Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34264/2014

THE IMMIGRATION ACTS

Heard at Bradford
On the 22nd July 2015

Decision and Reasons
Promulgated
On the 31st July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR MD MAMUN AHMED
(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Haque, Legal Representative
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission (granted upon renewed application) against the decision of First-tier Tribunal Judge Myers, promulgated on the 10th December, to dismiss the appeal against curtailment of his leave to remain so that no leave remained.

2. The respondent's original decision is dated the 30th July 2014 and was taken under paragraph 323(v) of the Immigration Rules. This states that "a person's leave to enter or remain may be curtailed … where a person has, within the first six months of being granted leave to enter, committed an

offence for which they are subsequently sentenced to a period of imprisonment". The reason for the invocation of this provision was that the appellant had, on the 6th May 2014, been sentenced to a period of 22 weeks' imprisonment in respect of an offence (of which he had been convicted on the 3rd April 2014) of assaulting his wife thereby occasioning her actual bodily harm. It was the appellant's wife who had sponsored his application to come the United Kingdom.

3. Judge Myers set out her findings and reasons at paragraphs 11 to 20 of her decision:

> "11. The Appellant clearly cannot meet the Immigration Rules and for his appeal to succeed would have to show circumstances warranting granting of leave outside the rules. In **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640** it was said that after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to consider whether there are compelling circumstances not sufficiently recognised under them.
>
> 12. In **MF (Nigeria) [2013] EWCA 1192**, a case involving deportation of a foreign criminal and therefore not directly applicable here, it was said that the new immigration rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence.
>
> 13. In **Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC),** the Chamber President (Blake J) summarised the case law of the Upper Tribunal in relation to the "best interest principle" as follows:
>
> > "It is not the case that the best interests principle means that it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:
> >
> > > i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
> > >
> > > ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
> > >
> > > iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and

present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well being of society amply justifies removal in such cases."

14. It is also necessary to consider S. 117 of the Immigration Act 2014 and have regard to the considerations listed in sections 117 as to whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

15. Article 8 provides that everyone has the right to respect for his private and family life. However, Article 8 is not an absolute right; the Secretary of State can interfere with that right if it serves a legitimate aim and is a proportionate response. I am to balance the Appellant's rights against the wider rights and freedoms of others and that in the general public interest the Secretary of State has the right to control the entry of non nationals into its territory.

16. Clearly even on his own evidence the Appellant does not have family life with his wife. Although he may hope for a reconciliation, there is nothing to suggest that his wife does likewise. The Appellant had no witnesses in support of his family life; he stated that his brother in law had said he would come to court but had not been able to because he was ill. He submitted a letter from the friends he was staying with who described him as helpful round the house with a good relationship with their children and their cat. They made no mention of his relationship with his wife and child, and in any event I place little weight on the contents of the letter because they state that he has lived with them since 16/04/14 and makes no mention of his sentence of imprisonment.

17. The Appellant submitted some court documents relating to his recent court appearance. These included his wife's statement to the police in which she said she was separated from her husband who started being violent towards her after a month of being in the UK. In spite of the restraining order made against him he sent her letters from prison and tried to phone her and she had to complain to the prison to make him stop. He had phoned her again on his release and she did not want any contact with him because he was violent and she was frightened of him.

18. The Appellant was interviewed by the police and stated that although he had not seen the restraining order he was aware of the condition that he was not to contact his wife. He admitted making the phone calls but said that this was by mistake because he had intended phoning his uncle who had a similar phone number to his wife.

19. The account given in these documents is markedly different to the Appellant's oral evidence to me. It is apparent that he was well aware of the contents of the restraining order, accepted that it had been explained to him, and therefore he must have known that he could not try to make arrangements to see his son except through his wife's solicitors. I conclude that the Appellant has not been truthful in his evidence and is prepared to lie to further his own ends.

20. It is clear to me that his wife has no intention of reconciling and that he has not made any attempt to have access to his son. Indeed there is little evidence that he has a son, although there is some passing mention of a child in the documents he submitted to the court. Even if he is the father of a British child there is no evidence that he has any right to contact with the child or that he is taking and intends to take an active role in the child's life. As a judge who also sits in the Family Courts I am aware that even were he to make an application for contact with his child the Family Court will only make an order if it is in the child's best interests and the fact that the Appellant has a conviction for domestic violence and has subsequently broken a restraining order may well militate against a contact order.

21. In conclusion, this is an Appellant who was granted entry clearance on the sole basis of his relationship with his wife. However, within a very short period of entering the UK this relationship had broken down because of his criminal behaviour. His wife has made it clear she wants nothing else to do with him. He has demonstrated contempt for the law of this country by breaking the restraining order against him, and by lying in court. There are no circumstances warranting granting of leave outside the rules, and I dismiss the appeal."

4. The appellant was unrepresented at the hearing of his appeal before Judge Myers. He has therefore been granted permission to argue that Judge Myers erred in law in that there is "no indication" (to quote from the grounds) that she followed the 'Adjudicator Guidance Note', issued in April 2003, concerning the procedures to be adopted in respect of an unrepresented appellant. However, as Mr Haque readily conceded, neither is there any evidence to indicate that the judge did not follow those procedures. Tellingly, no complaint has been made about this by the appellant himself. Mr Haque therefore abandoned this ground of appeal.

