Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01924/2014**

THE IMMIGRATION ACTS

Heard at Birmingham City Centre Tower	**Decision & Reasons Promulgated**
On 16 June 2016	**On 20 July 2016**

Before

UPPER TRIBUNAL JUDGE PITT

Between

CS
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Haye of H & M Law
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant or any member of his family. This direction applies to, amongst others, all

parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I make this order in order to avoid a risk of serious harm to the children in this matter.

2. In a decision dated 21 March 2016, I set aside the decision of the First-tier Tribunal Judge which allowed an appeal against the respondent's decision of 16 September 2014 to refuse to revoke a deportation order. That decision is appended. This decision remakes the appeal against the refusal to revoke the deportation order.

3. The parties were in agreement that, in line with SSHD v ZP (India) v SSHD [2015] EWCA Civ 1197, the correct legal approach was to follow paragraphs 390 and 391 of the Immigration Rules which provide as follows:

> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
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> (i) the grounds on which the order was made;
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> (ii) any representations made in support of revocation;
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> (iii) the interests of the community, including the maintenance of an effective immigration control;
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> (iv) the interests of the applicant, including any compassionate circumstances.
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> ...
>
> 391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:
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> (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or
>
> (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,
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> Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

4. The parties were also in agreement that the provisions of paragraphs 398, 399 and 399A of the Immigration Rules do not apply here. This is because someone with a sentence of less than 12 months only falls to be assessed under paragraphs 398, 399 and 399A only if, set out in paragraph 398, the respondent considers that "their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law". Mr Mills confirmed that is not the case here. The parties also agreed that the provisions of paragraph 117C of the Nationality, Immigration and Asylum Act 2002 did not apply here where the appellant, as someone with a sentence of 6 months, is not a "foreign criminal" as defined therein or elsewhere in the legislation; see OLO and Others [para 398 – foreign criminal") [2016] UKUT 00056 (IAC).

5. It should be noted, however, that the Court of Appeal was clear at [24] of ZP (India) that little substantive differences arises in revocation case even where paragraphs 398 – 399A are not in play, stating:

> "The exercise required in a case falling under paragraph 391 is thus broadly the same as that required in a case falling under paragraph 390A or paragraph 398. Decision-takers will have to conduct an assessment of the proportionality of maintaining the order in place for the prescribed period, balancing the public interest in continuing it against the interference with the applicant's private and family life; but in striking that balance they should take as a starting-point the Secretary of State's assessment of the public interest reflected in the prescribed periods and should only order revocation after a lesser period if there are compelling reasons to do so."

6. That being so, my starting point is the public interest in the maintenance of the deportation order for ten years, the respondent's assessment as contained in paragraph 391. The deportation order was made against the appellant on 2 June 2010 following a conviction for possession of a false identify document and sentence of 6 months' imprisonment. The decision was not appealed and the appellant was deported from the UK to India in 2010, so 5 years ago. Only "compelling reasons" can lead to a revocation of the deportation order now.

7. The evidence before me cannot show those "compelling circumstances". The First-tier Tribunal found that the appellant had not shown a genuine and subsisting relationship with his own son or his step-son. That was a conclusion manifestly open to the judge where the appellant has spent very little time with either child and has mostly lived in a different country from them. There was nothing before me to indicate otherwise. The appellant is the biological father of one child and step-father to the other but his lack of a strong relationship with either does not indicate that it is strongly in their best interests for him to return to the UK, certainly not so as to amount to a compelling circumstance that should lead to the revocation of the deportation order.

8. The appellant gains little assistance from section 117B of the Nationality, Immigration and Asylum Act 2002 where he does not have a genuine and subsisting relationship with the children and where his family life with his partner was established only whilst he was here unlawfully, indeed after

he was deported, his son being born thereafter also. The appellant and his wife clearly wish to be together and to bring up their children together but that cannot amount to a compelling circumstance in the context of a deportation appeal.

9. If anything, the scales now weigh even more heavily against the appellant as, after the hearing before the First-tier Tribunal, he attempted to enter the UK illicitly in breach of the deportation order but was arrested and is currently in immigration detention. Paragraph 390 specifies that the "maintenance of an effective immigration control" is a relevant factor and here it weighs heavily against the appellant and the revocation of the deportation order.

10. It is my conclusion that compelling reasons are not shown here that can outweigh the public interest in the continued exclusion from the appellant from the UK.

Notice of Decision

11. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be re-made.

