



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15898/2018(P)

THE IMMIGRATION ACTS

Decided under Rule 34

Of the Upper Procedure (Upper Tribunal) Rules 2008

Without a hearing

On 9th July 2020

Decision & Reasons Promulgated

On 23rd July 2020

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LD

(ANONYMITY ORDER MADE)

Respondent

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania born in April 1981. He arrived in the UK illegally in July 2001, and claimed asylum. His asylum claim was refused in August 2001, and the appeal dismissed in August 2002. He then absconded. In December 2008 he returned to Albania. In January 2011 he re-entered the UK with entry clearance as a spouse, and in December 2013 he was granted indefinite leave to remain on this basis. On 29th July 2016 he was convicted of conspiracy to supply class A drugs and given a three year' sentence of

imprisonment. In April 2017 he received a notice of intention to deport from the Secretary of State, to which he responded by making an asylum and human rights claim. In March 2018 he withdrew the asylum claim but continued to argue that deportation would be a breach of his Article 8 ECHR rights. In July 2018 a deportation order was signed against him and the Secretary of State refused his human rights application. His appeal against that decision was allowed on human rights grounds by First-tier Tribunal Judge Talbot in a determination promulgated on the 21st January 2020.

2. Permission to appeal was granted by Upper Tribunal Judge Gill on 11th March 2020 on the basis that it is arguable that the First-tier Tribunal erred in law when concluding that it would be unduly harsh for the claimant's son, CD, to remain in the UK whilst the claimant is deported because it is arguable that the First-tier Tribunal did not take into account that the claimant had limited contact with his son and was not his primary carer and/or that the First-tier Tribunal failed to give adequate reasons for concluding that it would be unduly harsh for CD to remain in the UK whilst the claimant was deported. It was also found to be arguable that the conclusion that the appeal should be allowed outside of the exceptions to deportation laid down in the Immigration Rules was not decided correctly by reference to whether there are very compelling circumstances over and above the exceptions.
3. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules to decide matters fairly and justly directions were sent out to the parties by Upper Tribunal Judge O'Callaghan by email on 21st April 2020 seeking written submissions on the assertion of an error of law with a view to determining that issue on the papers, and giving an opportunity for any party who felt that a hearing was necessary in the interests of justice to make submissions on that issue too. Submissions were received from the claimant but not the Secretary of State in response to these directions.
4. The matter came before me to determine whether it is in the interests of justice to decide this matter without a hearing and if so to determine whether the First-tier Tribunal has erred in law and if so whether the decision should be set aside. I find that it is appropriate to determine whether there is an error of law on the papers as neither party has put forward any objection to this course of action despite being given the opportunity to make submissions on this issue, and, I find, whilst appreciating that this is an issue of great importance to the claimant given it determines his Article 8 ECHR rights in the context of his deportation, that the issues which arise are discrete and it can, I find, be done fairly and justly in this way.

