



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20975/2018 (P)

THE IMMIGRATION ACTS

Decided under rule 34
On 28th August 2020

Decision & Reasons Promulgated
On 2nd September 2020

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

DIPESHKUMAR KRUSHNAKANT PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. Pursuant to directions sent on 24 April 2020 indicating a provisional view that in light of the need to take precautions against the spread of Covid-19 and the overriding objective, it would be appropriate in this case to determine the issue of whether the First-tier Tribunal's decision involved the making of an error of law and if so whether the decision should be set aside without a hearing; the parties did not raise any objections and both made written submissions on the issues raised in the appeal.
2. In circumstances where no objections were made to the issues being determined without a hearing and where the parties have made detailed written submissions; it is in the interests of justice to proceed to determine the error of law issues on the papers in light of the written submissions available and the full appeal file.

3. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Hawden-Beal promulgated on 18 December 2018, in which the Appellant's appeal against the decision to refuse his human rights claim, in the context of deportation, dated 4 October 2018 was dismissed.
4. The Appellant is a national of India, born on 2 October 1982, who last entered the United Kingdom in 2010 with entry clearance as a fiancé and was granted indefinite leave to remain in 2012. On 13 March 2017 the Appellant was convicted of doing an act with intent to prejudice/defraud HM Revenue and Customs and conspired to conceal/disguise/convert/transfer/remove criminal property, further to which he was sentenced to 38 months' imprisonment and a decision was made to deport him, with a deportation order made on 1 October 2018.
5. The Respondent refused the application the basis that the Appellant's deportation was in the public interest because of the offence committed and that he did not meet any of the exceptions to deportation set out in the Immigration Rules. In particular, there was no evidence of the Appellant's daughter or his relationship with her and a lack of evidence about the Appellant's son such that it was not accepted that there was a genuine and subsisting parental relationship and in any event, no evidence that the Appellant's deportation would be unduly harsh, either remaining in the United Kingdom without him or relocating to India with him. Further, it was not accepted that the Appellant was in a genuine and subsisting relationship with his wife due to the lack of evidence of cohabitation prior to his imprisonment and in any event the effect of deportation would not be unduly harsh on her. The Appellant did not meet the private life exception and there were no very compelling circumstances to outweigh the significant public interest in deportation.
6. Judge Hawden-Beal dismissed the appeal in a decision promulgated on 18 December 2018 on all grounds. In essence, the First-tier Tribunal found that the Appellant had a genuine and subsisting relationship with his wife and two children, all of whom were British citizens and it would be unduly harsh on them to relocate to India with him. It was not however accepted that it would be unduly harsh for the Appellant's wife and children to remain in the United Kingdom without him such that he did not meet the family life exception to deportation; nor did he meet the private life exception and there were no very compelling circumstances to outweigh the public interest in deportation.

The appeal

7. The Appellant appealed to the Upper Tribunal on the following grounds. First, that the First-tier Tribunal materially erred in law in failing to consider the best interests of the Appellant's children under section 55 of the Borders, Citizenship and Immigration Act 2009. Secondly, that the First-tier Tribunal materially erred in law in failing to properly consider the Appellant's criminal and immigration history. Thirdly, that the First-tier Tribunal materially erred in law in failing to apply the Supreme Court's decision in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53. In particular, it was stated that the First-tier Tribunal failed to take into account that the Appellant had only been convicted of one offence,

that he pleaded guilty, that he was a model prisoner who did not pose a risk of re-offending; which were all relevant to the balancing exercise required. Further, that the First-tier Tribunal had evidence of medical appointments for one of the Appellant's children that had not been taken into account; nor had the close bond between the Appellant and his son and that if deported, the family were likely to need state assistance. In the alternative, a number of similar matters were raised, in addition to a good work record and rehabilitation which were relevant to consideration of whether there were compelling circumstances beyond the second exception.