12. The appeal is re-made as refused.

Signed  Date 24 June 2016
Upper Tribunal Judge Pitt

APPENDIX – ERROR OF LAW DECISION PROMULGATED ON 22 MARCH 2016

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01924/2014

THE IMMIGRATION ACTS

Heard at Birmingham City Centre Tower

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Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondent: Mr David, instructed by J Stifford Law

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

13. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant or any member of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

14. This is an appeal against the decision promulgated on 2 July 2015 of First-tier Tribunal Judge Ford which allowed the appeal against the respondent's decision of 16 September 2014 to refuse to revoke a deportation order.

15. For the purposes of this decision I refer to the Secretary of State for the Home Department as the respondent and to CS as the appellant, reflecting their positions as they were before the First-tier Tribunal.

16. The background to this matter is that the appellant entered the UK on a six month visit visa on 26 September 2004. When that six month visit visa expired he remained as an overstayer. On 10 March 2010 he was encountered by the immigration authorities and found to be in possession of a false Belgian passport. On 26 March 2010 he was convicted of possession of a false identity document with intent and sentenced to six months' imprisonment and recommended for deportation. After making an asylum claim which he then withdrew the appellant requested return to India under the Facilitated Return Scheme. A deportation order was made on 2 June 2010 and the appellant was deported on the same day.

17. After his departure, the appellant's British partner followed him to India. She lived with him there from June 2010 until October 2011. The appellant and his partner married in India on 2 July 2010. They then relocated to Spain where the appellant's partner exercised her Treaty rights as an EEA national by working. The appellant was able to obtain an EEA family residence permit and join her there. The couple continued to live together in Spain and had a child together, G, born on 3 June 2013 in the UK.

18. Whilst living in India and Spain, the appellant's wife had left her son, R, from a previous relationship with her parents. Finding it difficult to live apart from him and wanting to bring G up with the support of her family in the UK, the appellant's wife moved back to the UK after G's birth and the appellant returned to India. He made an application for the revocation of his deportation order on 3 June 2013. As above, the respondent refused that application on 16 September 2014.

19. The family history as set out above was not materially disputed before me. The respondent accepts the genuine and subsisting relationship with the appellant's wife and that he is the father of G and stepfather of R.

20. First-tier Tribunal Judge Ford had this to say about the appellant's relationship with the children, really the factor on which this case turns, finding as follows at [35]:

> "Neither child has formed a strong bond with the Appellant as of yet. That is because the Appellant was in Spain when G was born and I had no evidence before me to show that G would even recognise his father at this point in time. Apart from possibly some time spent in Spain visiting his mother and the Appellant, R has no knowledge of the Appellant and no relationship with him"

and at [39]:

> "39. Paragraph 399 only refers to undue harshness if the child is to remain in the UK without the person who is to be deported and does not refer to other family relationships. It refers to the genuine and subsisting parental relationship between the Appellant and the child. I am not satisfied that the Appellant has a genuine and subsisting relationship with R. His relationship with G is limited due to the fact that the Appellant has not been living in the UK with G since his birth almost two years ago."

21. The First-tier Tribunal went on as follows at [40], [42] and [43]:

> "40. The real issue in this case is not the parental relationship the Appellant has with G and/or with R. The real issue is whether, in order to enjoy any parental relationship with his father, G should be obliged to move to Spain with his mother, which involves the separation of R and G, or alternatively the separation of R from his maternal grandparents with whom he has a very close relationship of emotional dependency, given that they have been his carers between 2010 and 2013 and he has remained living with them in the same household since then.
>
> …
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> 42. Having considered the matter carefully, and bearing in mind the serious nature of the offence, the length of the sentence, the length of time the appellant has been outside of the United Kingdom, the fact that G is the Appellant's son and it is in his best interests to have a relationship with his father which he has not yet been able to form, and in particular the importance in the lives of both G and R of the maintenance and continuation of their fraternal relationships, I am satisfied that this decision is unduly harsh on both G and R. I do not accept that the decision is unduly harsh for [the Appellant's wife] as she formed her relationship with the Appellant at a time when she knew he had no immigration status and she married him after he was deported from the UK. Whilst it is untrue to suggest that the Secretary of State was unaware of the relationship, I am unable to find that the decision is disproportionate taking into account her relationship with the Appellant. She is a British national but as an adult she made a decision to enter into and pursue a relationship with the Appellant knowing the difficulties for that relationship. But there are two British national children involved in this situation, and bearing in mind all of the factors listed above, I am satisfied that the continuing deportation of the Appellant is disproportionate to the public interests of being protected. The Appellant has served his sentence for his offence. He has now been excluded from the United Kingdom for a period of almost five years following his six month sentence. The reality of this family situation is that either (the Appellant's wife) takes G to live with her and the Appellant in Spain, thus denying R the continuing close relationship he currently has with his mother and his brother G, or (the Appellant's wife) severs her relationship with the Appellant and G does not have the opportunity to develop and enjoy his relationship with the Appellant. It is not an option for R to move to Spain with his mother and the Appellant because he is now almost 11 years of age and has lived his entire life in the United Kingdom. It will be contrary to his best interests to remove him from the emotional support and stability offered to him by his maternal grandparents. It would also be contrary to his best interests to remove him from the education system in the

