



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/09594/2018

THE IMMIGRATION ACTS

**Heard at Birmingham Civil Justice Centre
On 16th July 2019
And Field House on 19th November 2019**

**Decisions and Reasons Promulgated
On 18th December 2019**

Before

**UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE RINTOUL**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Mr TAITEI [M]

Respondent

Representation:

For the Appellant: Ms H Aboni (16th July 2019), Mr P Deller (19th November 2019)
Senior Home Office Presenting Officer.
For the Respondent Mr S Vokes instructed by Cartwright King solicitors

DECISION AND REASONS

1. The Secretary of State sought and was granted permission to appeal the decision of First-tier Tribunal Judge Gurung-Thapa who had allowed the appeal by Mr [M] against the decision of the SSHD to refuse his human Rights claim following the making of a deportation order.

2. In brief, the judge, in reaching her decision that it was unduly harsh for the children and his wife to remain in the UK without him, improperly took into account the more general issues of Mr [M]'s immigration status and history, his remorse and the conviction in addition to the circumstances of the children and partner.
3. Although submitted by Mr Vokes that the findings made by the judge were sufficient to meet the 'threshold' of 'very compelling circumstances over and above those required to meet Exceptions 1/2' despite the First-tier Tribunal judge not having considered that issue, we are satisfied that the findings and the evidence before the First-tier Tribunal judge was insufficient to reach such a finding. The judge had not considered whether there were very compelling circumstances. Ms Aboni submitted that the findings of the judge did not meet the threshold required and the decision should be set aside.
4. We were satisfied that the errors of law are such that we set aside the decision to be remade; findings reached by the First-tier Tribunal judge were retained.

19th November 2019 hearing

5. Mr [M] filed a small bundle of additional documents which included updating witness statements and a social worker report. There was no challenge by the SSHD to the content of those documents, or to the findings of fact made by the First-tier Tribunal judge; we heard no oral evidence. Mr Deller and Mr Vokes filed a speaking note/skeleton argument and we heard oral submissions from each of them.
6. The background and retained factual findings are as follows:
 - (i) The appellant was arrested on 16th January 2004 and gave a false name. He was convicted on 23rd January 2004 of obtaining property by deception, resisting/obstructing a police constable and driving whilst uninsured. He received a financial penalty and points on his licence. He was served with administrative removal paperwork as a result of deception. He absconded.
 - (ii) He was due to appear in the Sheriff Court on 19th September 2006 having been charged with being concerned in the supply of Class A controlled drugs. He absconded.
 - (iii) On 16th January 2009 he was arrested for domestic assault, gave his real name and was linked to the above. A PNC check showed he had pending prosecutions. No criminal proceedings ensued from the domestic violence arrest.
 - (iv) An application made to the SSHD on 30th April 2015 resulted in him being given leave to remain on 4th September 2015 until 4th March 2018 (30 months).
 - (v) On 18th July 2016 he was convicted at Aberdeen Sheriff Court for supply, perverting the course of justice and failing to attend proceedings in the Sheriff Court. He received a sentence of 42 months imprisonment.
 - (vi) An application made on 1st March 2018 for further leave to remain was refused; on 13th April 2018 a deportation order was signed in accordance

with s32(5) UK Borders Act 2007. It is Mr [M]'s appeal against the concurrent refusal of his human rights appeal that is the subject of these proceedings.

