IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01365/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 November 2015	**On 9 December 2015**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KENNETH WINSTON WILSON

Respondent

Representation:
For the Appellant: Mr. S Walker, HOPO
For the Respondent: Mr. Gibson-Lee, Counsel

DECISION ON ERROR OF LAW

1. The Secretary of State has been granted permission to appeal the determination of First-tier Tribunal Judge N Bennett allowing the appeal of the respondent against the Secretary of State's decision to deport him to Jamaica.

2. I will in this determination refer to Mr Kenneth Winston Wilson as the appellant and the Secretary of State as the respondent for ease of reference.

3. The appellant is a citizen of Jamaica who was born on 26 June 1976. He entered the UK on 2 November 2002 as a visitor and was granted leave to enter until 2 May 2003. He married his wife, [ST] on 26 April 2003. He applied for leave to remain as a student nurse on 10 July 2003, and was granted leave until 30 April 2004. His application for further leave in this capacity was refused and was granted leave to remain until 31 August 2005 after a successful appeal. A further application for leave to remain in this capacity on 4 September 2004 was refused on 4 November 2004. His wife gave birth to their daughter, [T], on 26 February 2005. [SN] gave birth to his first son, [L], on 12 April 2005. He had applied for leave to remain as the spouse of a settled person which was granted on 26 August 2005 until 26 August 2007. [SN] gave birth to his second son, [K], on 28 September 2006. He was granted indefinite leave to remain on 16 August 2007. [VR] gave birth to his third son, [D], on 11 February 2011.

4. The appellant has eleven convictions the first of which was on 28 February 2007 for driving while disqualified and using a vehicle while uninsured. He was convicted of further offences on 18 December 2009 and 10 December 2010; and on 14 January 2014 of six offences of theft that he had committed between 12 April 2013 and 14 September 2013 and had asked for four other offences to be taken into consideration. He was sentenced to twelve months' concurrent imprisonment for each offence, except for the offence committed on 29 May 2013. He was sentenced to seven months imprisonment for this offence. The judge also made an anti-social behaviour order because of this offence, which was to last for five years.

5. In light of the appellant's immigration and criminal history, the respondent said that his offences brought him within the scope of the automatic deportation regime. She accepted that deportation would interfere with his rights under Article 8 and that it might not be in the best interests of the children but considered that the interference was in accordance with the permissible aim of preventing crime and disorder.

6. Although the judge did not make clear on what grounds he was allowing the appeal, it is apparent from reading the determination that he allowed it under Article 8 of the ECHR.

7. The judge's reasons for allowing the appellant's appeal are set out at paragraphs 41 to 59. The judge stated at paragraph **41** that the appellant is liable to automatic deportation under the 2007 Act. He is also a foreign criminal for the purposes of Section 117C of the 2002 Act. The appellant falls within the scope of paragraph 398(b) because he was sentenced to a term of imprisonment of at least 12 months. Miss Heybroek accepted that he did not fall within paragraphs 399 and 399A of the Immigration Rules. Consequently, his appeal can only succeed under the Immigration Rules if, in exceptional circumstances, the public interest in deportation is outweighed by other consideration.

8. The judge then proceeded to apply section 117. In considering Section 117C(2), the judge found in the appellant's favour that he was sentenced

to a term of imprisonment at the lower end of the scale. His offences did not involve violence or threats of violence, children or dealing in drugs. Also in his favour was the assessment in the OASys Report that he was at low risk of causing serious harm. There was no escaping that the appellant was sentenced as a serial offender. Although this was not a promising background, there was some evidence that substantiated the oral evidence that he would not reoffend. He attributed his offences to a lack of money. The OASys Report records that he acknowledged smoking cannabis heavily. The judge considered that the appellant had enrolled on a RAPt programme while he was in prison and appears to have profited from it. The judge also considered the letter from the prison chaplain which indicated that prison records show that he was abstinent and of good behaviour.

9. The judge then considered Article 8 in the context of Exception 2 of Section 117(5) which applies if the effect of deportation on his family members would be unduly harsh. The judge found on the evidence that the separation from his wife and the children as a result of the appellant's deportation would be unduly harsh. The judge held at paragraph 59

> "59. While the matter is very finely balanced, I am satisfied that the effect that deportation would have on the wife, [TC], would be unduly harsh, unless the appellant is given a final chance to show that he has reformed. I am therefore satisfied that there are exceptional circumstances that outweigh the strong public interest in deportation, having regard to the fact that, for the purposes of Section 117C(2) of the 2002 Act, the appellant's offending is at the lower end of the scale."

