for a depressive disorder and would be returning to a very stressful environment. His opportunities for keeping in touch with his UK family would be very limited given the current circumstances in Somalia. His mother would lose her son and carer and probably see him for the last time on his departure as the chances of his securing re-entry would be slim and delayed as a result of deportation. We also bear in mind the Respondent's current stated policy as evidenced by the Immigration Act 2013. Section 19 of that Act amends the Nationality, Immigration and Asylum Act 2002, with the broad effect that this Appellant would appear to benefit from Exception 2 in new Section 117C of the 2002 Act by reason of his relationship with his son. We do find when we balance all of the relevant factors that the refusal of leave to remain prejudices the family and private life of the Appellant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8."

34. In my judgement, that is a balanced and fair assessment (albeit in summary form) of the competing public interest factors against the personal circumstances of the appellant and his son.

35. I do not accept Mr Richards' submission that the Tribunal's reference to s.117C of the 2002 Act, because it was not in force at the relevant time, results in the Tribunal's decision being flawed. That provision applies to a foreign criminal sentenced to a term of imprisonment of less that 4 years (see s.117C(3)) and states that :

> The public interest requires [the individual's] deportation unless Exception 1 or Exception 2 applies."

36. Exception 2 is set out in s.117C(5) as follows:

> "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."

37. I accept Mr Hodgetts' submission that the First-tier Tribunal was required to take into account the impact upon the appellant's son. As I have already indicated, the

Tribunal considered that the Appellant's deportation would have a significant effect upon the appellant's son if his father were "snatched away from him when he had built bonds" and that the appellant's deportation would "effectively fracture[]" the family life of the appellant and his son. In my judgement, the reference to Exception 2 in para 46 of the Tribunal's determination is no more than a recognition that the appellant's deportation would have "unduly harsh" consequences. That the Tribunal has made that finding by reference to s.117C(5) of the 2002 Act does not amount to an error of law. It was merely stating its conclusion on the evidence by reference to this provision and thereby taking into account a relevant and significant factor in assessing proportionality and whether there were "exceptional" or "compelling circumstances" which produced an unjustifiably harsh consequence so as to justify the grant of leave outside the Immigration Rules under Article 8.

38. As Mr Hodgetts submitted, neither the Secretary of State's grounds nor Mr Richards' submissions directly asserted that the Tribunal's finding that the appellant's deportation was disproportionate is an irrational finding. In my judgement, it clearly is not. The Tribunal was, in my judgment, entitled to conclude that the public interest was outweighed by the impact of the appellant's deportation, in particular upon his son and their relationship. In may well be that the Tribunal's ultimate finding was not necessarily a finding that every Tribunal would make. However, as Carnwath LJ (as he then was) pointed out in Mukarkar v SSHD [2006] EWCA Civ 1045 at [40]:

> "The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law…."

39. In my judgment, the Tribunal fully took into account the public interest and identified features of the appellant's case which justified its finding that there were "exceptional circumstances" such that the appellant's deportation would be disproportionate.

40. For these reasons, the First-tier Tribunal did not err in law in allowing the appellant's appeal under Article 8 of the ECHR.

Decision

41. The First-tier Tribunal's decision to allow the appellant's appeal under Art 8 did not involve the making of an error of law. Its decision stands.

42. The Secretary of State's appeal to the Upper Tribunal is, accordingly, dismissed.

Signed

A Grubb
Judge of the Upper Tribunal
Date: