IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01474/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 8 June 2015	**On 29 June 2015**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KASRU MIAH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Ms V Easty instructed by R Legal Solicitors

DECISION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department. I shall refer to Mr Miah as the claimant herein.

2. The claimant is a citizen of Bangladesh born 2 April 1964. On 23 July 2014 the Secretary of State made a "Decision to make a Deportation Order" in relation to the claimant. The claimant appealed this decision to the First-tier Tribunal and, in a determination dated 19 February 2015, First-tier Tribunal Judge Rowlands allowed such appeal.

3. It is prudent to initially set out the claimant's history in the United Kingdom. The claimant arrived here on 4 May 1982, i.e. when he was 18 years old, and was granted indefinite leave to remain at that time. From 1989 until September 2012 he accumulated a total of eleven convictions for nineteen offences which, at least according to the First-tier Tribunal, were of a relatively minor nature. On 28 August 2013 the claimant was convicted at Southwark Crown Court of *"intimidating a witness or juror with intent to obstruct, pervert or interfere with justice"* as well as two counts of *"commission of further offence during operational period of a suspended sentence order*". He was sentenced to six months' imprisonment on the first count and three months' imprisonment on each of the other two counts to run consecutively; totalling twelve months' imprisonment.

4. On 27 January 2014 the claimant was convicted of *"driving a motor vehicle with excess alcohol"* and sentenced to twenty weeks' imprisonment concurrent to his existing sentence of 28 August 2013. Just six weeks later, on 5 March 2014, the claimant was convicted of a further offence, this time of *"using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence"*, for which he was sentenced to twelve weeks' imprisonment, to run consecutively.

5. It was in light of this further offending that the claimant was later served with the decision under challenge.

6. The First-tier Tribunal allowed the claimant's appeal *"on human rights grounds"*. The Tribunal's core conclusions are found in paragraphs 31 to 35 of its determination, which, for the sake of completeness, I now to set out in full:

> "31. I am aware that a restraining order is in place in relation to this appellant and his family. However, it is clear that his wife no longer wishes the restraining order to remain in force. Effectively what the Magistrates Court is saying to her is that as and until he has shown that he can behave himself under the terms of the restraining order they will not lift it. Clearly they envisage a point when he is in the United Kingdom and not in detention. That is now a matter for me having taken into account all of the circumstances. The Immigration Rules have much to say on this issue and in cases such as this where the appellant claims that deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, the rules say that deportation of a person from the UK is conducive to the public good and in the public interests if their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law. So far as I am concerned he falls into the second part of that category. However, the Secretary of State must then go on and consider whether or not either paragraphs 399 or 399A apply.
>
> 32. Paragraph 399 applies if a person has a genuine and subsisting parental relationship with a child under the age of 18 who is in the UK and it would be amongst other things unduly harsh for the child to live in the country to which the person is to be deported or unduly harsh for the child to remain in the United Kingdom without the person who is to

be deported. The same section deals with the issue of relationship with a partner who is in the UK and is a British citizen and again it would be unduly harsh for her to live in Bangladesh or to remain in the United Kingdom without the person who is to be deported.

33. Paragraph 399A would apply to him personally if he was lawfully resident in the UK for most of his life, socially and culturally integrated into the UK and there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

34. I have taken into account everything that I have read including letters, Social Worker reports, court documents and have reached the conclusion that it would be unduly harsh on his children for them to remain in the UK without him. There is no suggestion that they would be likely to join him in Bangladesh and my decision is not made on the basis of it being unduly harsh to expect them to go with him back there. I am absolutely certain that they would not do so in any event. However difficult he may have been over the years as a spouse, it is probably unduly harsh also to expect his wife to live in the United Kingdom and to bring up the children without such support as she will ultimately get from him.

35. Nothing that I have said in reaching my decision should leave the appellant in any doubt that is his last chance. If he does not take this opportunity to deal with his alcohol problems then I have no doubt that the court which administers the restraining order will have nothing to do with the revocation of it and he will have blown any chance whatsoever of reconciling himself with his wife and family and getting back to some kind of normality. I only hope he takes this opportunity."

7. By way of a decision dated 19 March 2015 First-tier Tribunal Judge Chambers granted the Secretary of State permission to appeal to the Upper Tribunal, thus the matter comes before me.

8. Before identfying the Secretary of State's grounds of challenge and my conclusions thereon I set out the content of the relevant Immigration Rules in order to provide a context to the Secretary of State's challenge:

"398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

...

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and,

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported.

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is to be deported."

9. Turning next to the Secretary of State's grounds - these can be summarised thus:

(i) The First-tier Tribunal erred in concluding that it would not be unduly harsh to expect the claimant's children to accompany him to Bangladesh by failing to undertake a qualitative assessment of this issue;

(ii) The First-tier Tribunal failed to give legally adequate reasons for its conclusion that it would be unduly harsh for the children to remain in the United Kingdom without their father. In the alternative, such conclusion is irrational on the evidence provided;

(iii) The First-tier Tribunal erred in concluding that it would be unduly harsh for the claimant's wife to join him in Bangladesh; in particular for a failure to engage with paragraph EX.2 of Appendix FM to the Rules;

(iv) The First-tier Tribunal erred in concluding it would be unduly harsh for the claimant's wife to remain in the United Kingdom without him, such conclusion being irrational on the face of the evidence before the Tribunal;

(v) The First-tier Tribunal failed to have regard to sections 117B and 117C of the Nationality, Immigration and Asylum Act 2002;

(vi) The First-tier Tribunal took into account an irrelevant factor when determining the appeal on the basis that the claimant would, if he remained living in the United Kingdom, eventually return to the family home (i.e. once the restraining order is lifted); and, finally,

(vii) The First-tier Tribunal erred in failing to acknowledge the pressing nature of the public interest;

10. It is apparent that the First-tier Tribunal made no finding in relation to the application of paragraph 399(a)(ii)(a) of the Immigration Rules. This is clear from the terms of paragraph 34 of the determination where the Tribunal state that: *"there is no suggestion that they* [the children] *would be likely to join him in Bangladesh and my decision is not made on the basis of it being unduly harsh to expect them to go with him back there."* (emphasis added).

11. The reasons for the First-tier Tribunal's failure to consider such requirement can be traced back to paragraph 32 of the determination, which contains an obvious misstatement of the terms of the Rule, the connective "or" being used instead "and", between the requirements of paragraphs 399(a)(ii)(a) and 399(a)(ii)(b) of the Rule.

12. The First-tier Tribunal was clearly not entitled to allow the claimant's appeal on the basis the he satisfied the requirements of paragraph 399(a) of the Rules, absent first finding that he met the requirements of both paragraph 399(a)(ii)(a) and paragraph 399(a)(ii)(b) thereof. The failure to make a finding in relation to the former amounts, in my conclusion, to an error of law in the First-tier Tribunal's determination capable of affecting the outcome of the appeal.

13. Ms Easty maintained that this being the only error found in First-tier Tribunal's determination, the appropriate course should be to set the First-tier Tribunal's determination aside and remit the matter back to the same First-tier Tribunal judge to finish the job he started i.e. to make a finding in relation to paragraph 399(a)(ii)(a) of the Rules.

14. I am not in agreement with this method of disposal, commended by Ms Easty.

15. In my conclusion the First-tier Tribunal's findings made in relation to paragraph 399(a)(ii)(b) are so devoid reasoning, even when read in the context of the determination as a whole, that the losing party, in this case the Respondent, is unable to properly understand why she has lost on this issue.

16. Whilst the First-tier Tribunal identifies the relevant documents when coming its conclusions, there is no qualitative analysis within the determination of the evidence contained within those documents and

there is failure to identify which features of such evidence led the Tribunal to conclude that it would be unduly harsh for the children to remain in the United Kingdom without their father. In my view the Secretary of State is left without the ability to understand what aspects of the children's circumstances led to Tribunal to conclude as it did. The finding in this regard is also, therefore, flawed by legal error.

17. Furthermore, the same failure of reasoning also belies the First-tier Tribunal's conclusion that it would be unduly harsh to expect the claimant's wife to live in the United Kingdom and bring up the children without the claimant's support (paragraph 399(b)(iii) of the Rules). In the event, insofar as the First-tier Tribunal allowed the appeal pursuant to paragraph 399(b) of the Rules, and it is far from clear that it did make such a finding, that conclusion is plainly unlawful absent a consideration of whether it would be unduly harsh for the claimant's wife to live in Bangladesh with the claimant (paragraph 399(b)(ii)) - a matter which required an assessment of whether there are in existence compelling circumstances over and above those described in paragraph EX.2 of Appendix FM. The First-tier Tribunal undertook no such assessment.

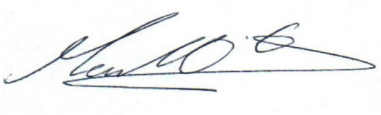
18. In short I agree with Mr Bramble that this determination must be set aside and that the re-making of the decision under appeal should be *de novo*. In such circumstances, and given the significant fact finding which needs to be undertaken in order to re-make the decision, I remit the matter back to the First-tier Tribunal to be determined afresh in front of a judge other than First-tier Tribunal Judge Rowlands.

Notice of Decision

The Secretary of State's appeal before the Upper Tribunal is allowed. The First-tier Tribunal's determination is set aside and the appeal is remitted to the First-tier Tribunal for consideration afresh.

No anonymity direction is made.

Signed:



Upper Tribunal Judge O'Connor
Date: 16 June 2015