



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01512/2013

THE IMMIGRATION ACTS

**Heard at North Shields
on 8th September 2014**

**Determination
Promulgated
On 9th September 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RMB

(Anonymity order in force)

Respondent

Representation:

For the Appellant: Mr Kingham - Senior Home Office Presenting Officer.
For the Respondent: Ms Soltani agent for Freemans Solicitors.

DETERMINATION AND REASONS

1. On 14 July 2014, following a hearing at North Shields, the determination of a panel of the First-tier Tribunal (the Panel) was set aside and directions given for the rehearing of RMB's appeal against the order for his deportation from the United Kingdom. There are a number of preserved findings including the factual findings regarding RMB's immigration history, offending behaviour, family and private life, and the best interests of the children. The scope of this hearing is limited to considering whether unjustifiably harsh consequences will

arise if RMB is removed from the United Kingdom in accordance with the deportation order on the basis of an alleged breach of human rights.

2. The Panel found that RMB is unable to satisfy any of the 'Article 8 exceptions to deportation' outlined in paragraphs 399 and 399A of the Immigration Rules. They also note there is no evidence to show that RMB has ever had leave to remain in the United Kingdom.
3. In relation to assessing the best interests of the two minor children S, born in September 2007, and J, born in April 2011, the Panel noted that the Secretary of State accepted that it is likely to be in the best interests of the children to remain in the care of their respective mothers and that the children are British citizens. The Panel find that the evidence relating to RMB's relationship with the two children he has with SL is much stronger than his relationship to the other children he has fathered in the United Kingdom. It was noted that while RMB may have regular contact with his older children and has established a parental relationship with them before he went to prison; he has never lived together with those children in a family unit. It was also noted that the two younger children are unlikely to have much contact with their father because they were both born in 2011 either shortly before or after he had been imprisoned.
4. The Panel note, however, evidence of SL (the mother of S and J) living with RMB's mother since he went to prison and the existence of ongoing family ties despite the fact the relationship between RMB and SL was found to be 'on and off'. There is evidence that RMB has maintained indirect contact with the family whilst he was in prison. The Panel concluded that it was in the best interests of the children to have an ongoing relationship with their father and in view of the fact the children are still very young, that distant communication from Dominica would be an inadequate for the parental relationship to continue as a result of which they conclude it will be in the children's best interests for RMB to remain in the UK.
5. RMB is the subject of a deportation order as a result of his criminal offending details of which are set out in the PNC printout in the Secretary of States bundle. The reference in that document to a charge of conspiracy to commit GBH in April 2012 is said not to relate to RMB as he was in prison at that time. This postdates the index offence upon which the deportation decision is based and in light of the lack of adequate information in relation to the same it shall not be factored into the considerations any further.

The law

6. Since the error of law hearing the provisions of the Immigration Act 2014 relating to Article 8 ECHR assessments has been brought into

force by the relevant commencement order and it is accepted by both advocates that these provisions must now be taken into account by this Tribunal. Section 19 of the 2014 Act inserts a new Part 5A into the Nationality, Immigration and Asylum Act 2002 setting out the manner in which public interest considerations are to be assessed when undertaking an Article 8 ECHR assessment, as follows:

7. Section 117 provides:

19 Article 8 of the ECHR: public interest considerations

After Part 5 of the Nationality, Immigration and Asylum Act 2002 insert—

“PART 5A Article 8 of the ECHR: public interest considerations

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person’s right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b)are better able to integrate into society.

(3)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a)are not a burden on taxpayers, and

(b)are better able to integrate into society.

(4)Little weight should be given to—

(a)a private life, or

(b)a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5)Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6)In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a)the person has a genuine and subsisting parental relationship with a qualifying child, and

(b)it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 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.

117D Interpretation of this Part

(1) In this Part—

- “Article 8” means Article 8 of the European Convention on Human Rights;
- “qualifying child” means a person who is under the age of 18 and who—
 - (a) is a British citizen, or
 - (b) has lived in the United Kingdom for a continuous period of seven years or more;
- “qualifying partner” means a partner who—
 - (a) is a British citizen, or
 - (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, “foreign criminal” means a person—

- (a) who is not a British citizen,
- (b) who has been convicted in the United Kingdom of an offence, and
- (c) who—

- (i) has been sentenced to a period of imprisonment of at least 12 months,
- (ii) has been convicted of an offence that has caused serious harm, or
- (iii) is a persistent offender.

(3) For the purposes of subsection [\(2\)\(b\)](#), a person subject to an order under

—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it.”

Discussion

8. Directions made at the error of law stage provide for the parties to file all additional evidence upon which they intend to rely. A bundle has been received from RMB's representatives containing further copies of historical witness statements and additional statements prepared by RMB, his mother, sister, and a supporter, all dated since the date of the error of law hearing. There is, however, no up-to-date evidence from SL, the mother of the two younger children. The material

provided fails to identify any unduly harsh consequence of RMB's removal.