Submissions – Error of Law

5. In the grounds of appeal for the Secretary of State it is argued, in short summary as follows. It is argued that there was a material misdirection of law in the decision that it would be unduly harsh to the claimant's son, CD, if he were deported. At paragraph 24 of the decision regard is had to s.55 and the best interests of the child, but these are only a primary consideration. It is argued that the impact on CD's education is not an unduly harsh consequence in the context that the claimant does not live with CD and is not his primary carer and CD will have access to care and medical treatment in the UK. There are therefore inadequate reasons for finding that the impact on CD would be unduly harsh particularly as whilst the claimant was in prison there was no apparent face to face contact between him and CD, and contact via telephone and video calls could continue from abroad. In this context insufficient weight is given by the First-tier Tribunal to the three aspects of the public interest in deporting the appellant: the protection of the public from further crime; the deterrent effect on other foreign nationals; and the need to maintain respect for the system of immigration control.
6. In submissions for the claimant dated 11th May 2020 Edgewater Legal argue, in summary, as follows. The submissions address the three issues identified by Judge Gill in her grant of permission.
7. Firstly, with respect to the contended limited contact between the claimant and his son, CD, it is argued that to come within the family life exception at s.117C(5) of Nationality, Immigration and Asylum Act 2002 it is necessary to show a genuine and subsisting parental relationship with a qualifying child, and not that the claimant is a primary carer, see also SR (subsisting parental relationship - s.117B(6)) Pakistan [2018] UKUT 334 IAC where fortnightly 3 hours of contact satisfied this requirement. CD is a British citizen so clearly a qualifying child. The First-tier Tribunal was well aware of the extent of the contact between the claimant and his son, see paragraph 15 and 25 of the decision, and found the claimant's evidence on the issue credible. The evidence was not challenged by the Presenting Officer, and was corroborated by CD's mother and in the report of the professional social worker. At paragraph 20 of the decision the evidence of the social worker concluding that the claimant and CD "have a deep understanding and affection for each other" and have a "tactile relationship" is set out, and this leads the First-tier Tribunal to conclude at paragraph 28 of the decision that the social worker was "impressed with the depth of relationship" between the claimant and CD despite CD's communication difficulties.
8. Secondly, it is argued that adequate reasons are ones that are just that, and there is no need for perfection, and the duty on the First-tier Tribunal was simply to explain to the losing party, in this case the Secretary of State, why she had lost. The correct test for unduly harsh was identified at paragraph 27 of the decision, in which it was said that what was needed was "a degree of harshness going beyond what would necessarily be involved by any child faced with the deportation of a parent." At paragraph 29 the First-tier

Tribunal identified two factors which went beyond the trauma of separation that any child would face on deportation of a parent: the fact that the absence of the claimant would create parenting stress for CD's mother particularly as she had another child with particular care needs; and secondly that indirect contact between the claimant and CD was unlikely to take place for the reasons given by his mother and the social worker. CD is a profoundly disabled child and so the parenting stress on his mother would be atypically great; and his mother would not allow video calls between the claimant and CD for the reasons set out by the social worker in her report because she feels that CD would be retraumatised by revisiting his loss by seeing the claimant in this way, as per the evidence set out from both at paragraphs 18 and 20 of the decision. In addition there would be the loss to CD of the claimant who is a carer with particular understanding of him given his severe disabilities, this is set out in the evidence at paragraph 20 and although this not high-lighted by the First-tier Tribunal in their reasoning this was nonetheless implicit, and any error to set this reasoning out explicitly is immaterial given the other reasoning and obviously strong evidence on undue harshness in this case.

9. As the First-tier Tribunal found that an exception to deportation, at s.117C(5) of the 2002 Act/ paragraph 399(a) of the Immigration Rules applied there was no need for them to go on to consider whether very compelling circumstances over and above the exceptions existed as clearly there would be no public interest in the deportation of the claimant if he satisfied an exception. As such it was not necessary to apply this test. If there is any error of law in the decision in making findings that went beyond the fact that he fulfilled the requirements of the exception then this would therefore be immaterial to the outcome of the appeal.

Conclusions – Error of Law

10. The Secretary of State accepted in the reasons for refusal letter, as set out at paragraph 6 of the decision, that the claimant's son, CD, is a qualifying child as he is a British citizen and that it would be unduly harsh for him to go and live in Albania as the claimant and CD's mother are no longer in a relationship. That it would be unduly harsh for CD to go and live with the claimant in Albania is further reasoned by the First-tier Tribunal at paragraph 26 of the decision in relation to his need for care and services in light of his disabilities. It is accepted by the Secretary of State that CD suffers from cerebral palsy, epilepsy and deafness. It is contested that CD has a genuine and subsisting parental relationship with CD or that it would be unduly harsh for the claimant to be deported and CD to remain in the UK.
11. CD is a profoundly disabled child who needs a very high level of support and care. He has needed a lot of medical help during his life. He is now 13 years old but has a learning age of a 3 to 4 year old child. He cannot walk or stand unaided, he cannot speak and is profoundly deaf, he needs help with going to the toilet, feeding and washing. He has small vocabulary of sign

language. He has increased epileptic seizures since November 2019. This is evident from the evidence of his mother and supported by the extensive medical evidence provided to the First-tier Tribunal.

