



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

Appeal Number: UI-2023-003263

HU/53010/2022

First-tier Tribunal No:

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

Heard on 2 October 2023

Prepared on 10 October 2023

23rd October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

CAMERON STUART WHITE

(Anonymity order not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Marziano, counsel

For the Respondent: Mr M Parvar Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of New Zealand born on 31 May 1982. He appeals against a decision of Judge of the First-Tier Tribunal Hone dated 27 June 2023 which dismissed the appellant's appeal against a decision of the respondent dated 5 May 2022. The appellant had applied on 22 September 2021 (as subsequently varied) for indefinite leave to remain on the basis of article 8 (right to respect for private and family life). On 3 September 2020 the appellant was found guilty of making indecent photographs of children and was ordered to be placed on the sexual offenders register for five years and a sexual harm prevention order for five years was also imposed.

The Appellants' Case

2. The appellant's case was that he was now in a permanent relationship with a British citizen but there were insurmountable obstacles to his return to New Zealand and such a return would result in unjustifiably harsh circumstances. Although the appellant's partner was willing to travel to New Zealand with the appellant, the appellant's argument was that that was impossible because he could not sponsor his partner in New Zealand due to the conviction. He argued that he had undertaken rehabilitation which reduced the public interest in refusing his application.

The Decision at First Instance

3. At [8] of the determination, the judge confirmed that article 8 was engaged in this case because of the appellant and his partner's relationship. The judge began her findings at [14] onwards noting at [16] that rehabilitation did little to reduce the seriousness of the offence which the appellant had committed. The judge analysed the legal difficulties in New Zealand at [21] noting that it was a two stage test. First of all was there a relationship which in this case appeared not to be in dispute but secondly was the sponsor a suitable person to sponsor a migrant into New Zealand? It was on this point that the appellant had failed. The appellant needed to obtain a waiver to the sponsor's suitability requirement but the New Zealand authorities were not prepared to grant such a waiver.
4. The judge pointed to a lack of expert evidence on the existence of any other New Zealand immigration requirements. There was nothing to support the appellant's assertion that there was no other way for the partner to join the appellant in New Zealand on a permanent basis. The judge found that the appellant and his partner were not credible on this point. The judge indicated that the burden was on the appellant to show insurmountable obstacles and that burden was not discharged. The appeal was dismissed.

The Onward Appeal

5. The appellant appealed against this decision conceding that the appellant's offending disqualified him from being able to rely on the immigration rules. The appeal was on the basis that refusing to grant leave to remain was disproportionate. The grounds that there had been no balance sheet analysis of the article 8 claim, in this connection see below my consideration of [29] and [30] of the determination. The grounds argued that the appellant's rehabilitation was relevant to the weight to be given to the public interest in the proportionality exercise. There were no detailed reasons for the credibility finding. Permission to appeal was granted by the First-tier Tribunal on the grounds that the judge had inadequately reasoned the proportionality findings and that the disregard of the appellant's rehabilitation efforts was irrational. I assume that what the judge granting permission meant was that it was arguably irrational.

The Hearing Before Me

6. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.
7. In oral submissions counsel referred to a witness statement prepared by the appellant relating to the appellant's rehabilitation. For the judge to say that was immaterial must be itself a material error of law. The question of rehabilitation was relevant to the issue of removal. This however was not a deportation appeal because the appellant's offending did not meet the custody threshold. The sentence the appellant received was a rehabilitation order. I queried with counsel what authorities there were concerning the issue of rehabilitation (the appellant's grounds of appeal had not cited any). I was only referred to the Supreme Court judgement in **Hesham Ali**.
8. The appellant's partner, it was argued cannot enter New Zealand under the partner provisions. The appellant had provided evidence of the refusal and the detailed legal advice setting out the position. The applicant was considered to be an unsuitable sponsor because of the conviction. It was acknowledged that there was no evidence of the visit visa rules for New Zealand although that could be provided and would be encyclopaedic in extent. The impact of the refusal of the partner visa was significant. The difficulties which the judge set out were not properly weighed in a balancing exercise. It was a very short determination and the judge fell into error.

9. In reply for the respondent it was argued the judge had appropriately directed herself and made findings which were open to her. There was a balance sheet approach in the determination. The judge was entitled to take the view that the appellant's offending caused serious harm. The judge acknowledged that the appellant had engaged with the probation service taking steps towards rehabilitation but that did little to reduce the seriousness of the offending. Rehabilitation was considered and taken into account in the proportionality exercise. Expert evidence was expected in a case like this where it involved a question of foreign law. The judge had not found the appellant and his partner to be wholly incredible. The credibility finding referred to entry into New Zealand rather than credibility as a whole. It was difficult to say that this was not adequate reasoning. There was no obligation to rehearse every point of evidence. The determination explained in clear terms the reasons for the judge's conclusions. There was no error.
10. Finally in conclusion for the appellant it was remarked that a level of rehabilitation such as this should be taken into account in the proportionality exercise. The judge's findings on rehabilitation were woefully insufficient. The sentence which the appellant received was one of rehabilitation that was alluded to in the granted permission to appeal. The appellant and his partner had gone to lengthy procedures to stay in New Zealand it was not therefore correct for the judge to say that the appellant and his partner were motivated by a desire to remain in the United Kingdom. There was expert evidence from a New Zealand lawyer before the judge. It only referred to a family visa because that was the most suitable.

