IAC-FH-AR-V4

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00772/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 October 2015	**On 27 November 2015**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

ANTHONY PETER PHILLIPS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Adams, instructed by D H Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria. He appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 7 April 2014 to make a deportation order against him. The appeal was allowed, but subsequently a panel of the Upper Tribunal found a material error of law in the decision of the First-tier Tribunal and concluded that the matter was to be remade in the Upper Tribunal. Hence the hearing before me today.

2. The appellant last entered the United Kingdom on 18 August 1999 with a six month visit visa. He did not regularise his stay in the United Kingdom

until 5th April 2002 when his wife applied for leave to remain as a work permit holder and included him in her application. They had married in 1985 and have four children who were born respectively in 1981, 1988, 1993 and 2000. All the family were granted indefinite leave to remain in the United Kingdom on 21 October 2009.

3. On 25 February 2013 the appellant was convicted at Southwark Crown Court of conspiracy to acquire/use/possess criminal property and was sentenced to eighteen months' imprisonment.

4. The panel noted the judge's sentencing remarks at which time the judge said among other things that this was a very serious offence of money laundering. In evidence the appellant did not accept his guilt and said he had been wrongly advised not to appeal the sentence and conviction and had instructed solicitors to consider whether an out of time appeal against his conviction could be lodged. He was regarded as being of low risk by the Probation Service.

5. It was common ground that the appellant's youngest son, P, is cared for by both the appellant and his wife. In the refusal letter it was accepted that it would not be reasonable to expect P who had never lived anywhere other than the United Kingdom to accompany his father to live in Nigeria. It was found that it was in P's best interests to live with both of his parents. It was accepted that he had a close relationship with his father who took him to sporting activities and provided him with emotional support and advice. During the period when the appellant was in prison, P continued to be cared for by his mother and was supported by his siblings, who are all adults, although the Tribunal accepted that this support was not at the same level as the support provided by his father.

6. The appellant's wife has significant health problems. She was diagnosed with thyroid cancer in 2003. In 2010 she was diagnosed with spinal tuberculosis of the lower back, and she developed lymphoma of the right eye in 2013. The appellant became a registered carer of his wife. Since he came out of prison he had resumed caring for her although he was no longer a registered carer. While he was in prison his wife was cared for by her children with help from other relatives. There are a number of close relatives in the United Kingdom including the appellant's nieces and nephews who live close by and also the children of his sister who died in 2010, and also his wife's sister who lives close by and with whom she has a good relationship.

7. In medical evidence from the appellant's GP, dated 9 May 2014, it was said among other things that the appellant's wife would find it difficult to look after her son P on her own and that if she does not get help from her husband she will deteriorate quite rapidly both mentally and physically. There was also a letter from a consultant in palliative medicine, dated 16 May 2013, in which it was said that Mrs Phillips is mobile, independent and can manage independently even though there is still some pain and she takes medication for her various conditions. The panel found that

although in 2013 she was mobile and could manage to some extent independently, nonetheless she continued to take medication including medication for pain relief and presently remained reasonably mobile although there were some days when her pain was worse than on other days and she had developed eye problems for which she attended Moorfields Hospital.

8. The panel went on to accept that the appellant provides good care for his wife both physically and emotionally. It did not accept the appellant's claim that he did not know where other siblings than two he had referred to lived and considered that he had attempted to distance himself from all his relatives in Nigeria. It was also accepted that the appellant has a close relationship with his nephew S and is viewed as a father figure by all the children of his deceased sister. The panel also accepted Mrs Phillips' evidence and the appellant's evidence that whilst she was able to cope well on some days there were other days when she was not able to cope well without help, and that spinal tuberculosis could be a debilitating illness.

9. Those are the essential findings of fact which require to be taken into account as the factual basis to which the legal tests have to be applied.

10. In his submissions Mr Adams argued that in light of the findings of fact by the panel it would be unduly harsh for P or Mrs Williams to be expected to join the appellant in Nigeria or for them to manage without him if he were removed without them. The test imposed a high threshold and it was a question of the severity on them if the appellant were removed. It would be worse than cruel. P had only known his father and the mother's medical condition meant that the appellant had taken care of his son and still did so and it would be severe if he were removed and P had to depend on his mother who was to an extent wheelchair bound. He had to have a father figure in his life. He needed both parents. Also bearing in mind his mother's health problems it would be unduly harsh for her if the appellant were removed to Nigeria. They had been married for over 30 years and had built a family in the United Kingdom and that would be broken up by them having to live separately.