12. CD's mother's evidence is that she had struggled to care for him alone whilst the claimant was in prison, and that there is a strong bond between CD and the claimant. He would be distressed by not seeing him in person and could not cope with a relationship via video call which he would find distressing, and so she would not allow such calls to take place. The evidence of the social worker is confirmatory of their being a deep and tactile relationship between the claimant and CD and her view is that the loss of this relationship would be traumatic because he would have no contact whatsoever because contact via video call would be distressing and useless for CD in his mother's view so she would not allow it (a view which she regards as a sound parenting decision), and because of the parenting stress on his mother if she were forced to deal with him as a lone parent.
13. The evidence of the claimant is that he spends every other weekend with CD, and also visits in the week when he can take time off from work. He provides for him financially and is committed to maintaining his relationship with him.
14. At paragraph 25 the First-tier Tribunal finds that the claimant has a genuine and subsisting parental relationship with CD, and notes that there was no challenge to his evidence from the Secretary of State's representative in cross-examination, and that the claimant's evidence on this point was corroborated by that of CD's mother and the expert social worker. This is the correct legal test for the relationship for qualification under the exception relating to family life with a child at s.117C(5) of the 2002 Act. There is no requirement that the claimant be his child's primary carer and there is no factual error in understanding the precise nature and extent of the relationship between the claimant and CD in the decision.
15. The First-tier Tribunal directs itself properly that the best interests of the children are "a primary consideration" at paragraph 24 of the decision, and on the exception relating to the claimant's deportation being unduly harsh at paragraph 23. There are proper legal directions as to the legal meaning of unduly harsh with reference to case law at paragraph 27 noting that this focuses solely on the child and is something severe or bleak and goes beyond what would necessarily be involved for any child facing the deportation of a parent. At paragraph 30 the First-tier Tribunal reminds itself that this test has a "very high threshold". I find the legal directions relating to the meaning of the question of whether the claimant's deportation would be unduly harsh to his son, CD, are faultless.
16. The First-tier Tribunal then answers the question as to whether it would be unduly harsh to deport the claimant whilst CD remains in the UK at paragraphs 28 and 29. I find that those reasons are more than adequate,

particularly given the context of the evidence set out in the decision at paragraphs 7 to 20, the relevant parts of which I have summarised above. At paragraph 28 the First-tier Tribunal explicitly says that weight in coming to the conclusion is placed on the expert evidence of the social worker, which is found to be relevant given her experience but also her time spent with the family and preparing the report with reference to the extensive documentation regarding CD.

17. As the claimant's solicitors point out the First-tier Tribunal identifies firstly the parenting stress on his mother left to care for CD alone in the context of her having another child for whom she is sole parent who has his own difficulties including a recent diagnosis of autism. This was clearly reasoning in the context of the very severe disabilities of CD which clearly make parenting immeasurably more difficult for his mother.
18. Secondly the First-tier Tribunal identifies the issue that indirect contact between CD and the claimant via video link would not take place as his mother is of the view, supported by the social worker as a reasonable parenting decision, that this would be traumatising for him given his limited understanding of the world and disabilities. It is plain from the evidence that given his lack of speech and the fact that he is operating at the level of a 3 or 4 year old that the relationship that the claimant and he has is a physical one, and that it was reasonable to conclude that unlike with an ordinarily able child he could not benefit from video link contact at all.
19. I find that this reasoning shows that the First-tier Tribunal has identified severe and bleak consequences going beyond the normal consequences of deportation for CD if the claimant is deported which reach a very high threshold, and that there is therefore no error of law in the reasoning in this case.
20. I find that it is not arguable that the appeal is determined on the basis of s.117C(6) of the 2002 Act due to their being very compelling circumstances over and above the exceptions, as it is found that an exception had been made out, because in the final paragraph of the decision, paragraph 33, it is stated that his deportation is outweighed by it being unduly harsh to his child. It maybe that paragraphs 31 and 32, which consider the aspects of the public interest in deportation and acknowledge that these are not simply the prevention of reoffending, were not strictly necessary to reach this conclusion but they in no way amount to an error of law.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
2. I uphold the decision of the First-tier Tribunal allowing the appeal of the claimant on human rights grounds.

Signed *Fiona Lindsley*

9th July 2020

Upper Tribunal Judge Lindsley