



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00142/2016

THE IMMIGRATION ACTS

Heard at Field House
On 13 December 2017

Decision & Reasons Promulgated
On 06 July 2018

Before

**THE HONOURABLE LADY RAE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PERKINS**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHELTON [C]

(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer

For the Respondent: Ms M Malhorta, Counsel instructed by Shan & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the Claimant", against the decision of the Secretary of State to refuse him leave to remain on human rights grounds on 19 September 2016. He was made the subject of a Deportation Order on that day.
2. The case has taken a rather cumbersome route because of conceptual errors by the Secretary of State. Much is made in the Reasons for the Decision of the claimant's status as a refugee being revoked but he has never been a refugee and so there is no question of his refugee status being revoked.

3. The claimant is a citizen of Sri Lanka. He was born in November 1992. He came to the United Kingdom in September 2006 without permission and claimed asylum in March 2007. His claim for asylum was refused and an appeal allowed in June 2007 but instead of his being granted refugee status, as might have been expected, on 12 November 2009 he was granted indefinite leave to remain in the United Kingdom. That leave was cancelled by reason of Section 5(1) of the Immigration Act 1971 when a Deportation Order was made against him. The Claimant maintains that he is entitled to remain on human rights grounds and that therefore the decision to refuse him leave to remain on human rights grounds was unlawful. The Grounds of Appeal to the First-tier Tribunal rely on Article 8 of the European Convention on Human Rights and do not raise protection grounds.
4. It follows that the attention of the parties and to some extent of the First-tier Tribunal has been misdirected although the First-tier Tribunal in this case recognised that the Claimant had never been given refugee status and found that the claimant could not appeal against the decision to revoke something that was never granted. The judge went on to allow the appeal on human rights grounds.
5. When he gave permission to appeal Designated Upper Tribunal Judge McCarthy suggested that it may have been more appropriate to have dismissed the appeal on Refugee Convention grounds because there was no jurisdiction to entertain it but as Refugee Convention grounds were not raised in the grounds of appeal to the First-tier Tribunal and neither party has asked us to dismiss the appeal on Refugee Convention grounds we find that the First-tier Tribunal Judge was right not to dismiss the appeal on grounds that were not raised. The Judge did indicate at paragraph 16 of the Decision and Reasons that “the protection claim is bound to fail” but nothing turns on this.
6. We have decided to dismiss the Secretary of State’s appeal against the decision to allow the appeal on human rights grounds and we explain the reasons below.
7. The claimant was subject to deportation because he was convicted at the Crown Court sitting at Harrow of an offence of attempted robbery on 21 May 2012 and was sentenced to two years’ imprisonment. He was therefore subject to “automatic deportation” under Section 32(5) of the UK Borders Act 2007.
8. The First-tier Tribunal was obliged by Section 117A of the Nationality, Immigration and Asylum Act 2002 when determining whether a decision made under the Immigration Acts breaches the person’s right to respect for private and family life to have regard to the terms of Section 117 as amended. In particular this required the Tribunal to acknowledge that the maintenance of effective immigration control is in the public interest and that the deportation of foreign criminals is in the public interest and the more serious the offence committed by the foreign criminal the greater the public interest is in deportation.
9. However in the case of a foreign criminal who has not been sentenced to imprisonment of four years or more the public interest only requires that person’s deportation where “Exception 1 or Exception 2” do not apply. Exception 1 applies where a person has been lawfully resident in the United Kingdom for most of his life and therefore does not apply to the Claimant who was born in 1992 and has lived in the United Kingdom since 2006. Exception 2 applies where the person to be deported “has a genuine and subsisting relationship with a qualifying partner ... and the effect of C’s deportation on the partner or child would be unduly harsh”.