8. Permission to appeal was initially refused by both the First-tier Tribunal and the Upper Tribunal; with permission ultimately being granted by the Upper Tribunal after Judicial Review proceedings and in light of the High Court decision. The decision of Her Honour Judge Karen Walden-Smith granting permission is available on the file, but the Appellant's grounds of application for Judicial Review are not. It appears from the grant of permission that it was considered arguable that the First-tier Tribunal erred by considering the Appellant's criminality when considering the unduly harsh test and that one of the grounds relating to human rights was not pleaded in the application for permission to appeal to the Upper Tribunal. Following the grant of permission there was no request for an oral hearing such that the initial decision refusing permission to appeal was quashed, permission then being granted by the Vice President of the Upper Tribunal in light of the High Court decision.
9. An application was made by the Appellant on 19 March 2020 under Rule 15(2) of the Tribunal Procedure (Upper Tribunal) Rules to adduce an Independent Social Worker's report dated 5 March 2020 on the basis that this further evidence goes to the heart of the case and was not available previously because of the limited time before the First-tier Tribunal hearing. It is not suggested that this evidence is relevant to the initial consideration by the Upper Tribunal of whether the First-tier Tribunal erred in law and if so, whether the decision should be set aside and it self-evidently would be relevant only to any re-making of the decision under appeal if an error of law was found which required the decision to be set aside. This further evidence has not therefore been admitted at this initial stage and not taken into account for the purposes of the present decision.
10. Pursuant to the directions issued on 24 April 2020, written submissions were made on behalf of the Appellant on 5 May 2020. The submissions were that the First-tier Tribunal materially erred in law in having regard to the Appellant's criminality when considering the test of unduly harsh, contrary to the Supreme Court decision in KO (Nigeria) which was handed down prior to the First-tier Tribunal decision. In the written submissions it was accepted on behalf of the Appellant that the grounds of appeal advanced to the First-tier Tribunal and Upper Tribunal, whilst referring to KO (Nigeria) could have been pleaded more precisely but in any event, it was a Robinson obvious point. The Appellant submits that the decision should be set aside and a resumed hearing in the First-tier Tribunal to consider the outstanding issue of whether it would be unduly harsh on the Appellant's wife and children to remain in the United Kingdom without him, in particular as the First-tier Tribunal's decision

contains no analysis of the effect on the children of remaining in the United Kingdom without him. It is suggested that the First-tier Tribunal did not consider this because it was of no weight when balanced against the Appellant's offending behaviour.

11. Pursuant to the directions issued on 24 April 2020, written submissions were made on behalf of the Respondent on 28 July 2020. The Respondent opposes the appeal on the basis that although the First-tier Tribunal has applied the decision in MM which was disapproved of by the Supreme Court in KO (Nigeria), the error was not material in this appeal. First, the Respondent submits that it is not immediately clear that the First-tier Tribunal took into account the severity of the Appellant's offending in the findings made in relation to the second exception to deportation. Secondly, in any event, the First-tier Tribunal referred to the correct guidance in MK, as approved in KO (Nigeria) as to the meaning of unduly harsh and found, on the evidence before it, that the difficulties for the family if the Appellant were to be deported were no more than would be experienced by any other family who faced deportation of an adult parent, including likely financial problems and difficulties with the Appellant's wife's working pattern; with distress to family members. However, these were all matters which are the expected consequences of deportation and were not matters which could meet the high threshold for being unduly harsh. Less still on the evidence before the First-tier Tribunal could the Appellant establish very compelling circumstances to outweigh the public interest in deportation. On these facts, the Appellant's appeal would inevitably be dismissed.

Findings and reasons

12. It appears from the written submissions made on behalf of the Appellant that the only ground of appeal now pursued is that the First-tier Tribunal erred in law in taking into account the Appellant's criminality when considering whether the impact of deportation on his wife and children would be unduly harsh to remain in the United Kingdom without him (having already found their relocation to India would be unduly harsh). Further, it is accepted that this ground of appeal could have been more clearly pleaded initially but that the point was in any event Robinson obvious.
13. The original grounds of appeal in this case were poorly pleaded and although reference was made to KO (Nigeria) it was apparently on an incorrect application of that authority that the First-tier Tribunal erred in law in failing to take enough about the Appellant's conviction into account when considering whether deportation would be unduly harsh by failing to take into account positives about his criminal and immigration history, including that it was a single offence to which he pleaded guilty and that there was no risk of reoffending. The grounds of appeal as originally drafted were themselves also on a misplaced application of KO (Nigeria). However, contrary to the written submissions made most recently, the First-tier Tribunal's attention was specifically drawn to the Supreme Court decision in KO (Nigeria) as confirmed in paragraph 22 of the decision and I agree that it was a Robinson obvious point that the First-tier Tribunal failed to apply it – even if not obvious or clear to the author of the application for permission to appeal.

