



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/09958/2018**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Court 7, Royal Courts of
Justice,
The Strand, London
On 13 August 2018**

**Decision & Reasons
Promulgated**

On 01 October 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

H L

[ANONYMITY ORDER MADE]

Respondent

Representation:

For the appellant: Mr Esen Tufan, a Senior Home Office Presenting Officer
For the respondent: Ms Nahid Ahmed, Counsel instructed by Smart Law
Solicitors

Limited

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order in this appeal. The claimant will be referred to in these proceedings only as H L. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the claimant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Decision and reasons

- 1.** The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against his decision to make a deportation order pursuant to section 3(5)(a) of the Immigration Act 1971 (as amended). The claimant is a citizen of the People's Republic of China.
- 2.** No anonymity order was made in the First-tier Tribunal. I have considered whether anonymity is appropriate having regard to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) and to the Presidential Guidance given by the President of the Ft-TIAC in 2011 that all asylum appeals should be anonymised at case creation. In addition, the claimant's children are entitled to anonymity.
- 3.** It is appropriate to anonymise this appeal and I make that order.

Background

- 4.** The claimant is 31 years old, having been born in China in 1987. He entered the United Kingdom aged 20, on or about 28 May 2007, with false documents provided by a snakehead people trafficker, on the basis (he claimed) that he would work without an income in the United Kingdom until his snakehead debt was repaid. The claimant sought asylum at the port of entry and a screening interview was conducted, at which the claimant could not produce any immigration documents for himself.
- 5.** On 10 May 2007, the claimant was convicted at Uxbridge Magistrates' Court of an immigration documentation offence, contrary to section 2 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 and sentenced to 16 weeks' imprisonment. That is an offence of dishonesty. On 15 June 2007, the Secretary of State decided not to pursue deportation as the claimant did not then meet the criteria for a deportation order.
- 6.** The claimant has never attended an asylum interview and his asylum claim was refused on 22 August 2007 for failure to attend an interview, and because he absconded and failed to report. The claimant did not challenge that decision. He absconded from 6 August 2007 but surfaced 3 years later, on 21 September 2010. However, he soon failed to report again and on 11 October 2010, he was treated as having absconded for the second time. The claimant's former wife is the mother of his children, who saw the offence committed and who are very young (3 and 6 years old). She is not settled in the United Kingdom and no member of the family is other than a Chinese citizen.
- 7.** The claimant was convicted on 13 September 2017 at Chelmsford Crown Court of two offences against his then wife, one of assault, and one of assault occasioning actual bodily harm. The claimant was sentenced to 6 months' imprisonment in total. The sentencing Judge said this:

"You have pleaded guilty to two counts, one assault occasioning actual bodily harm, and another of common assault, and let me tell

you, it is wholly unacceptable for you to behave in a violent way towards your wife, and you know that it's morally wrong as well as being legally wrong. No matter how difficult your relationship might be, there is no excuse to resorting to violence. The most serious of these offences was committed on the 11th of August when I accept that you both punched and kicked your wife and that you undoubtedly will have caused huge distress to your young children, who were in the building at the time. ...this was a serious assault which, in my judgment, comfortably passes the custody threshold and can only be met by a sentence of imprisonment ...in relation to harm, [your wife] was a vulnerable victim and [it was] a sustained assault, in relation to culpability, you kicked her with a shod foot. ...”

The Judge considered the appropriate starting point to be 9 months' imprisonment, reduced to 6 months for an early guilty plea.

- 8.** The relationship of the claimant and his former wife is at an end. He does not see his children and has had no contact with them since the offence in August 2017.
- 9.** In the OASys report, which the Judge had before him, it records that the claimant was habitually violent towards his former partner and represented an enhanced risk of reoffending. The assessor considered that there were concerns in relation to the children and that social services should be contacted if he were to try to seek contact with his children.
- 10.** COS documents highlighted that there were further allegations against the claimant, 'which were not progressed but should be considered when assessing risk'. The offence details in the OASys report were as follows:

“The victim...and [the claimant] have been together for 7 years and have 2 young children together. ...On the 11/08/2017, the victim states that she had been back home for a few days and states that [the claimant] was angry with her and accused her for having an affair. Victim states that the day before this assault [he] demanded her new passcode for her telephone so he could check her telephone, which she refused, and [he] proceeded to 'smash the place up'. The victim states that this is normally a precursor to his physical violence. Victim states that she took the children to another room where there were other workers so that [the claimant] would not attack her or her children.

The following morning, the victim states that [the claimant] was still angry with her and started to smash up the room again, including the children's iPad. The victim said she was scared, as she knew the suspect would start to attack her and the children, so she grabbed the children and ran downstairs. [The claimant] chased after her and caught up with her. The victim stated that [the claimant] started a frenzied attack on her, punching her to the head several times, causing her to fall to the ground. She states that his blows caused her great pain as [the claimant] is very strong and goes to the gym...