- (vii) He has a wife with whom he cohabits, Ms [M], with whom he has one child born 10th October 2016 (C6). His partner has two children from an earlier relationship, one born 23rd May 2002 (C1) and one born 21st September 2009 (C5). All three children and his wife are British Citizens. Their relationship started in 2009, started living together in 2010 and were married in November 2015.
 - (viii) Mr [M] also has a child born 30th June 2006 (C4) who is a British citizen from an earlier relationship.
 - (ix) He has two other children born 15th August 2003 (C2) and 30th January 2006 (C3) from an earlier relationship. Those children are Zimbabwean citizens, have indefinite leave to remain and live with their maternal grandparents. Their mother is in another relationship with other children.
 - (x) There is no evidence Mr [M] has committed any further offences since the drugs offence in 2006, save for perverting the course of justice.
 - (xi) Mr [M] informed his criminal solicitors of his previous criminal activity and this was what led to his subsequent arrest and conviction in 2016. He also informed his immigration solicitors who had applied for him to be given limited leave to remain in 2015.
 - (xii) Mr [M] plays an active role in all of his children's upbringing; C4 visits every three weeks and spends part of the summer holidays with him and his wife; C2 and C3 live close by and spend holidays and weekends with him and his wife. The relationship with C4 was broken whilst he was in prison and her behaviour deteriorated but it has now settled down since he came out of prison.
 - (xiii) Ms [M], who is a qualified social worker and works full time, struggled to cope emotionally and financially when Mr [M] was in prison; her mother visited from Zimbabwe for three months during that time to assist her. She would not be able to continue working full- time if Mr [M] were deported.
 - (xiv) The older children became withdrawn and spent more time in their rooms when Mr [M] was in prison.
 - (xv) The SSHD accepts that it would be unduly harsh for any of the children to go to Zimbabwe in order not to be separated from their father.
 - (xvi) The SSHD accepts that it would be unduly harsh for his wife to go to Zimbabwe in order not to be separated from her husband.
7. The social workers report was prepared by an experienced social worker who has worked in both Zimbabwe and the UK. She has over 17 years' experience and this was evident from the care with which her report is written. She not only had telephone interviews but also undertook home visits at Mr [M]'s home and the grandparents.
8. Her conclusions include:

“17. [C2] and [C3] have enjoyed the consistent and stable care of their grandparents. This has in some way helped children from having multiple carers as they could have moved from one parent to the other then extended family member to the other due to a range of difficulties with each of the care arrangements. [C2] and [C3] have a strong bond and positive attachment with their grandparents.

18. [C2] and [C3] have regular contact and communication with their mother and father in the form of regular visits, telephone contact, on holidays, at Christmas and birthdays. This has helped the children cultivate a warm and close relationship with their mother and father from their early childhood and has been a source of emotional and material support.

19. [Mr] [M] had done well to keep all his children in contact with each other. Research shows siblings can be comforters, caretakers, role models, spurs to achievement, faithful allies, and best friends. No matter how close they are, most brothers and sisters share years of experiences that form a bond, a common foundation they do not have with anyone else...if parents are unable to provide the necessary care or are not available sibling attachments can be even closer....

...

21. The importance of grandparents in caring for [C2] and [C3] is well documented. Grandparents play an important role in the lives of their grandchildren, though it is often indirect. Most of their significance to children is seen through the support and help they give to their parents. Grandparents are often seen as “stress buffers”, family “watchdogs”, “roots”, “arbitrators” and “supporters”.

22. Research suggests that children find unique acceptance in their relationships with grandparents which benefits them emotionally and mentally. Grandparents can be a major support during family disruptions. Sometimes they are playmates for their grandchildren. They are also historians – teaching values, instilling ethnic heritage, culture and passing on family traditions.

23. I therefore respectfully submit that [C2] and [C3] are receiving consistent and stable care from their maternal grandparents. The father and mother have regular contact with [C2] and [C3] and their half siblings on holidays and weekends.

24. ...During interviews, the children stressed the importance of their father in their lives as the glue that brings and keeps the half siblings together. They always look forward to family gatherings with their father on holidays and family events, and his presence completes the children’s sense of family. The father’s direct involvement in his children’s lives and the children’s comments lead me to conclude that the father and his role is increasing as the children grow old, as he now has a stable family with his wife.

25. Research shows that high father involvement (as measured by reading, disciplining, taking on trips) is associated with fewer child behaviour problems and lower criminality and substance misuse all of which tend to be played out in school and impact on development. ...

26. If Mr Taitei [M] was to be removed from the United Kingdom the relationship with his children and the attachments is most likely to be significantly disrupted and the children particularly the youngest one will be

at risk of suffering significant emotional harm as a result of separation anxiety because the father has been the main carer while mother is at work most of the time. Contact between the father and children will be very difficult to maintain even via the social media as there is a serious problem with electricity in Zimbabwe where load sharing has resulted in households going for 11 hours, sometimes longer, without electricity. It is therefore in the children's best interest for Mr Taitei to remain in the United Kingdom where regular contact will remain possible.

27. ... Mr [M] will not be able to provide [economically] for his children from Zimbabwe in the same way he would be able to do while in the United Kingdom, once his immigration status is regularised."

9. Rai Legal, who previously represented Mr [M], write to the SSHD on 28th April 2015 and stated, inter alia,

"We have supplied evidence of the Applicant's previous convictions. These have been recorded on the application form itself.

The applicant is remorseful and regretful for his past behaviour, ...