11. In his submissions Mr Melvin argued that the evidence concerning Mrs Phillips' mobility had been considered. P had been adequately cared for while his father was in prison, having been looked after by his mother and adult siblings. The Immigration Rules represented a complete code for a proportionality assessment in a deportation case such as this. Mr Melvin referred to the Home Office IDIs of 28 July 2014 concerning criminality guidance with regard to such matters as undue harshness and the need for there to be compelling circumstances for a spouse not to be expected to move abroad with her husband should she wish to do so. The child could visit his father in school holidays and keep in touch by means such as Skype or FaceTime. The statutory context and the context of the Immigration Rules was important. Public interest required there to be serious circumstances for this to be outweighed and they did not exist in

this case. The appellant's wife had spent nearly 40 years in Nigeria so there was little by way of insurmountable obstacles to her returning there. The fact that the quality of treatment might be less and that she would not obtain state benefits was of little weight in the undue harshness assessment. The offence was a very serious one. There was a powerful public interest and it would be harsh but not unduly harsh for the child if his father were removed to Nigeria.

12. By way of reply Mr Adams argued that the adverse credibility points made by the judge were irrelevant to the central issues in the case. Lee, which had been referred to in Mr Melvin's skeleton, was a more serious case and it was a matter of looking at the case on the facts. There were no meaningful contacts in Nigeria for the family and it was clear that the wife could not go to Nigeria with her husband, having said so. They did not even have a house to go to there and she had serious health problems. The fact that people travelled voluntarily around the world was not the same as being required to go without a choice. The fact of parental integration did not mean that it would be the same for their son, and the section 55 issues were important.

13. I reserved my determination.

14. The background to this appeal is to be found in the automatic deportation provisions in the UK Borders Act 2007 which states at section 32 that where an individual is a foreign criminal i.e. not a British citizen, and has been convicted of an offence and sentenced to a term of imprisonment of at least twelve months, they are subject to automatic deportation unless one of the exceptions in section 33 of the Act applies. For the purposes of the instant case the important exception is exception 1 in section 33(2) i.e. where the removal of the foreign criminal pursuant to the deportation order would breach an individual's Convention rights protected by the Human Rights Act 1998. The relevant Convention right in this case is of course Article 8 involving the right to respect for an individual's private and family life.

15. From 9 July 2012 paragraphs 396 to 400 of HC 395 seek to set out the weight to be given to the public interest in deportation cases where an individual relies on his private or family life under Article 8 and these provisions were further amended by HC 532 with effect from 28 July 2014. These apply to this case.

16. There is a presumption set out in paragraph 396, that it is in the public interest to deport where a person is liable to deportation. Of further relevance is paragraph 398(b). This states that where the deportation of a person from the United Kingdom is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least twelve months, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and if it does not the public interest in deportation will only be outweighed by other

factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A. Paragraph 399(a) is concerned with the situation where a person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the United Kingdom, and paragraph 399(b) applies where the person has a genuine and subsisting relationship with a partner who is in the United Kingdom. In both these cases, and this provision is applicable to the facts of the case before me, the relevant test, cutting to the detail, is whether it would be unduly harsh for P to live in Nigeria and unduly harsh for him to remain in the United Kingdom without his father, and in respect of Mrs Phillips, whether it would be unduly harsh for her to live in Nigeria because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM and it would be unduly harsh for her to remain in the United Kingdom without the Appellant. It was because of the failure of the First-tier panel to apply this test correctly that the matter comes before me. I have set out the findings of fact of the First-tier Tribunal above, and no further evidence has been adduced to take matters any further. The issue of what is meant by "unduly harsh" has been considered by the Tribunal in a number of cases recently, in particular in MK [2015] UKUT 223 (IAC), BM and Others [2015] UKUT 293 (IAC), MAB [2015] UKUT 435 (IAC) and KMO [2015] UKUT 00543 (IAC). In general there is agreement that the words do not, as was said in MK, equate with uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging but pose a considerably more elevated threshold in that "harsh" in this context denotes something severe or bleak and the addition of the adverb "unduly" raises an already elevated standard still higher. As was said in MAB, endorsed in KMO, consequences for an individual will be "harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are "inordinately" or "excessively" harsh taking into account all of the circumstances of the individual.

17. There is however a disagreement between those two authorities as to whether, as was said in MAB, the phrase "unduly harsh" does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual but the focus is solely upon an evaluation of the consequences and impact upon the individual concerned. However in KMO it was concluded that it is necessary to have regard in making that assessment to the matters to which the Tribunal must have regard as a consequence of the provisions of section 117C of the 2002 Act, in particular including that the more serious offence committed the greater is the public interest in deportation of a foreign criminal.