[the claimant's] work colleagues tried to stop him and grabbed his arms, however [the claimant continued to attack her with his feet and delivered several kicks to her head whilst she was still on the floor. [The claimant's] colleagues managed to pull him off and he shouted at the victim, 'I AM GOING TO KILL YOU! IF I CAN'T KILL YOU TODAY I WILL KILL YOU IN THE FUTURE.'

Between 7/8/2017 and 11/8/2017, the victim states that, a few days prior to the first assault, she cannot remember the exact date but it was the day after she returned from her friend's address, that [the claimant] was still angry at her for running away from him. The victim states that he started smashing up the room again, he opened the window and threatened to throw ..the two year old child out of the window. The victim states that she was genuinely scared he would do this and told the children to run, they were crying and screaming. The children only went as far as the landing, not knowing what to do, the victim stood in the doorway to stop [the claimant] reaching the children. [The claimant] then started attacking her, by grabbing her hair, and rained down blows on her head and arms. The victim stated she had bruises on her arms but they have now [gone]. The victim states that [the claimant's] work colleagues intervened and he was stopped. The victim took the children away to the park and states [the claimant] came and begged her to come [home] and she did."

- 11.** The conclusion of the officer who prepared the OASys was that 'it is evident that these incidents were more frequent than recorded with police and therefore it is my assessment that [the claimant's] behaviour was triggered by means of him wishing to gain control of his partner and used violence as a means to gain said control'. The report concludes that there is a risk of serious harm, not just to the ex-partner but to the children. There were also 'allegations made around [the claimant] being physically and emotionally abusive to the children, however these were not progressed at Court'.
- 12.** If the claimant were to be granted bail, the officer considered that the children should be referred for social services to become involved in their protection. The risk was likely to be greatest if the claimant wanted to exert control over his partner or their children, if he was in a state of heightened emotional arousal, or in conflict with his former partner, such as when he was in conflict with his partner, when the relationship broke down, or if he went back to live with his former partner and their children. He should not be permitted to return to the family home 'unless assessed as suitable by Children's Social Care'.
- 13.** The claimant was assessed as presenting a medium risk of serious harm to partners and children he resides with, the risk being 'in relation to violence, threats of violence, threatening and intimidating behaviour, and/or emotional or psychological harm through experiencing or witnessing domestic abuse'. If he were released to the community, a complete review of circumstances, needs and risk would be required, including assessing the accommodation needs and suitability of any proposed address, referral to

Children Social Care to assess safeguarding concerns, a minimum of once-weekly reporting for at least 12 weeks, 1:1 case management work around domestic violence / abuse, and if he rekindled the relationship with the children's mother, regular liaison with police around any police callouts, to assist with risk assessments. If the risk increased, there should be discussions with the manage, risk reviews, liaison with relevant services involved, and risk escalation to the National Probation Service.

- 14.** On 25 January 2018, the Secretary of State made a deportation order against the claimant, on the basis that it was conducive to the public good for him to be removed, based on his criminality, pursuant to paragraphs 398, 399 and 399A of the Immigration Rules HC 395 (as amended). The claimant was served with a section 120 notice but did not raise any new matter within the 10 working days allotted.
- 15.** On 19 March 2018, the claimant submitted a human rights claim, challenging the decision to deport him. He relied on his relationship with his children but provided no evidence of their best interests, of their domestic circumstances, or of the nature of his relationship with them. He gave no reason why it was not reasonable to expect him to provide evidence about his children. He simply asserted that as their father, he should not be removed.
- 16.** The Secretary of State found that the relationship between the claimant and his former partner was no longer subsisting; that he had not shown very significant obstacles to reintegration in China; and that to remove him would not breach the United Kingdom's international obligations under Article 8 ECHR.

First-tier Tribunal decision

- 17.** The claimant told the First-tier Tribunal he had no family in China now. In the United Kingdom, he has his ex-partner, whom he assaulted, and two children, aged 6 and 3, who he does not see. The partner did not attend or give evidence to the First-tier Tribunal. The claimant told the Judge that his former partner had exaggerated her account to distance herself from the claimant and strengthen her bond with her new partner, who is lawfully present in the United Kingdom, unlike the claimant.
- 18.** The Judge accepted the claimant's evidence that this was an isolated incident, exaggerated by the claimant's former partner, and also found that as the documents offence was a strict liability offence, the claimant's use of travel documents to which he was not entitled did not amount to an offence of dishonesty. The Judge considered that the offence was a single, one-off incident and that deportation would be disproportionate.
- 19.** The Judge found there was a lack of substance in the public interest argument and that the balance did not lie in favour of deportation. He allowed the appeal.

