



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19702/2016

THE IMMIGRATION ACTS

Heard at Field House, London
On 26th June 2018

Decision & Reasons Promulgated
On 4th July 2018

Before

**MRS JUSTICE MOULDER
UPPER TRIBUNAL JUDGE STOREY**

Between

**XU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Halim, Counsel

For the Respondent: Mr Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the determination of the First-tier Tribunal of 23 November 2017 dismissing the appellant's appeal against the decision of the respondent to refuse his human rights claim.
2. Permission was granted by Judge Hollingworth on 8 March 2018.

Background

3. The background to this matter is that the appellant first arrived in the UK in 2003. The immigration history is summarised in paragraphs 2 - 5 of the First-tier Tribunal decision. For the purposes of this appeal the material event is the appellant's conviction in July 2014 of possession with intent to supply both class A and class B drugs for which the appellant was sentenced to 3 years 6 months imprisonment.
4. On 26 February 2015 a decision was made to refuse the appellant's human rights claim and to make a deportation order. The appellant appealed that decision which was dismissed by the First-tier Tribunal.

Judgment of the First-tier Tribunal

5. In the judgment of the First-tier Tribunal the judge summarised the evidence that he had received from the appellant's wife and from the appellant's friend who helped out the appellant's wife.
6. The judge summarised the submissions on both sides in relation to the issue of whether it would be unduly harsh for the children to remain in the UK without the appellant. Counsel for the appellant relied on a report from an independent social worker that the children suffered considerable distress at being separated from the appellant and the stresses on the appellant's wife and that the family was struggling financially in the absence of the appellant.
7. The judge set out the law in section 117 C of the 2002 Act and referred to paragraphs 396 - 398 of the immigration rules. The judge then referred to various authorities including the recent authorities of the Supreme Court in *Hesham Ali v SSHD [2016] UKSC 60*, and of the Court of Appeal in *EA (Zimbabwe) v SSHD [2017] EWCA Civ 10 and NE-A(Nigeria) v SSHD [2017] EWCA Civ 239*.
8. From paragraphs 50 onwards the judge set out his findings and reasons. At paragraph 52 the judge recorded the presumption that the deportation of a foreign national offender is in the public interest and that it will only be in exceptional compelling circumstances that the public interest is outweighed by the individual circumstances of the appellant. At paragraph 54 the judge stated that the appellant was convicted of a serious drugs offence. At paragraph 58 the judge noted that the appellant was assessed as being of medium risk of serious harm to children, the public and known adults, that the risk of offending was 28% in the first year and 42% in the second year although the judge noted that he was assessed as being a low category.
9. At paragraph 60 the judge considered whether the effects of deportation were unduly harsh on the appellant's wife and children if they had to relocate to China and concluded (at paragraph 65) that the effects of deportation would be unduly harsh if they were to relocate to China.

10. From paragraph 66 the judge considered whether the effect would be unduly harsh if they remained in the UK without the appellant. The judge had regard to the evidence of the independent social worker's report (paragraph 68 - 71 and 73 - 75). The judge noted that the report concluded that continued separation from their father could potentially result in negative attachment behaviours that could affect them into adulthood.
11. At paragraph 72 the judge said that it was necessary for there to be circumstances which are more than "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult or challenging."
12. At paragraph 76 the judge considered whether it was unduly harsh for the children and the appellant's wife to remain in the UK without the appellant. He said:

"the question then is whether, taking account of all the circumstances, including the appellant's offending, it is unduly harsh for the children and/or the appellant's wife to remain in the UK without the appellant. The appellant wife does appear to be struggling somewhat although it is clear that she must be managing to some extent because the children are well presented at school and attend regularly and on time. However, it is also clear from the evidence before me that the children's mother (the appellant's wife) is struggling to some extent with meeting more than the children's basic needs. She does not feel able to undertake extracurricular activities with them although they do apparently attend clubs and also have the assistance of the appellant's friend and his wife who also take them out. There was reference to poor quality housing but it was unclear to me why this has not been addressed by other agencies. The appellant's wife is entitled to state benefits and to state help and should therefore be able to access support and assistance in addressing housing issues..."

13. At paragraph 78:

"the children and the appellant's wife remain in close contact with the appellant. Of course, this cannot be considered to be the same as a face-to-face relationship with a parent. Mr Toal, on behalf of the appellant, provided evidence of studies which confirm the impact on children of being deprived of a proper parental relationship particularly where there were financial constraints for the wife looking after the children in the UK. Sadly, the effects of deportation are such that there can be adverse effects on the children left in the UK. However, this does not, in itself, mean that the effects of deportation, are unduly harsh. As the case law states it is necessary for the circumstances to be more than uncomfortable or merely difficult or challenging. In the appellant's case, whilst it is of course clear... That the children miss their father, they are managing well at school and at home. There are concerns that the appellant's wife is not addressing the children's wider needs but in fact that children are attending out-of-school clubs and have been taken for outings by the appellant's friend. It is a sad fact of life that many parents have to explain to

their children that finances do not allow for purchases other than necessities and this is not sufficient to mean that the effects of deportation are unduly harsh on the appellant's children. I find, taking account of all the circumstances, that the effects of deportation on the children is not unduly harsh."

Grounds of appeal

14. The grounds of the appeal are:

- i) a failure to have due regard to material evidence relating to the risk of reoffending;
- ii) a failure to have due regard to material evidence as to whether it would be unduly harsh for the children and the appellant's wife to remain in the UK without the appellant;
- iii) a failure to consider the best interests of the children as a primary consideration.