9. The statements from RMB contain his apologies and statements of regret for previous offending but this does not engage with the specific direction relating to the issue this Tribunal is tasked to consider. It is accepted that if RMB is deported from the United Kingdom his contact with his mother and siblings will change from direct to indirect contact, although at the moment this is all that occurs as a result of the family living in London and RMB living in Sunderland as per his bail conditions.
10. It is accepted the family will miss each other but it is not shown that the consequences of such separation will result in anything other than the normal emotional impact of this family not being able to live together or having the relationship they may have had in the past and will be denied in the future. No other member of the family attended the Upper Tribunal hearing to support RMB in person although I accept there may be funding issues in relation to the costs of transport. No application has been made by RMB to vary his bail to allow him to live with or near family in London either.
11. It is accepted the Panel found that the best interests of the children were for RMB to remain in the United Kingdom, and that is a preserved finding, but it is also settled law that this is not the determinative factor but one (albeit of great importance) that has to be considered as part of any assessment.
12. The evidence fails to establish that if RMB is removed from the United Kingdom there will be any unduly harsh or unjustifiably harsh consequences for the children or anybody involved with this individual. It is clear that the mothers' of the children RMB has fathered have been responsible for meeting the needs of those children by way of provision of basic necessities such as food, clothing, heating, love, and any other physical or emotional needs. It is not established that if RMB is removed from the United Kingdom that will change or that there will be a negative impact upon the children such that it is a necessary requirement for their overall welfare that he remains. Contact can be maintained indirectly and although the Panel made comment regarding the ages of the children, who are at the date of this hearing nearly seven and three respectively in relation to SL's children and so able to understand cards or other forms of indirect contact with their father, they will be able to do so more if such contact is maintained post removal and as they grow older.
13. The statutory provisions state that little weight should be given to private life or a relationship formed with a qualifying partner, as SL is, established by a person at a time when the person is in the United

Kingdom unlawfully [s114 (4) Nationality, Immigration and Asylum Act 2002 (as amended by the 2014 Act)]. Whilst the weight to be given to the evidence is a matter for the court the fact this provision is now enshrined in statute cannot be ignored; although there is no definition of how the draughtsmen interpret the phrase 'little weight'. In any event this reflects European case law which has been applied by the Tribunal for some time, namely that the weight given to family and private life established at the time when an individual has no lawful right to remain here is reduced, although it is also clear from the authorities that children should not be punished for the wrongdoings of their parents.

14. Of more importance to this case are the provisions of section 117C NIAA 2002 (as amended) as RMB is the subject of a deportation order. Section 117C (3) applies as RMB has not been sentenced to a period of imprisonment of four years or more. The public interest requires his deportation unless Exceptions 1 or 2 apply. Exception 1 clearly does not as RMB has not been lawfully resident in the United Kingdom for most of his life and it has not been proved there will be very significant obstacles to his integration into Dominica.
15. In relation to Exception 2 - the question of whether RMB has a genuine subsisting relationship with a qualifying partner or a genuine subsisting parental relationship with a qualifying child can be answered in his favour in relation to the latter element, but it is also necessary for him to establish that the effect of his deportation on the partner or child would be unduly harsh. In this respect the directions given for this hearing seeking evidence of unjustifiably harsh consequences as opposed to unduly harsh appears to be indicative of a request for evidence dealing with a similar issue and so no further delay for additional evidence to be filed dealing with the stricter test in section 117 C is required.
16. Even if the introduction of the term unduly harsh indicates a higher test the difficulty for RMB is that the evidence he has provided is wholly inadequate in establishing the existence of either element. The children may miss him, they will not be able to have their father there as they grow up, but they will remain with their mother who will meet their day-to-day needs. The relationship with his own family is part of his private life in the United Kingdom but only little weight can be given to that as a result of the statutory provisions and the fact he has never had lawful leave to remain in the United Kingdom and has always had a precarious immigration situation.
17. RMB is subject to an automatic deportation order as a result of what was stated to be a sophisticated conspiracy to supply cannabis which is referred to in paragraph 2 of the error of law finding. UK Borders Act 2007 requires the deportation of a person in RMB's situation unless one of the exceptions in section 33 is made out, which has not

in this case. It is not unduly harsh or unjustifiably harsh if this family is to be separated as a result of the deportation decision. It has not been shown that the consequences of such separation satisfy the required test.

18. I find having considered all the evidence with the degree of anxious scrutiny required in an appeal of this nature that RMB has failed to discharge the burden of proof upon him to the required standard to show he is able to benefit from any exception contained in any statutory provision to allow him to avoid being deported from the United Kingdom as a direct consequence of his acts of criminality. In SS (Nigeria) v SSHD [2013] EWCA Civ 550 the appellant had been sentenced to 3 years for dealing drugs. He appealed relying on the best interests of his children. The Court of Appeal said that in previous cases in which potential deportees raise claims under Article 8 relying on the children's interests insufficient attention had been paid to the weight attached to the policy of deporting foreign criminals which came from primary legislation. The deportation was upheld. In AD Lee v SSHD [2011] EWCA Civ 348 Sedley LJ said "the tragic consequence is that this family... Would be broken up forever, because of the appellant's bad behaviour. That is what deportation does."

Decision

19. **The First-tier Tribunal Panel materially erred in law and their decision set aside. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

20. I continue the order for anonymity pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 8th September 2014