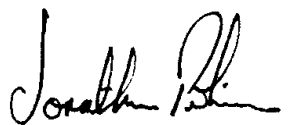
10. Despite some rather puzzling typographical errors in the Decision and Reasons it is accepted that the Claimant does not have a qualifying child. However he does have a life partner and so may come within the scope of Exception 2. With that background in mind we look carefully at the First-tier Tribunal's decision.
11. The judge notes that the claimant married in August 2016 and claimed that his relationship with the woman who is now his wife began in 2009. The judge also found that the claimant had taken significant steps in his rehabilitation, was a model prisoner and undertook numerous courses in prison and had not reoffended.
12. The judge found that the claimant is married and the relationship is "genuine and durable" and he found the claimant's wife to be a "highly impressive, credible and honest witness".
13. He found that the claimant had a social life in the United Kingdom and had worked and studied there and spoke good English. He was settled in the United Kingdom.
14. He also found that the claimant's wife is a British citizen who has always lived in the United Kingdom. She has achieved a degree and is working as a teaching assistant and that "all of her close family members, including her parents with whom she lives are present in the UK". He found that the claimant's wife was a graduate and was working as a "teaching assistant/teacher" in school. It puzzles us that the judge does not seem to appreciate the difference between these two roles but we do not see that anything turns on that in this appeal. The claimant's wife does not speak Tamil fluently and has little or no connections with Sri Lanka but does have a "very strong family life and roots in the UK". The judge found that it would not be proportionate to require the sponsor to relocate to Sri Lanka "where she would have little in the way of job prospects due to her language issues and particularly compared to her thriving career in the UK".
15. The judge went on to say that he found the claimant's conviction to be conduct that was completely out of character and that he posed "little risk of reoffending" and indeed the judge found positively that the claimant "will not do so". The judge found that it would be "unduly harsh" for the sponsor to remain in the United Kingdom and would not be able to live any kind of meaningful family life with her husband in Sri Lanka.
16. It is plain from the face of the decision that the First-tier Tribunal had little to say about the importance attached to deporting foreign criminals but we do not see this as an error of law because at paragraph 21 the judge acknowledged unequivocally that by reason of his being sentenced to two years' imprisonment "there is a presumption in public interest in his deportation". It is therefore quite impossible to argue seriously that the judge was not aware of the importance of Section 117C(1) or, on the facts of this case, that he failed to heed that importance. It would have been better if the judge had expressly paid regard to paragraph 117C but his finding at paragraph 24, which follows findings about the difficulties the claimant's wife would have in Sri Lanka at paragraph 22, refers to deportation being "unduly harsh to the sponsor" which is precisely the statutory test required under Exception 2.
17. It follows therefore that the First-tier Tribunal Judge clearly directed himself lawfully.
18. We have reflected on the decision because the reasons given are thin and there is strong public interest in deportation.

19. The judge's considerable reference to the claimant's reformed character and lack of further convictions is concerning in the sense that these are not in themselves reasons to allow an appeal. They do not feature at all in Part VA of the 2002 Act and are of limited relevance. However if propensity to reoffend is an aggravating feature, and we find this it is, it is appropriate for a Judge to record that this is not such a case. The appeal was not allowed because the claimant has reformed but because of the effect that his removal would have on his wife.
20. What matters here is that there is a necessary direction having proper regard to the requirements of the 2002 Act and a decision which we cannot say is irrational or otherwise unlawful.
21. The Secretary of State's first two grounds of appeal complain that the Judge wrongly found that the public interest in deporting the Claimant was diminished by reason of the delay between his conviction (2012) and the deportation order being made (2016) and that the judge gave unlawfully disproportionate weight to the Claimant's rehabilitation. These arguments are misconceived. At paragraph 22 of the Decision and Reasons the Judge says, after identifying the "unduly harsh" test in paragraph 21, that "I do not find that it would be proportionate to require the sponsor to relocate" to Sri Lanka. The Judge had already indicated that he was minded to allow the appeal before he considered the delay and rehabilitation. Rather than misdirecting himself, the judge was ensuring that there were no aggravating features before committing himself to the decision that he had already indicated that he thought correct.
22. The third ground of appeal criticises the Judge's finding that the consequences of removal would be unduly harsh. We do not agree that the decision was unlawful. The Judge gave clear reasons based on the Claimant's wife being settled in the United Kingdom where she has strong links and a career. It may be that this is a case that could have been decided differently on its facts but the decision that the consequences of removal would be unduly harsh is not unlawful.

Notice of Decision

It follows therefore that we dismiss the Secretary of State's appeal and the decision of the First-tier Tribunal shall stand.

Signed



Jonathan Perkins, Upper Tribunal Judge

Dated: 5 July 2018