IAC-FH-NL-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01225/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 March 2015	**On 22 April 2015**

Before

THE HONOURABLE MR JUSTICE COLLINS
UPPER TRIBUNAL JUDGE McGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MATTHEW ASARE FRIMPONG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Mr R Hubber, Counsel instructed by Descartes Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Andonian who on 6 January this year allowed an appeal by the respondent against a deportation order which had been made by the Secretary of State.

2. The background is in no way favourable to this appellant. There is no record of his entry into this country. He claimed to have been born in this

country in 1959 to Ghanaian parents who moved back to Ghana and then returned to the United Kingdom sometime in 1979. However in 1998 he married a lady by proxy in Ghana and in November 2006 he submitted an application to transfer a certificate of entitlement to the right of abode using a Ghanaian passport under the false identity of another man. That he had fraudulently adopted that other man's identity is unquestioned because he was convicted on 9 December 2010 at the Snaresbrook Crown Court of possessing that false identity document and as a result was sentenced to eighteen months' imprisonment. It is plain from the remarks of the sentencing judge that a very poor view was formed of the appellant. As the judge said for long periods of time he had adopted a false identity, in effect stolen or hijacked the identity of the real person in question who had indeed suffered as a result. He raised a totally false defence and showed no remorse, indeed never has shown any remorse for what he did. He was released from that sentence on 7 April 2011. Unfortunately the Secretary of State did not take any steps to remove him as a result of his conviction because the sentence meant that he was an automatic deportee. However, in due course, that decision was reached and as we say he appealed to the First-tier Tribunal.

3. Judge Andonian said he had no sympathy whatsoever for the appellant and indeed it is perfectly clear that if it had simply been his private life he would have got nowhere. The reason why the appeal was allowed was because of the effect of the appellant's deportation upon his wife. There was powerful evidence before Judge Andonian that dealt with his wife's condition. She was hugely handicapped and had recently had a stroke. Her left arm and hand were completely useless following a fall in late 2012 and unfortunately her condition has deteriorated. She is in pain, has kidney disease and diabetes and apparently needs someone to inject her with insulin because she cannot do it herself as one arm and hand are useless because of the stroke from which she suffered. She relies on the appellant for 24 hour care. He told lies about how he was earning money but it is clear that the family is living on the benefits to which his wife is entitled. However the only thing that is in his favour is that he clearly has cared for, and continues to care for his wife. She told Judge Andonian that she was unaware of the appellant's falsehoods and as the judge decided, and we quote:

> "I found her to be the real victim in this appeal, an innocent and credible lady whose love for her husband had not diminished one iota even after his arrest and conviction and before she became immobile due to her stroke and the other progressive illness such as liver and kidney disease she did visit him as much as she could in prison."

4. She was asked whether she would go and live with him in Ghana if he was deported and she said that she could hardly move let alone travel to a foreign country where she would receive no medical support and nowhere to live and in addition the appellant's stepchildren gave evidence to Judge Andonian that their children, that is to say his step-grandchildren, were very close to him, regarding him as their grandfather. He had brought up his step-children and their biological father had died a considerable time

ago so they considered him to be their father. Now of course, so far as they are concerned, the family life is probably not within the meaning of Article 8. Nonetheless one has to bear in mind the position of the grandchildren who look to the appellant as their true grandfather. However it is the appellant's wife's condition that is crucial so far as this appeal is concerned. She is significantly not only physically impaired but also there is evidence from the reports that she does rely on her husband and were he not to be there she would deteriorate so far as her mental condition was concerned.

5. The attack upon the judge's decision is based upon the submission that he failed properly to consider the up-to-date Rules in reaching his conclusion and that he had failed to make a decision which looked to the other side as it were of the situation than that simply relating to the position of the wife. However the fact is that he did consider the up-to-date primary legislation. That is contained in Section 117C of the 2002 Act and that so far as material provides by sub-Section (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 the deportation of the criminal. Then there is, by sub-Section (5) an exception which applies where the criminal 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 deportation on the partner or child would be unduly harsh. Qualifying partner means by Section 117D (a) a partner who is a British citizen (that does not apply) or (b) is settled in the United Kingdom within the meaning of the Immigration Act 1971. One is then to look back to Section 33(2A) of the 1971 Act which provides that reference to a person being settled in the United Kingdom is reference to his being ordinarily resident here without being subject under the Immigration Laws to any restriction on the period for which he may remain. Accordingly the appellant's partner is a qualifying partner.