Discussion and Findings

11. This is a reasons based challenge to a determination which while concise does deal with the relevant points. The appeal was outside the immigration rules under article 8. It was contended on behalf of the appellant that he could not enjoy his article 8 rights in his relationship with his partner because she could not obtain a permanent visa to live in New Zealand with him. The judge was concerned that there was a lack of evidence to support the contention that there was no other way for the appellant's partner to live with or indeed to visit the appellant in New Zealand. Indeed it was conceded in argument before me that there was no independent expert evidence on the provisions regarding visit visas.
12. The burden of proof was on the appellant to demonstrate that there were insurmountable obstacles to his return to New Zealand. The only obstacle put forward was that the appellant's partner could not obtain a permanent visa. The judge did not regard that as an insurmountable obstacle since it did not prevent the appellant and his partner being in New Zealand at all. It was only that there were difficulties in the partner visa route. As the presenting officer correctly pointed out in the hearing before me this is a case where one would have expected expert evidence

on the ramifications of New Zealand law but instead the evidence before the judge concentrated only on the difficulties experienced by the couple in obtaining a partner visa. The burden of proof rested on the appellant to show insurmountable obstacles but he did not do this.

13. The appellant also complains that the judge paid inadequate attention to the rehabilitation work he has undertaken. Such work which it was argued mitigates the public interest to be placed on the seriousness of the offending. The seriousness itself appears to be acknowledged by the appellant, the question is what weight should the judge have placed in the proportionality exercise on the fact that there was a rehabilitation order imposed on the appellant? Although no authorities were cited in the grounds of appeal, there have been a number of decisions of the higher courts in relation to rehabilitation particularly in deportation cases. In the Supreme Court authority of **HA Iraq [2020] EWCA Civ 1176**, it was said:

"[T]he fact that a potential deportee has shown positive evidence of rehabilitation, and thus of a reduced risk of re-offending, cannot be excluded from the overall proportionality exercise. The authorities say so, and it must be right in principle in view of the holistic nature of that exercise. Where a tribunal is able to make an assessment that the foreign criminal is unlikely to re-offend, that is a factor which can carry some weight in the balance when considering very compelling circumstances. The weight which it will bear will vary from case to case, but it will rarely be of great weight [my emphasis] bearing in mind that ... the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern. I would add that tribunals will properly be cautious about their ability to make findings on the risk of re-offending, and will usually be unable to do so with any confidence based on no more than the undertaking of prison courses or mere assertions of reform by the offender or the absence of subsequent offending for what will typically be a relatively short period."

14. What the appellant in this case is suggesting is that the rehabilitation work undertaken by him reduces the public interest weighing against him in the article 8 proportionality exercise. The difficulty for the appellant is that such rehabilitation work carries little weight. The judge was aware of this when she said at [16]: *"it is accepted that the appellant has engaged with the probation service and taken some steps toward rehabilitation. Though given the seriousness of the harm caused, in my finding this does little to reduce the seriousness of the offence."*
15. It was a matter for the judge to decide in the proportionality exercise what weight should be given to rehabilitation work undertaken by the appellant. The offence was a serious one and the authorities indicate that rehabilitation is not usually of great weight. That the sentencing of the appellant included a compulsory rehabilitation element was evidently not

enough for the judge to consider that rehabilitation should now require some significant weight. If rehabilitation carried little weight as the judge indicated then it could not significantly reduce the weight of the public interest in the proportionality exercise. Another judge might have assigned a different weight but the question is whether judge Hone made a material error of law in this regard and I find that she did not.

16. Her decision cannot be said to be irrational. Nor can it be said to be too short or omitting important factors. For example, it was claimed in the grounds of onward appeal that the judge had not carried out a balancing exercise. The drafter of the grounds had perhaps not read the judge's determination with sufficient care in making this point. At [29] the judge begins her article 8 balancing exercise with a subheading to that effect. She refers to striking a fair balance between the competing public and individual interests involved and specifically says that she adopts a balance sheet approach. At subparagraph (d) she weighs certain factors in the appellant's favour and at [30] she strikes what she describes as a fair balance between the competing public and individual interests involved.
17. As I have indicated the determination is concise but it contains all the relevant matters. It was open to the judge to come to the view on rehabilitation she does. The judge carried out a full proportionality exercise. Her finding on credibility related specifically to the claim that there were no alternative routes for the appellant's partner in circumstances where no evidence of a lack of alternative routes was put forward. It was not an attack on the appellant's credibility generally, for example the fact of the relationship was accepted by the judge and factored into her balancing exercise, see [29 (d) (i)]. A point perhaps overlooked by the grantor of permission. The grounds of onward appeal are in effect no more than a mere disagreement with the judge's decision. The appellant and his partner do not have the right to choose where to exercise their family life. As the judge points out New Zealand is a visa free country for United Kingdom citizens and there was a dearth of evidence on what other options were open to the parties to live in New Zealand. The burden was on the appellant to demonstrate that there were no such other options but he did not do so for the reasons given by the judge. I find there was no material error of law in the judge's determination and I dismiss the onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 10th day of October 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge