Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/21496/2018**

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice **Decision & Reasons Promulgated**
On 21 October 2019 **On 24 October 2019**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

TERRENCE MARK ROBINSON

(ANOYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr. D. Clarke, Home Office Presenting Officer

For the Respondent: Mr. J. Plowright, of counsel

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Jamaica and arrived in the United Kingdom, as a visitor, on 11 August 1999. He married a British citizen on 29 January 2000 and was granted leave to remain as her spouse on 8

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February 2000. He was then granted indefinite leave to remain on 28 February 2001.

2. On 3 March 2004 he was convicted of wounding with intent to do grievous bodily harm and was sentenced to four years imprisonment. He was served with a notice of a decision to make a deportation order and lodged an appeal but he had become appeal rights exhausted by 24 April 2006.

3. The Appellant refused to revoke his deportation order on 4 December 2006 and he was detained pending removal on 8 January 2007. The Respondent then applied for asylum. He was released from detention but absconded. He was encountered on 28 July 2008 and applied for leave to remain on compassionate grounds and this was treated as an application to revoke his deportation order.

4. The deportation order was revoked on 29 July 2011 and on 21 September 2011 his further submissions were refused but he was granted an in-country right of appeal. He appealed and his appeal was allowed on 25 June 2012. He was granted six months limited leave to remain which was due to expire on 29 March 2013. He made a human rights claim on 24 May 2014.

5. He made a further application for leave to remain on 31 March 2017 and on 5 February 2018 the Respondent was served with a second decision to make a deportation order and his 2014 human rights claim was refused. The Respondent appealed and First-tier Tribunal Judge Rastogi allowed his appeal in a decision promulgated on 20 June 2019. First-tier Tribunal Judge Kelly refused to grant the Appellant permission to appeal on 16 July 2019 but Upper Tribunal Judge Kekic did grant her permission to appeal on 12 September 2019.

ERROR OF LAW HEARING

6. Both the Home Office Presenting Officer and counsel for the Respondent made oral submissions and I have taken these into account when reaching my findings below.

ERROR OF LAW DECISION

7. Paragraph 396 of the Immigration Rules states that:

> "Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007".

8. Paragraph 398 of the Immigration Rules states that:

> "Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> > (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least 12 months…
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".

9. Paragraph 399 states that:

> "This paragraph applies where paragraph 398(b) or (c) applies if
>
> > (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
> >
> > > (i) the child is a British citizen; or
> > >
> > > (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported".

10. Paragraph 399A states that:

"This paragraph applies where paragraph 398(b) or (c) applies if-

(a) the person had been lawfully resident in the UK for most of his life; and

(b) his is socially and culturally integrated into the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported".

11. Section 117A of the Nationality, Immigration and Asylum Act 2002 states that:

"(1) This part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts-

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result, would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard-

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals to the considerations listed in section 117C".

12. Section 117C states:

"Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of a foreign criminal is in the public interest.

(2) The more serious the offence committed by a foreign criminal, that greater is the interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where-

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C's socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2".

13. Upper Tribunal Judge Kekic granted permission to appeal on two basis. The first was that it was arguable that First-tier Tribunal Judge Rastogi's reasoning on whether there were very compelling circumstances over and above those cited in paragraphs 399 and 399A was inadequate.

14. In paragraph 40 of her decision First-tier Tribunal Judge Rastogi found that the Appellant and his wife were in a genuine and subsisting relationship and in paragraph 63 she found that it would be unduly harsh to expect the Respondent's partner to move to Jamaica with him as it would be

unconscionable to her to desert her sister to whom she was the primary carer and appointee.

15. However, in paragraph 65 of her decision, when she considered whether it would be unduly harsh for the Respondent's wife to remain in the United Kingdom without him, she said:

> "I have reservations as to whether this situation, harsh as it no doubt it, is capable of being described as 'unduly harsh'".

16. The Home Office Presenting Officer submitted that, therefore, she had not reached a finding on an element which she had to consider before proceeding to find whether there were very compelling circumstances over and above the exceptions to deportation to allow an appeal.

17. Counsel for the Respondent relied on the fact that First-tier Tribunal Judge Rastogi had continued in paragraph 65 by finding that the question of whether it would be unduly harsh for the Respondent's partner to remain here without him, "needs to be set in the context of what both she and the [Respondent] would have understood of his position here having regard to the 2012 letter". However, the Judge did not explain why this letter gave rise to a situation which was unduly harsh. This was clearly a lacuna in her reasoning which amounted to an error or law.

18. The second basis upon which permission was given, was that it was arguable that First-tier Tribunal Judge Rastogi had placed too much emphasis on Respondent's rehabilitation.

19. The Appellant did not seek to challenge the finding made by First-tier Tribunal Judge Rastogi in paragraph 44 of her decision that she was satisfied that the appellant had been effectively rehabilitated and presented with a very low risk of reoffending.

20. However, in paragraph 15 of *OH (Serbia) v Home Secretary* [2008] EWCA Civ 694, Wilson LJ, as he then was, found that:

> "(a) The risk of offending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.
>
> (b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.
>
> (c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes".

21. It is also the case that in paragraph 21 of *Taylor v Home Secretary* [2013] EWCA Civ 845, Moore-Bick LJ held:

> "I would certainly not wish to diminish the importance of rehabilitation in itself, but the cases in which it can made a significant contribution to establishing the compelling reasons sufficient to outweigh the public interest in deportation are likely to be rare…Moreover, as was recognised in *SU (Bangladesh) v Secretary of State for the Home Department* [2008] EWCA Civ 427 rehabilitation is relevant primarily to the reduction in the risk of re-offending. It is less relevant to other factors which contribute to the public interest in deportation".

22. In *RA (s117C: "unduly harsh"; offence; seriousness) Iraq* [2019] UKUT 00123 (IAC) the Upper Tribunal also found that "rehabilitation will not ordinarily bear material weight in favour of a foreign criminal".

23. This case law was reflected in the approach adopted by First-tier Tribunal Judge Rastogi in paragraph 70 of her decision, in so far as she reminded herself that "whilst, in general terms, rehabilitation is not a factor which carries a great deal of weight".

24. However, she then continued: "I find that I can properly distinguish the appellant's case". The basis of this finding was, in part, based on the fact that the Respondent had been sent a letter by the Appellant, dated 29 September 2012, which stated that:

> "I am writing to inform you that the Secretary of State has taken note of your conviction dated 3 March 2004 at Southwark Crown Court for wounding with intent to do grievous bodily harm. The Secretary of State takes a serious view of your conduct and, in light of your conviction, she has given careful consideration to your immigration status and the question of our liability to deportation.
>
> In all the circumstances, however, the Secretary of State has decided not to take any deportation action against you on this occasion but you should clearly understand that, the provisions of the Immigration Act 1971 as amended by the Immigration and Asylum Act 1999 continue to apply to you. Under these provisions a person who does not have a right of abode is liable to deportation if the Secretary of State deems his deportation conducive to the public good or if he is convicted of an offence and is recommended for deportation by a court.
>
> I should warn you therefore that if you should come to the adverse notice in the future, the Secretary of State will be obliged to give further consideration to the question of whether you should be deported. If you commit a further offence, the Secretary of State would also need to consider the automatic deportation provisions of the UK Borders Act 2007. You should be aware that under such circumstances, the Secretary of State may be legally obliged to make a deportation order against you".

25. This decision post-dated the previous decision by the Upper Tribunal to uphold the Respondent's appeal against the decision to deport him but it was also a stand-alone decision by the Appellant that it was not in the public interest to deport the Respondent.

26. Counsel for the Respondent relied on the third paragraph of the letter and submitted that this amounted to a decision that he would not be deported if he did not re-offend. However, I accept, as submitted by the Home Office Presenting Officer, that in the second paragraph, the Secretary of State

had informed him that "a person who does not have a right of abode is liable to deportation if the Secretary of State deems his deportation conducive to the public good". Therefore, as someone who had been sentenced to prison for more than four years, he remained potentially liable to deportation.

27. The Home Office Presenting Officer also relied on the fact that the factual matrix relied upon by the Respondent in relation to his Article 8 rights was different to that relied upon at his last appeal. In my view, First-tier Tribunal Judge Rastogi recognised this and addressed the present facts appropriately.

28. But I note that in paragraph 15 of *OH* Wilson LJ found that:

> "(d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal resides in the [Appellant] and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the [Appellant] in the context of the facts of the case…."

29. Therefore, First-tier Tribunal Judge Rastogi was obliged to take into account all three separated features of the public interest, even though she was also entitled to take the contents of the letter into account, as a linked but independent feature. Her failure to do so meant that the only aspect of the public interest which she explicitly addressed was that of rehabilitation. This amounted to another error of law in the context of the relevant case law.

30. However, the Appellant did not seek to challenge First-tier Tribunal Judge Rastogi's finding in paragraph 68 of her decision that "the effect of the 2012 letter was setting out the [Appellant's] view that she (at the time) no longer considered it to be in the public interest to deport the appellant…".

31. It would have assisted the First-tier Tribunal and the Upper Tribunal if the Appellant had provided detailed and cogent reasons for coming to the conclusion that, although it was not in the public interest to deport the Respondent in 2012, it was now in the public interest to deport him in the light of the length of time he had lived here, his relationship and the fact that he had not offended since 2003. In particular, it would have been useful for the Appellant not to simply state that it was in the public interest to deport the Respondent but to refer to how such a deportation would meet the three separate elements of that public interest.

32. The failure to do so made it very difficult for First-tier Tribunal Judge Rastogi to properly address the public interest and it is hoped that the Appellant will make her position clearer before the appeal is heard again in the First-tier Tribunal.

DECISION

(1) The Appellant’s appeal is allowed.

(2) Most of First-tier Tribunal Judge Rastogi’s decision is set aside but her finding in relation to the Respondent being in a genuine relationship with his partner and the finding that it would be unduly harsh for the Respondent’s partner to move with him Jamaica are preserved.

(3) The appeal is remitted to the First-tier Tribunal for a *de novo* hearing on all but the preserved findings in paragraph (2) above.

(4) The hearing should not be listed before First-tier Tribunal Judges Rastogi or Kelly or Designated Judge Wilson.

Nadine Finch

Signed   Date 21 October 2019
Upper Tribunal Judge Finch