14. There is as such, no dispute between the parties that the First-tier Tribunal erred in relying expressly on the case of MM and others that the Appellant's criminal and immigration history was relevant to whether the impact of deportation would be unduly harsh, as set out in paragraph 38 of the decision expressly. Although the Respondent's submission that it is not clear whether this was actually done on the facts has some force given there is no explanation as to what weight is given or how this has been considered; the First-tier Tribunal did expressly state that there is a great public interest in deporting the Appellant to India and that regard had been had to case law referring to the same which had not been approved by the Supreme Court.
15. The issue between the parties in this appeal is whether the error now more specifically identified was material to the outcome of the appeal. The Appellant's submission is that it was because in effect, the First-tier Tribunal have made no express findings on the best interests of the children or the impact on them of the Appellant's deportation if they remained in the United Kingdom and, in combination with not considering this in isolation without reference to the Appellant's immigration and criminal history, there have been no lawful findings on whether the Appellant's deportation would be unduly harsh on his family members. The Respondent's submission is that on the facts, the Appellant had not established that the impact on his wife and children could meet the high threshold of being unduly harsh.
16. The Appellant's case before the First-tier Tribunal was that he met the family life exception to deportation in that the effect of his deportation on his wife and children, whether they relocated to India with him or remained in the United Kingdom without him would be unduly harsh. The evidence however focused on the reasons why the Appellant's wife and children could not relocate to India (on the basis primarily of their British citizenship and the eldest child's health conditions) rather than on the impact on them of remaining in the United Kingdom.
17. In particular, the skeleton argument on behalf of the Appellant went little further than a bare assertion of it being unduly harsh and identified only that the family had a joint mortgage, were interdependent on each other and the Appellant plays an active role as a parent and within the family and that there was no other support in the United Kingdom. These were not matters which on any rational view could meet the high threshold for establishing that deportation would be unduly harsh (the test for which was correctly set out in paragraph 36 of the First-tier Tribunal decision, as expressly endorsed by the Supreme Court in KO (Nigeria)).
18. As to the evidence before the First-tier Tribunal, the written evidence of the Appellant and his wife did not address the issue in any detail and the oral evidence added little of substance either. The oral evidence which was given was as to the financial impact and impact on the Appellant's wife's working pattern, is recorded in the decision and goes no further than the normal impact on any family where a working parent is deported. These factors are all expressly considered in paragraph 37 of the decision just after the First-tier Tribunal correctly set out the meaning of unduly harsh. Further, at the end of paragraph 38, the First-tier Tribunal found that

the British nationality of the Appellant's family and lengthy separation if he is deported is not without more sufficient to meet an exception to deportation or provide enough to weigh in the balance against deportation and on the facts in this case, found that there was nothing more identified.

19. The grounds of appeal and written submissions on behalf of the Appellant also fail to identify what on the facts before the First-tier Tribunal, could possibly establish that the impact of the Appellant's deportation on his wife and children if they remained in the United Kingdom would be unduly harsh. Although it can readily be inferred in most cases that the best interests of British national children are to remain in the United Kingdom with both parents; there was no evidence before the First-tier Tribunal specifically as to the impact on either of the children of remaining in the United Kingdom if the Appellant were deported.
20. On the very limited evidence that was before the First-tier Tribunal, whether or not the Appellant's criminal and immigration history was taken into account, there simply was no evidence of anything beyond the normal impact of deportation and separation of a working parent on the remaining family; such that the Appellant could not, on the evidence, establish that his deportation would be unduly harsh on his wife or children if they remained in the United Kingdom. That is the only conclusion that could be reached on this point by the First-tier Tribunal whether or not it erred in law as identified above.
21. Similarly, the Appellant has not identified through submissions anything in the evidence which could, individually or cumulatively, amount to very compelling circumstances to outweigh the significant public interest in deporting him as a foreign criminal. The fact that it was a single offence without risk of reoffending, that he pleaded guilty and was a model prisoner; the fact that he has a strong family life in the United Kingdom, with family members who would be adversely affected by his deportation (which is the normal consequence of deportation) and the lack of any adverse factors in section 117B of the Nationality, Immigration and Asylum Act 2002 could not on any view outweigh the public interest in deportation. On the evidence before the First-tier Tribunal, the Appellant's appeal could not have been allowed on this basis either.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed *G Jackson*
Upper Tribunal Judge Jackson

Date 28th August 2020