5. Linked to (but in my view discrete from) the above ground is the suggestion, contained within Deputy Judge Chamberlain's grant of permission to appeal, that Judge Myers failed to put it to the appellant that he had lied about his reason for breaching the terms of a Restraining Order (following release from his sentence of imprisonment) by contacting his wife by telephone.

6. The judge recorded the account that the appellant gave at the hearing for breaching the Restraining Order at paragraph 8 of her decision:

> "He was in court again at the beginning of November for breach of a restraining order under the Protection from Harassment Act against his wife. This was due to a misunderstanding; he did not understand the terms of the order because when he was sent to prison he lost the paper with the

> restraining order on it and did not understand when it said. When he was released from prison he called his wife because he wanted to know how his son was. He has not seen his son since the day he was convicted, and has been living with friends since his release from prison. He was represented at his original conviction and at the latest court appearance, but his present solicitors had given him some papers which he produced to the court, whereas the previous solicitors had not given him papers."

By contrast, it is apparent from paragraph 18 of Judge Myer's decision (above) that the appellant had told the police he did not intend to call his wife at all, but had done so by accident and that it had been his intention to call his uncle who had a similar telephone number.

7. In my judgement, fairness did not require the judge to put it to the appellant that he was a "liar", as is suggested by Deputy Judge Chamberlain. Indeed, it could be viewed as oppressive to do so, given that the appellant lacked the protection of a representative to object to what would have amounted to little more than name-calling. The most that can be said is that the appellant might have been afforded an opportunity to comment upon the discrepancy between his conflicting explanations for breaching the Restraining Order. However, it is difficult to see how the appellant could possibly have explained away or reconciled those accounts. I therefore consider it a counsel of perfection to suggest that he ought to have been given the opportunity to do so. Further, and in any event, the appellant had been convicted of contravening the terms of the Order, "without reasonable excuse". Thus, the possibility that he may have had a reasonable excuse for acting has he did had already been adjudicated upon by a criminal court, which the appellant was now in effect seeking to go behind. Moreover, it was the original conviction for assault the formed the basis for curtailment rather than the subsequent conviction for breaching the Restraining Order.

8. I therefore turn to consider the appellant's complaint that the judge failed to demonstrate that she had considered the exercise of discretion bestowed by paragraph 323 of the Rules.

9. It is right to say that the original decision-maker did not specifically consider the exercise of discretion under paragraph 323 of the Rules. He did however do so <u>outside</u> the Rules. Thus:

> 'The Secretary of State has had regard to all relevant circumstances appertaining to your case such as your character, age and known ties to the UK but it is not considered that these are sufficient to warrant a grant of leave <u>outside</u> the Rules.' [Emphasis added]

10. It is also clear, from the final sentence of her decision, that Judge Myers considered an exercise of discretion on this basis. Thus:

> "There are no circumstances warranting granting of leave <u>outside</u> the Rules, and I dismiss the appeal" [Emphasis again added]

11. It was undoubtedly a technical error of law for both the decision-maker and the judge to fail to recognise that there was an exercisable discretion under the Rules as well as outside them. However, this is in my judgement immaterial to the outcome of the appeal. It seems to me that precisely the same factors fell to be considered in the exercise of discretion, whether that be within or outside the Rules.

12. I therefore turn, finally, to the complaint that Judge Myer's consideration of the exercise of discretion was in any event inadequate.

13. There is force in Mr Haque's submission that, having apparently cut and pasted the legal principles that are relevant to the application of Article 8 of the Human Rights Convention into paragraphs 11 to 15 of her decision, the judge failed thereafter to demonstrate that she had applied those principles to the facts of the appeal. That complaint perhaps applies with particular force in respect of the application of "the considerations listed in section 117" [paragraph 14]. Although thus acknowledged, those considerations were neither quoted nor considered by the judge within the specific context of the facts of the appeal. I have nevertheless concluded that this error was also immaterial to the outcome of the appeal. This is for the following reasons.

14. At paragraph 20 of her decision, Judge Myers noted that there was little evidence that the appellant had a son or that he was a British citizen. Moreover, even if both those things had been established, she concluded that there was no evidence to show that the appellant had contact with him. (She also, somewhat unnecessarily, speculated upon the effect that the appellant's criminal history might have upon any application for contact he may/might make to the Family Court). Those findings have not been challenged. Thus, had the judge applied the considerations in Section 117B(6) to her findings of fact, she would have been bound to conclude that the appellant had not established that he had a son who was a "qualifying child" and/or that he had a "genuine and subsisting parental relationship" with that child. It would follow from this that the appellant had failed to establish that the public interest in his removal was outweighed by other factors. Thus, the judge's failure to consider and apply the statutory provisions was ultimately immaterial to the outcome of the appeal.

Notice of Decision

15. The appeal is dismissed.

Anonymity is not directed

Signed Date

Judge Kelly

Deputy Judge of the Upper Tribunal