10. Deputy Upper Tribunal Judge McWilliam granted permission to the respondent to appeal the judge's decision on 4 March 2015. She stated that the application was out of time by twelve days, but the respondent had given reasons for the delay. She accepted that the decision was not received by the respondent until 2 February 2015. In addition she considered the merits of the application, extended time and admitted the application.

11. In response, Ms Heybroek of Bellyard Chambers submitted a respondent's reply under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 17 March 2015. She submitted that the Secretary of State should not have been granted an extension of time to lodge her appeal without further enquiry. Ms Heybroek submitted that in granting permission the UTJ stated that she accepted "that the decision was received by the appellant (the Secretary of State) until 2 February 2015." She submitted that this is not what the Secretary of State's application stated, and the UTJ erred in coming to this conclusion; the application stated there was a delay in the determination arriving with SAT but at no point stated that the Secretary of State had not received the determination.

12. Mr Gibson Lee appeared to suggest that Ms Heybroek had asked UTJ McWilliam to reconsider her decision, which was not what Ms Heybroek intended at all. Ms Heybroek intended that when the case came before

the Upper Tribunal, the Upper Tribunal Judge was to consider whether UTJ McWilliam erred in granting an extension of time to the Secretary of State. Mr Gibson Lee did not properly pursue this issue. In any event, on the file were three emails from the Home Office Specialist Appeals Team (SAT), one on 29 January 2015 and two on 30 January 2015 to the court indicating that they had been informed that their appeal to the Upper Tribunal via the First Tier had been refused on 5 January 2015, and that they had never received any notification of this. If this was the case, they requested a copy of the decision regarding their appeal. It is apparent that the determinations were sent to SAT by email on 4 February 2015. On this evidence I find that Ms Heybroek's submission was misconceived. UTJ McWilliam did not err in extending time and admitting the application.

13. I now turn to whether the First-tier Tribunal Judge erred in law in his decision.

14. UTJ McWilliam in granting permission said as follows:

> "3. The first challenge is that the judge erred in the assessment unduly harsh. The second challenge is that the judge failed to recognise that the scales are heavily weighted in favour of deportation and to give adequate consideration to the public interest test. The remaining issues raised are in relation to the proportionality assessment generally.
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> 4. The appellant conceded that he was unable to satisfy the exceptions set out in paragraph 399 or 399A of the Rules and the judge agreed with this. However, the judge then went on to find that, for the purposes of Section 117, exception 2 applied because deportation would be unduly harsh. This is arguably irrational. If what the judge meant to do is to allow the appeal outside the Rules, it is arguable that he did not identify compelling circumstances over and above those in paragraph 399 or 399A. There is a lack of clarity in the decision. The grounds are arguable."

15. Mr Gibson Lee argued that the judge did not err in law. He did this by reading out paragraphs 12 to 18 of Ms Heybroek's response. He then read out the reasons given by FTTJ Osborne when she refused permission to the respondent to appeal on 22 December 2014. He then read out part of the sentencing remarks of His Honour Judge Tomlinson QC, which was reproduced by FTTJ Bennett at paragraph 4 of his determination. He then went to read out extracts of FTTJ Bennett's determination and concluded just as FTTJ Osborne had said when refusing permission that the determination was a careful and well-reasoned one in which the judge set out the pertinent issues, law and evidence relating to the facts of the appeal. The judge's findings were properly open to him on the basis of the evidence. The judge had considered the public interest in the appellant's deportation and specifically acknowledged at [50] that exception 2 of Section 117C(5) of the 2002 Act applied. Furthermore the judge had found that the matter was very finely balanced but nonetheless for proper reasons which he set out in his determination the judge was entitled to find on the basis of the evidence that the appellant has a genuine and

subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child and that the fact of his deportation on the partner or child would be unduly harsh.

16. I find that Mr Gibson Lee failed to grasp the basis on which UTJ McWilliam had granted permission at paragraph 4 of her decision.

17. I find that at paragraph 41 the judge misdirected himself. Having accepted Miss Heybroek's submission that the appellant did not fall within paragraphs 399 and 399A of the Immigration Rules, the judge misdirected himself by holding that as a consequence, the appellant's appeal could only succeed under the Immigration Rules if, in exceptional circumstances, the public interest in deportation was outweighed by other considerations. Paragraph 398 states

> '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.'

18. It was not apparent from the determination that this test was applied by the judge. I agree with UTJ McWilliam that the judge did not identify compelling circumstances over and above those in paragraph 399 or 399A. There was a lack of clarity in the decision. Accordingly, I find that the judge's decision cannot stand. It is set aside in order for it to be re-made.

19. The appellant's appeal is remitted to Hatton Cross for re-hearing by a judge other than FTTJ Bennett.

Signed Date

Upper Tribunal Judge Eshun