> United Kingdom and expect him to adapt at the age of almost 11 to living in Spain, a country of which he has very limited knowledge. There is no evidence to show that he speaks Spanish and he is at an important transition point in his childhood. He will be moving to secondary school with his cohort in September 2015.
>
> 43. I am satisfied that this decision is disproportionate because the public interest of maintaining immigration control and preventing crime and disorder have been served by the Appellant's deportation, but it is highly questionable whether his continued exclusion is necessary to maintain and protect those public interests. Also, I am satisfied that his exclusion is unduly harsh for both British citizen children involved in this case. I am satisfied that the circumstances have been materially altered by the birth of G in the UK and the relationships that have been formed between G and other family members since then."

22. The First-tier Tribunal then goes on to allow the appeal "on Article 8 human rights grounds".

23. At paragraph 14 of the grounds the respondent submits that:

> "The FTTJ has failed to provide any reason for concluding that it would be unduly harsh for the children to remain in the UK without the Appellant, other than the speculative hindrance to the development of a relationship with G. It is respectfully asserted that the conclusion that there would be an 'unduly harsh' consequence … completely ignores the Tribunal's previous findings that the Appellant has no real relationship with either of these children."

24. It is my view that this ground has merit such that the decision cannot stand. The First-tier Tribunal found in very clear terms at [35] and [39] that neither of the children had a "genuine and subsisting relationship" with the appellant. The provisions of paragraph 399 of the Immigration Rules and section 117C of the Nationality, Immigration and Asylum Act 2002 both require there to be such a "genuine and subsisting relationship" before consideration is given as to whether a particular child faces "unduly harsh" circumstances as a result of the continued deportation. Any assessment under either the provisions of paragraph 399 or s.117C regarding the appellant's relationship with the children is fatally flawed as a result. It was not open to the First-tier Tribunal to allow the appeal on the basis of undue hardship for the children where there was no "genuine and subsisting relationship" with those children.

25. In fact, the First-tier Tribunal erred in applying those statutory provisions at all as the appellant has a sentence of only six months so the deportation provisions set out in paragraphs 398-399A do not apply to him and nor does s.117C. The references to the appeal being allowed because the decision was "unduly harsh" for the children indicate clearly to me that they were incorrectly applied here. I was in agreement with Mr Mills that this in itself showed material error as the outcome of an Article 8 assessment that did not refer to those statutory provisions could not be said to be inevitably the same.

26. It is also not my judgement, contrary to argument for the appellant, that the judge found a higher test had been met when applying the statutory provisions so a "lower", free-standing second stage Article 8 "*Razgar*" assessment would inevitably have succeeded. The failure to factor in the fact of the appellant having very weak or no family life with R and mere biological parenthood of G and how that might affect the best interests assessment in any proportionality exercise also amounts to material error.

27. I find an error of law in the decision of the First-tier Tribunal for these reasons such that it must be set aside and remade.

28. This is not a case where the nature or extent of any judicial fact finding makes it necessary, having regard to the overriding objective in rule 2, to remit the case to the First-tier Tribunal.

Notice of Decision

29. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be re-made.

30. The appeal will be re-made in the Upper Tribunal.

Directions

31. The appeal will be re-made on the basis of oral submissions subject to written representations as to the need for any oral evidence, those representations being made no later than 21 days from the date of this decision.

32. No later than 7 days before the hearing, both parties will submit a skeleton argument setting out the correct legal approach to an appeal against as decision refusing revocation of a deportation order where the criminal conviction attracted a sentence of only six months.

Signed  Date 21 March 2016
Upper Tribunal Judge Pitt