Permission to appeal

- 20.** The Secretary of State appealed. He observed that the Family Court proceedings had not yet begun, and that, applying *GD (Ghana) v Secretary of State for the Home Department* [2017] EWCA Civ 1126 at [51], in any event, the Secretary of State was not bound by any order of the Family Court in deportation proceedings.
- 21.** The Secretary of State argued that the claimant's presence in the United Kingdom for the last 11 years had always been precarious: he has never had leave to enter or remain. The First-tier Judge had failed to have regard to part VA of the Nationality, Immigration and Asylum Act 2002 (as amended) and there was no evidence of any meaningful contact between the claimant and his children, nor that it would be in his best interests for him to remain.
- 22.** The best interests of a child could be outweighed by the United Kingdom's right to control immigration (see *MA Pakistan v Secretary of State for the Home Department* [2016] EWCA Civ 705). The Judge had failed to give sufficient weight to the public interest, as section 117A and 117B of that Act required.
- 23.** Upper Tribunal Judge Allen granted permission to appeal on the basis that the grounds of appeal identified arguable challenges to the First-tier Judge's decision.

Rule 24 Reply

- 24.** There was no Rule 24 Reply on behalf of the claimant.
- 25.** That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

- 26.** A skeleton argument was produced on behalf of the claimant at the Upper Tribunal. The claimant continued to assert that there were pending Court proceedings in the Family Court for which he should be allowed to remain in the United Kingdom. However, at [12] in the skeleton argument, that is plainly inaccurate.
- 27.** The claimant's new solicitors had written recently to his former wife's solicitors to commence contact proceedings. He had been granted some telephone contact with the children and had proposed a day every two weeks and overnight weekend contact on the same night. That had not yet occurred. The claimant's case was that his former partner was willing to try contact. There was nothing from her to confirm that assertion.
- 28.** In oral submissions, Ms Ahmad said that there were still no family proceedings. The claimant had not much money and preferred to try to reach an agreement, though he still had the intention of instituting contact proceedings. He had a right to contact with his children (see *MS (Ivory Coast)*). She accepted that there was no family life between the claimant and his children at the date of hearing, and argued that the failure to deal with section 117B was not fatal. The claimant should have been removed administratively, not deported, which would create a 10-year bar on return.

29. The solicitors who now represent the claimant were not involved in the First-tier Tribunal hearing and Ms Ahmad was forced into the position of taking instructions 'on the wing' during the hearing. The case had been prepared late, with the skeleton argument and new bundles only being put together shortly before the hearing. The claimant denied having seen the OASys report (which was plainly incorrect). There was no intention on the part of the claimant to begin contact proceedings and the statement that there were pending proceedings, made in the skeleton argument, was inaccurate. She accepted that there were no submissions in the skeleton argument before the First-tier Tribunal about the children's best interests.

Discussion

30. The decision in *MS (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 133 is not of assistance in these proceedings. It relates to a mother remaining in the United Kingdom while her contact application to see her children is before the Family Court. That is not the position here: the claimant has had all of this year to move the Family Court, but there is still no application and we only have his word for it that his former wife is willing to let him contact the children.

31. The evidence before the First-tier Judge was not such as to enable a rational decision that this was a one-off offence, still less (given his guilty plea) that his former wife was exaggerating in order to stay with her new, settled, partner and distance herself from the claimant. The OASys report, which the claimant clearly had seen, recorded appalling violence to his wife and threats to his children. The Judge's decision is perverse and I set it aside.

32. I then proceed to remake the decision. On the evidence, although he hopes to have a relationship with his children in future, the claimant has not had any relationship with them since the incident in August 2017, and is said to have threatened, frightened, and controlled them while he was living with their mother.

33. Section 117B(1) requires me to consider that the maintenance of effective immigration controls is in the public interest. The claimant has always been in the United Kingdom unlawfully so little weight can be given to his private life (section 117B(4)). There was more than sufficient evidence to support the Secretary of State's consideration that this claimant, who has never had leave to remain, and whose wife and children also were not settled in the United Kingdom or British citizens, cannot bring himself within section 117B(6) of the 2002 Act.

34. Section 117C is not applicable, as the claimant does not meet the definition of 'foreign criminal' at section 32 of the UK Borders Act 2007 (the sentence was less than a year and the offence was not a section 72 'serious crime').

35. Nor can the claimant bring himself within paragraph 399 or 399A of the Rules, for the same reasons already given in relation to section 117B.

36. I therefore substitute a decision dismissing this appeal.

DECISION

37. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the appeal.

Date: 24 September 2018

Signed [Judith AJC Gleeson](#)
Upper Tribunal Judge

Gleeson