



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09051/2017

THE IMMIGRATION ACTS

Heard at Field House
On 30 July 2018

Decision & Reasons Promulgated
On 9 August 2018

Before

UPPER TRIBUNAL JUDGE FINCH

Between

P
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. S. Clark of counsel, instructed by LT & P Solicitors

For the Respondent: Mr. S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

Anonymity

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

BACKGROUND TO THE APPEAL

1. The Appellant is a national of India. He entered the United Kingdom on 25 August 2004, as a student, and was granted further leave in this capacity until 30 November 2007. He was subsequently granted leave to remain as a Highly Skilled Migrant until 26 September 2009 and then leave to remain as a Tier 1 Highly Skilled General Migrant until 22 February 2015.
2. The Applicant applied for indefinite leave to remain as a Tier 1 (General) Migrant on 3 October 2014 but a decision on his application was deferred when he was arrested on various charges, including money laundering proceeds from a brothel and the possession of Class A drugs, in December 2014. On 3 July 2017 he was convicted of money laundering and keeping a brothel and was sentenced to 44 months imprisonment on each charge to run concurrently. He had previously received a suspended prison as the consequence of a fraud he perpetrated on his employers, HSBC, and had been unemployed since that date. In addition, he was convicted of battery in 2015 in connection with an assault on his wife and sentenced to an 18-month community service order, which he did not comply with.
3. The Respondent refused the Appellant's application for settlement on 14 August 2017 and also made a decision to remove him from the United Kingdom under section 47 of the Immigration, Asylum and Nationality Act 2006. Meanwhile on 12 July 2017 his wife had withdrawn her application for leave as his dependent on the basis that they had separated. The Respondent also made a decision to deport the Appellant on 1 September 2017.
4. The Appellant appealed and First-tier Tribunal Judge Ford dismissed his appeal in a decision, promulgated on 8 March 2018. First-tier Tribunal Judge Woodcraft refused him permission to appeal on 27 March 2018 but permission was granted by Upper Tribunal Judge Frances on 18 May 2018.

ERROR OF LAW HEARING

5. Counsel for the Appellant addressed me on the basis of his skeleton argument and then the Home Office Presenting Officer replied. I have taken their submissions into account when reaching my findings below.

ERROR OF LAW DECISION

6. The Appellant's application for settlement was refused under paragraph 245CD(b) and paragraph 322(1C) of the Immigration Rules. The former states that "the applicant must not fall for refusal under the general grounds for refusal...". The latter states that:

"Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused

(1C) where the person is seeking leave to enter or remain:

(ii) they have been convicted of an offence for which they have been sentenced to imprisonment for at least 12 months but less than 4 years, unless a period of 15 years has passed since the end of the sentence".

7. The Appellant has four children who are living in the United Kingdom. Two of them are children whom he had with his wife and they were born in 2007 and 2009. They have been granted leave to remain here until 5 March 2020. He has two other children by his partner. They were born in 2011 and 2014 and are British citizens.

8. In paragraph 18 of her decision, First-tier Tribunal Judge Ford stated that she must have regard to the factors set out in section 117A to D of the Nationality, Immigration and Asylum Act 2002. She relied upon the fact that the Applicant does fall within the definition of a "foreign criminal" for the purposes of section 117D which interprets the terms used within Part VA of the 2002 Act. The Home Office Presenting Officer adopted this argument and submitted that section 117C did apply to the Appellant because he is a "foreign criminal" as defined in section 117D(2). However, although section 117C is entitled "Article 8: additional considerations in cases involving foreign criminals, 117C(1) refers explicitly to "the deportation of foreign criminals being in the public interest" and the following sub-sections also refer to circumstances involving deportation. Section 117A(2) also states that:

"In considering the public interest question, the court or tribunal must (in particular) have regard-

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C".

9. As submitted by counsel for the Appellant it was the reference to cases concerning the deportation of foreign criminals which acted as the statutory condition precedent for the application of section 117C. The Appellant was not subject to a deportation order. Instead, the Respondent had decided to remove him from the United Kingdom. It is important to maintain the clear legal differential between these two separate procedures. This is especially the case when human rights are in issue.
10. The First-tier Tribunal Judge took the Appellant's circumstances into account in paragraph 59 of her decision but then in paragraph 60 she applied the "unduly harsh" test which derives from section 117C of the Nationality, Immigration and Asylum Act 2002 and paragraph 399 of the Immigration Rules. She should have applied the test in section 117B(6) of the 2002 Act as he had four children, who were qualifying children for the purposes of section 117D and he had a genuine and subsisting parental relationship with them.
11. Section 117B(6) gives rise to a very different test as it states that:

"In the case of a person who is not liable to deportation, the public interests does not require a person's removal where-

 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom".
12. This provision was simply not considered by First-tier Tribunal Judge Ford in her decision and this was a material error of law.
13. In addition, when considering the children's best interests, the Judge failed to make the necessary clear and unequivocal findings referred to by Mr. Justice McCloskey in paragraph 15 of *Abdul (s.55 – Article 24(3) Charter)* [2016] UKUT 106 (IAC).
14. It is also arguable that the First-tier Tribunal erred in her evaluation of the evidence relating to the strength of the Appellant's relationship with his two older children. In paragraph 59 she found that they had a poor relationship with the father and had only visited him once in prison. In fact, the evidence contained in the Appellant's Bundle indicated that they had visited him on four occasions and had maintained a close relationship with him.

15. As a consequence, there were errors of law in First-tier Tribunal Judge Ford's decision.

DECISION

- (1) The Appellant's appeal is allowed.
- (2) First-tier Tribunal Judge Ford's decision is set aside.
- (3) The appeal is remitted to the First-tier Tribunal to be heard *de novo* before a First-tier Tribunal Judge other than First-tier Tribunal Judge Ford and First-tier Tribunal Judge Woodcraft.

Nadine Finch

Signed

Date 30 July 2018

Upper Tribunal Judge Finch