6. Going back to sub-Section 5, exception 2, which is the exception in question, applies as we have said where deportation would be unduly harsh. So that is the test that the primary legislation requires to be applied.

7. Judge Andonian considered the law. He referred to **Razgar** and to **MF (Nigeria)** in relation to Article 8 and he considered the impact on the step-grandchildren but he went on to decide that the deportation would have, as he put it, a devastating effect on others, in particular on his innocent and incapacitated wife and innocent step-grandchildren and would not be a proportionate act in the circumstances. That approach is criticised because it is said not only to have regard to the primary legislation but also to Rules which have been made in relation to the removal of foreign criminals. Those Rules are to be found in 398 and 399(b). 398 so far as material provides how the rules should be applied where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention. 398(b) provides that the deportation of the person from the UK 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. In assessing the claim that deportation would breach the claimant's rights under Article 8 the Secretary of State 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.

8. Paragraph 399(b) deals with the case where the individual has a genuine and subsisting relationship with a partner who is in the United Kingdom and is settled in the UK but it requires that the relationship was formed at a time when the deportee was in the UK lawfully and their immigration status was not precarious. On his immigration status the appellant was not here lawfully and indeed his immigration status was precarious. So paragraph 399B does not apply.

9. However 399B provides:

> "Where an Article 8 claim for a foreign criminal is successful
>
> (a) in the case of a person who is in the UK unlawfully …. limited leave may be granted…."

That of course presupposes that there can be a case where a person in the UK unlawfully can qualify under Article 8.

10. When one goes back to the decision of Judge Andonian in paragraph 26 he concludes thus, and we quote:

> "I have also considered the various considerations that need to be taken into account under section 117C of the Immigration and Asylum Act 2002 inserted by section 19 of the Immigration Act 2014. Under that section I have considered the exceptions to the public interest requirement to deport, and it is only to exception 2 that I turn to in that regard, that being the fact that the appellant has a genuine relationship with a qualified partner, and that it would be unduly harsh for the partner if the appellant were to be deported."

11. Now whatever the Rules may or may not say the primary legislation in Section 117C makes it plain that the test that has to be applied is whether it would be unduly harsh. True it is that the Rule talks about compelling circumstances but that test on the approach to the facts by Judge Andonian would also clearly have been met. It is not submitted on behalf of the Secretary of State that the decision that it would be unduly harsh on the facts was one to which Judge Andonian could not come. It would in those circumstances, in our judgment, only be appropriate to allow this appeal if we were persuaded that on the facts the conclusion that notwithstanding the position that deportation is conducive to the public good and in the public interest, that deportation would have an unduly harsh impact on the appellant's partner not only because in all the

circumstances it would mean that effectively it would not be possible for family life to be maintained in Ghana but also that the appellant's partner would lose the carer whose support is vital to her welfare. That being so, it seems to us that whether or not in reaching his conclusion Judge Andonian applied the correct approach, the fact is when he reached his final decision he adopted a test which it is accepted was the correct test, namely was it unduly harsh and since it was not unlawful for him to have found on the facts that it was unduly harsh so far as the appellant's partner was concerned, it seems to us we have no alternative but to dismiss this appeal.

12. We make it clear that obviously as will be likely in all these cases it depends entirely upon its own facts. We are not setting out anything that is new law or untested law, we are simply applying to the facts of this individual case as found by the First-tier Tribunal Judge the approach which Parliament has decided is the correct approach, namely unduly harsh.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed: Dated: **20 April 2015**
For and on behalf of
Mr Justice Collins