Submissions

15. For the appellant it was submitted that although the judge referred on three occasions (paragraph 58, 77 and 79) to a low risk of reoffending, the judge diluted this by referring to the high percentage. Counsel for the appellant referred to the report of the probation service that the appellant was attending appointments and was drugs free. Counsel also referred to the evidence of correspondence, referred to in the social worker's report (at para 134), that the appellant had a degree of reflection about his past offending. Counsel submitted that the judge by referring to a "sterile percentage" had not weighed into the balance the low risk of reoffending.
16. In relation to the report from the social worker, counsel for the appellant acknowledged that this was accepted by the judge but submitted that the judge had failed to take into account factors referred to in the report which counsel submitted, took this case "out of the ordinary". In particular he referred to paragraphs 105, 133 and 136 of the report.
17. For the respondent it was submitted that in relation to the low risk of reoffending, the appellant was seeking to carve out an error where none existed. It was submitted that the judge was entitled to observe that the percentage risk was high and it was pointed out that the sentencing remarks recorded that the appellant had shown no contrition or remorse.
18. In relation to the issue of whether the effect on the children would be "unduly harsh", it was submitted that this requires a balance to be struck between the effects on the family and the public interest based on the seriousness of the offending. The judge expressed this clearly in paragraphs 76 and 78 in particular, referring to the relevant sections of the expert report.

Discussion

19. The conclusion of the First-tier Tribunal insofar as it deals with the weight to be attributed to the risk of reoffending was not in our view in error. At paragraph 58 of the judgement (as the appellant accepted) the judge correctly set out the position in respect of the risk of reoffending. Paragraphs 77 and 79 of the judgement in our view again correctly records the position. The appellant seeks to read an error into the reasoning by reference to an inference from the parentheses which in our view is unwarranted. The judge formed his conclusion on the basis of all the evidence before him referring expressly to both sentencing remarks (at paragraph 53), the probation report (paragraphs 55 - 58) and the social worker's report (paragraph 68-75). The judge was of course not required to accept the findings of the probation report but in fact the judge chose to do so. The appellant relies on statements in the probation report that the appellant is now drug-free and motivated to address his offending. However even taking this report at its highest, these observations do not alter the risk of reoffending as expressed in that report and correctly stated in the judgement. The risk of reoffending is a factor which the judge took into account but it did not in the circumstances significantly affect the weight which the judge gave to the seriousness of the offence and the public interest in deportation which arises as a result of the commission of that offence. In our view the judge did not fall into error in carrying out the balancing exercise.
20. As to the ground that the judge did not in his judgement provide a fuller analysis of the best interests of the children and failed to refer to section 55 of the Borders, Citizenship and Immigration Act 2009, there is no error in this regard. The judge correctly acknowledged (at paragraph 72 of the judgement) that the best interests of the children lay in the children being brought up with both parents present in their lives. The judge acknowledged the opinion of the social worker of the effect on the children of another "significant and distressing transition". It is in our view not correct to characterise the judge's approach as treating this as a case of "just separation".
21. Counsel for the appellant referred the court to paragraphs in the expert report referring to the keen interest taken by the appellant in the progress of his children and the fact he took the children to school. In oral submissions counsel for the appellant sought to place particular emphasis on paragraphs 133 and 136 of the expert report referring to the "significant degree of deprivation" being experienced by the family and the isolation which would be suffered by the children who no longer have the same opportunity to socialise and interact. At paragraph 136 of the report, the author wrote:

"in addition to basic care, the children require access to stimulating activities that promote their educational development. This will include opportunities to interact with their peers. The children and their mother informed me that they do not get to go out much to participate in leisure activities as they don't have the money. They do benefit from engaging in free activities like going to the park, however it was evident from speaking to them that their opportunities to

socialise and interact with other children and also participate in leisure activities has decreased somewhat since [the appellant] is no longer living with the family. Having spoken with the family, it is evident that the children lead a fairly isolated life and they are restricted through lack of finance and also having [the appellant] present to contribute financially as well as physically being there to take them to leisure activities.”

22. In relation to the judge’s approach to the “unduly harsh” requirement, in our view it is clear from the decision as a whole including the section on the law and the reference to the relevant case law, that the judge understood the test to be applied. There was no failure to have due regard to material evidence as to whether it would be unduly harsh for the children and the appellant’s wife to remain in the UK without the appellant. In our view, as is evident from paragraph 76 and 78 of the decision reproduced above, the judge dealt fully with the issues raised by the expert report including the particular issues on which the appellant now places emphasis, the housing situation of the appellant’s wife and family and the financial issues suffered by the appellant’s wife which meant that the children would be unable to participate in the same leisure activities as before.
23. In our view there was nothing in the circumstances of this case which amounted to very compelling circumstances and contrary to the submissions of counsel for the appellant, there was nothing in the impact on the children which takes this case “out of the ordinary”. The children were not going to be leading a “restricted” or “isolated life”. The children continue to attend school as well as after-school clubs. The fact that they were unable to participate in some social and leisure activities was taken into account by the judge. His conclusions on the evidence do not demonstrate any error of law.
24. As found by the judge, the appellant committed a serious offence which meant that there is a strong public interest in deporting the appellant and there was nothing in the particular circumstances of this case which outweighed that strong public interest.
25. For all these reasons we find that the grounds do not disclose material error of law and we uphold the First-tier Tribunal’s decision.

Notice of Decision

The appeal is dismissed.

Signed 

Date 3 July 2018