The Applicant also has pending matters in Scotland, and we make reference to the letter from George Mathers & Co referencing the same. The covering letter is self-explanatory and contains relevant attachments.

As you will note, the Applicant wishes to be fully frank and honest in this application with a view to moving passed (sic) his past behaviour and moving onwards with his family life in the United Kingdom. You will also note that the documents supplied from the Applicant's Disclosure Records from the Home Office and the records from George Mathers & Co, the name used was a different name ...

The Applicant however again wishes to be totally frank and honest, has made this application in his correct name and has also disclosed the previous name that he used."

10. The Mr Vokes stated that it had not been possible to obtain a copy of the George Mathers letter referred to. It is therefore not possible to ascertain exactly what was said in it.
11. The applicant was served on 17th December 2009, with the indictment for possession and supply of Class A drugs on 19th September 2006, giving a false name and failing to appear on 17th May 2007 without reasonable excuse, with a first appearance on 5th January 2010 and trial date of 18th January 2010 notified. It is not clear what happened on that date save that the actual conviction did not take place until 2016. On 21st June 2016 he was remanded in custody and on 18th July 2016 was convicted of the drugs offences, attempting to pervert the course of justice and failing to attend the Sheriff court.
12. Mr [M] pleaded guilty (in his false name) on 18th July 2016 and was sentenced that day. The judge's sentencing remarks include the following:

"... I appreciate ...that you are essentially a different person from the person who was due to appear in court on the 19th September 2006.

The fact that this has taken so long to resolve is not, it appears to me, the fault of the crown on this occasion, but entirely attributable to your failure to

face up to your responsibilities. There was a significant quantity of class A drug diamorphine involved in this case. The matter would have been disposed of in 2006 or 2007 and, probably at that time, the sentences that would have been imposed would be longer than they are now, so to that extent you have probably escaped some justice and simply by not appearing. ... in the circumstances in this case, I can see no alternative but to imposing a lengthy custodial sentence. Again, I appreciate that you see yourself as a pawn in this, but I'm sentencing you as a courier not as a main player in relation to this drug dealing and for those reasons I feel I can impose a relatively restricted sentence.

... I take Charge 3 [concealing identity] as simply a rather amateurship attempt to evade justice at the initial stage when you were detained. I don't intend to impose any additional penalty in relation to that. ...

In relation to charge 5 (failure to attend without reasonable excuse) I propose to impose an additional penalty because of your failure to appear for ... indictment. I do not consider that there was any significant utilitarian value in the plea being tendered and therefore that will be a non-discounted penalty ..."

Discussion

13. There is no doubt but that it is in the best interest of all the children and his wife, both individually and collectively, for Mr [M] to remain in the UK. As stressed by Mr Vokes, Mr [M] has played a critical part in enabling the children to have productive and supportive relationships with each other despite living in different places and despite having different day-to-day carers. His absence will be a loss to the children. We note that his wife has not said that she would not continue to facilitate such contact; nor has she explained what difficulties there would be given in particular that the grandparents and other adults have been positive about the continued relationships between the children.
14. We appreciate that Ms [M] struggled financially when Mr [M] was in prison; we appreciate that the children's behaviour deteriorated. We appreciate that high father involvement reduces adverse social and behavioural issues for children. And we appreciate that the attachments formed between the children and their father would be likely to be significantly disrupted and that the children would be at risk of suffering from significant emotional harm. We note however that there is no distinction drawn in the social worker's report as to how each individual child may be affected or how their present supportive parent/grandparent/sibling would enable them to deal with the departure of their father. We recognise that it can be difficult to foresee the future, but the report does not assist us in identifying any particular harsh or unduly harsh repercussions on the children. Financial difficulties cannot amount to an unduly harsh outcome – it is a consequence of a family losing the day to day presence of a person who is able to care for younger children.
15. We note that the social worker refers to there likely being difficulties in maintaining contact through social media because of electricity outages. We take note of the economic problems faced by Zimbabweans but find it difficult to understand on what basis that prevents social media contact. Although there may be outages for 11 hours a day in some areas some of the time, the

evidence was not before us that social media would be disrupted to such a high degree as to render it very difficult for contact to take place.

16. The social worker does not reach a conclusion that separation from their father/husband would be unduly harsh – or even harsh. That there would be great sadness and upset is almost inevitable. That the family as a whole may well take some time to adjust to new methods of contact is perhaps inevitable. But these are the consequences of criminality and the deportation regime implemented through statute.
17. The evidence is not before us that separation from their father/ husband would, either individually or collectively, be unduly harsh.
18. We were addressed by Mr Vokes on whether, if we were to find that separation would not be unduly harsh, there were very compelling circumstances over and above exceptions 1 and/or 2 such as would render deportation disproportionate. Mr Vokes relied not only upon the unifying impact of Mr [M] and what he submitted were the very great benefits that brings to the children as an element of very compelling circumstances but also on the fact that despite having serious charges pending, the SSHD granted him 30 months leave to remain. He submitted that this reduced the perceived public interest in deportation, enabled Mr [M] and his family to develop their public and private lives on the implied understanding that such would continue and that ‘an ordinary person’ would perceive it that way. He did not seek to rely on ‘legitimate expectation’ but referred to the submissions made which led to the grant of 30 months leave to remain included the ‘George Mathers letter’. He relied upon Mr [M] being a model prisoner, that there were no further convictions since 2006 and that the risk of committing further crime was very low; that Mr [M] was very remorseful, and these were all matters which fell within the rubric of very compelling circumstances.
19. We acknowledge and take into account the cumulative effect of the various matters relied upon by Mr Vokes. We have placed very little weight on Mr [M]’s remorse or that he is at low risk of re-offending – these are matters which should be the norm and not matters which could contribute to compelling reasons for him to avoid deportation. In so far as the 30 months grant of leave is concerned, we do not know what the ‘George Mathers letter said but have taken the view that it accurately described the drugs charges on the indictment and that it may have described a charge of failing to appear without reasonable excuse. Despite the lack of actual evidence, we have also taken, at its highest, that the George Mathers letter stated that Mr [M] intended to plead guilty at the first opportunity. Whilst it may possibly, although unlikely, be surprising that the SSHD in the light of that indication chose to grant Mr [M] 30 months leave to remain, it is not apparent whether a date for trial had been fixed at the time the April 2015 submissions were made. We note that leave was granted in September 2015, but the trial was not until 18th July 2016 and it therefore seems unlikely that the trial date was known when the submissions were made.
20. It is our view that at the date the decision to grant leave was made, Mr [M] was not a convicted criminal such that he would be liable to deportation. For the SSHD to delay taking a decision on his application for leave until after some

unspecified criminal proceedings had taken place – even though there may have been an intimation of a plea of guilty, would have been unreasonable. There is no indication in the April 2015 submissions that the SSHD was informed of the scale of the drug offences or of the possible sentence that could be imposed. The SSHD could not rationally speculate as to the outcome of criminal proceedings. It cannot be rationally concluded that the SSHD should take a decision to grant a different period of leave to that which was usually granted following applications of that nature given the vague circumstances. That he was granted leave to remain for the usual period of time does not, in his case, amount to a compelling circumstance.

21. It is of course correct that Mr [M] and his family have been able to develop and enhance their family and private life. That is almost inevitable given the passage of time. That the family re-established itself after his release from imprisonment and the children settled down cannot be described as a compelling circumstance. It is to be expected.
22. We do not accept Mr Vokes submission that ‘an ordinary person’ would view the factual matrix as one which should lead to Mr [M] avoiding deportation. Although he has been in the UK for some 18 years, he was unlawfully present after the expiry of his visit visa in 2000. His first crimes were committed 4 years after his arrival; he committed very serious drugs offences 6 years after arrival and absconded from justice for almost 10 years. He did not regularise his immigration status until he made his application in 2015. The adverse impact on his children and wife of his imprisonment is as a direct result of his criminal activity and is not mitigated by his plea that he has been given 30 months leave to remain after having been an absconder. The consequences of his criminality on his wife and children are not, on the evidence before us, compelling circumstances that mitigate against his deportation. The public interest, as now set out in statutory form and in the Immigration Rules and jurisprudence, requires Mr [M]’s deportation.
23. In summary we find that Mr [M]’s deportation would not result in unduly harsh consequences for his children or wife, whether individually or collectively. There are no very compelling circumstances such as would render his deportation a disproportionate interference with his or their right to respect to family life.

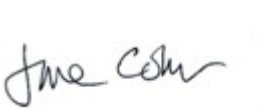
Conclusion

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision to be remade.

We remake the appeal by dismissing Mr [M]’s appeal against the refusal of his human rights claim.

Date 16th December 2019



Upper Tribunal Judge Coker