18. No doubt this disagreement will have to be resolved by the Court of Appeal in due course. In the instant case I do not think that the difference is one of materiality on the facts of the case. If one takes what may be regarded as the more lenient test, that set out in MAB, leaving aside therefore matters such as the appellant's criminality and concentrating purely on the impact on P and on Mrs Phillips, I do not consider that it has been shown that it would be unduly harsh for them if the appellant were removed as is the Government's intention. As I have set out above, it was

accepted in the refusal letter that it would not be reasonable to expect P to accompany his father to live in Nigeria and the issue of undue harshness therefore arises in respect of his father being removed. P is 15 and has the support of his mother albeit with her health problems that I have set out above, but also the support of his older brothers and the other family members including his mother's sister and his cousins. He would be able to keep in touch with his father by means of visits, telephone calls, letters, Skype and similar means. This is, I readily accept, very far from being the same thing as being in the presence on a day-to-day basis of his father, but the test, as I have set out above, is a high one. It would as Mr Melvin suggested, be harsh, but not, in my judgment, unduly harsh. As Sedley LJ said in Lee, that is what deportation does.

19. With regard to Mrs Phillips, bearing in mind her health problems and the fact that it would lead her to be removed from the rest of her family, I consider on balance that it would be unduly harsh for her to be expected to go to Nigeria with the appellant. However as with P, I consider it would not be unduly harsh to expect her to remain in the United Kingdom without the appellant. She has the support of her sons and their families and her sister who provided her with support and assistance when the appellant was in prison, and like P would be able to keep in touch with the appellant by the means that I have set out above. Again the consequences for her would be harsh but in my judgment they would not be unduly harsh.

20. I conclude therefore that the criteria in paragraph 399 and 399A are not made out in this case.

21. Thereafter I have to turn to the five stage test in Razgar in considering Article 8 where the issue of proportionality has to be considered under the test of "very compelling circumstances" as set out in paragraph 398. I accept that the appellant has family life with his wife and certainly P, although there is an absence of evidence to show family life with his grown up children. It may be sensible however to conclude in light of the panel's findings that he enjoys family life with his nephew S. No doubt given the amount of time he has been in the United Kingdom he has built up a private life here. Article 8.1 of the ECHR is therefore engaged.

22. The crucial issue is whether the interference with that private life is justified in the public interest given his offending, under Article 8.2. There is no doubt that the decision is in accordance with the law and for a legitimate aim, namely the prevention of disorder or crime, and for the protection of the rights and freedoms of others as well as the economic well-being of the country. It is necessary, as I have noted above, for him to show "very compelling circumstances" above those described in paragraph 399 and paragraph 399A in assessing the proportionality of his removal. That makes it clear that the public interest is entitled to be given great weight where the deportation of a foreign criminal falling within the automatic deportation provisions of the UK Borders Act 2007 is proposed. It was said in SS (Nigeria) that those very compelling circumstances

require a very strong claim indeed to outweigh the public interest. It is necessary in this regard to consider the best interests of P as a primary consideration but to note that those best interests may be outweighed by sufficiently weighty matters of the public interest. I acknowledge the panel's finding that it is in P's best interests to be with both of his parents. The impact on P and on Mrs Phillips has to be borne in mind. As set out above, I consider that all contact would not be precluded but that visits, telephone calls, letters and more immediate communication by way of Skype would be available to them. No doubt the appellant would find difficulties in adjusting back to life in Nigeria where he has not been for some sixteen years and where it is said he does not have a home. I must also bear in mind the factors set out in Part 5A of the 2002 Act and in particular section 117C. First under section 117C(1), the deportation of the appellant as a "foreign criminal" is in the public interest. Secondly the more serious the offence committed by him the greater the public interest in his deportation and the public interest is reflected in the seriousness of the offence, the expression of society's revulsion at serial criminal offending and deterring those from committing serious offences. The offence here is clearly a serious one, though he is not a serial offender but the deterrence element is a relevant factor. Section 117C(3) states that in the case of a foreign criminal such as the appellant who has not been sentenced to a period of imprisonment of four years or more the public interest requires their deportation unless exception 1 or exception 2 applies. Exception 1 does not apply since the appellant has not lived lawfully in the United Kingdom for most of his life. Nor does exception 2 apply since I have already found that the effect of his deportation on his children and wife would not be unduly harsh. As regards relevant factors under section 117B, I note that the maintenance of effective immigration control is in the public interest. It is in the public interest that an individual speaks English, as the appellant does. It is in the public interest that an individual is financially independent. The situation on this is not clear. In effect the circumstances relied on this case to demonstrate "very compelling circumstances" are essentially those set out at paragraph 399(a) i.e. the undue harshness upon his infant child and wife of his deportation. Bringing all these matters together, I consider that it has not been shown that there are very compelling circumstances over and above those in paragraph 399(a) and paragraph 399A such as to outweigh the significant and considerable weight which must be given to the public interest in this appeal and therefore any interference with the appellant's private and family life is proportionate. Accordingly he has failed to establish a breach of Article 8, and his appeal falls to be dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Allen