



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14457/2017

THE IMMIGRATION ACTS

Heard at Field House
On 18 June 2018

Decision & Reasons Promulgated
On 26 June 2018

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FABIAN ANTONIO COLEMAN
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr P. Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr B. Adekoya, legal representative

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State but it is convenient to continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Jamaica, born in 1996. He arrived in the UK on 17 December 2002 as a visitor. He was granted indefinite leave to remain on 10 October 2011 as the child of a person settled in the UK.
3. On 3 November 2017 the respondent made a decision to refuse a human rights claim. That was a claim made in response to the respondent's decision to make a deportation order against the appellant pursuant to section 5(1) of the Immigration Act 1971 (the 1971 Act) on the basis that his presence in the UK was not conducive to the public good.
4. The offences which prompted the making of the deportation order were being concerned in the supply of class A drugs (heroin and crack cocaine) and facilitating the acquisition of criminal property, for which he received a total sentence of 24 months' imprisonment suspended for 18 months with an additional requirement to carry out 200 hours of unpaid work. The offences were committed on 9 October 2014 and he was sentenced in the Crown Court sitting at Swindon on 27 January 2016. He has other convictions: driving offences for which he was disqualified from driving for six months and fined on 31 October 2012 in the Juvenile Court, robbery in 2013 for which he received a referral order for 10 months, and in 2015 attempting to travel without paying the fare for which he received a fine of £410.
5. The appellant appealed against the respondent's decision to refuse his human rights claim (in effect an appeal against the decision to deport him) and his appeal came before First-tier Tribunal Judge Heatherington ("the FtJ") at a hearing on 12 March 2018, following which he allowed the appeal on human rights grounds (Article 8).
6. The respondent's complaint about the FtJ's decision is that it fails to identify what are the "mitigating circumstances" or "very compelling circumstances" which outweighed the public interest in his deportation. Even if the FtJ could be said to have found that the risk of reoffending was low, that was but one aspect of the public interest.
7. Thus, it is argued in the grounds that the FtJ had failed to give clear reasons as to why the appeal had been allowed or why his private life outweighed the public interest.
8. In submissions Mr Duffy relied on the grounds. It was submitted that no reasons were given for allowing the appeal. There was no reference to the applicable immigration rules.
9. Mr Adekoya submitted that the FtJ had taken into account the public interest. He had referred at [8] to the lawfulness of the respondent's decision to deport the appellant and had correctly identified the issue as being whether the decision was proportionate. It was conceded on behalf of the appellant that the structure of the FtJ's decision might have been "defective" in terms of a lack of reference to the applicable immigration rules but it was submitted that the substance was not.
10. The FtJ had referred to the age at which the appellant came to the UK and the fact that he had not reoffended (since the respondent's decision).

Assessment and Conclusions

11. Having set out the background to the appeal in six paragraphs, under a subheading "Findings" the FtJ gave his reasons for allowing the appeal. He referred to section 32 of the UK Borders Act 2007 (although the respondent's decision was made with reference to s.5 of the 1971 Act). He found at [8] that "there is no doubt" that to remove the appellant would be an interference with his private and family life such as potentially to engage the operation of Article 8.
12. In the same paragraph he accepted that the respondent was in law entitled to make a decision to deport the appellant given his convictions and sentence. He stated that "as stated above", the fact that the appellant's sentence was for more than 12 months meant that the respondent was under a legal duty to deport the appellant (although under the UK Borders Act a suspended sentence does not qualify as a sentence that means a person is a foreign criminal who must be deported). He referred to the legitimate aim of deportation as being public safety and the prevention of crime and disorder.
13. At [9] he referred to the appellant as having committed a serious offence, reflected in the sentence imposed by the Crown Court and he noted that the appellant has other convictions including for the offence of robbery. He also said however, that since the appellant's move from London to Birmingham in December 2014 there was nothing to suggest that the appellant had engaged in any further criminal activity.
14. The FtJ next referred to the appellant's evidence that from 2016 he had a job delivering food, that he had undertaken a college course in law and criminology and that but for the deportation order he would have been able to take up a place at Birmingham University. He referred to the appellant's evidence that since moving to Birmingham he is a changed man and mature enough "to see what is wrong". He also noted the appellant's evidence that he had no family that he knew in Jamaica.
15. The FtJ summarised the evidence of the appellant's great aunt who has been a British Citizen for 15 years. Her evidence was that she ran a cleaning company, had supported the appellant and would offer him a job if he had status. There were various "support letters" which the FtJ said that he had considered.
16. At [13] the FtJ said that there was a presumption in favour of deporting foreign criminals but the fact that the appellant's sentence was less than four years means that that is a rebuttable presumption. He then said as follows:

"I find that there are very compelling circumstances which in this case outweigh the public interest and the permissible aims of maintaining effective immigration control and the prevention of crime and disorder."
17. In his concluding paragraph he said this:

“A sufficiency of mitigating circumstances meant that the appellant received a suspended sentence and not an immediate custodial sentence. The appellant claims to have rehabilitated himself and I am persuaded that he has. He has not offended since 2014. He has the opportunity of work and a university education. I was impressed by Mrs Scott’s evidence and the letters of support. This is a young man who has spent most of his life in the United Kingdom and has no relatives he knows in Jamaica.”

18. The complaint in the respondent’s grounds about the FtJ having failed to explain what were the “mitigating circumstances” which outweighed the public interest, is misconceived. The FtJ’s reference to mitigating circumstances was with reference to the fact that the appellant received a suspended, as opposed to an immediate, sentence of imprisonment. He was not there stating that there were mitigating circumstances sufficient to displace the public interest.
19. Nevertheless, as announced at the conclusion of the hearing before me, I am satisfied that the FtJ’s decision is marred by legal error such as to require his decision to be set aside. There are one or two slips here or there in the FtJ’s decision to which reference has already been made. However, they are not material.
20. The FtJ’s decision is surprisingly brief. Brevity is not inherently wrong but it may mean that matters of significance are omitted. That in my view is what has happened in this case. There is no reference by the FtJ to the framework for consideration of deportation appeals as set out in the immigration rules, the relevant ones here being paras 398(c) and 399A. The former relates to deportation that is conducive to the public good/offending caused serious harm or persistent offender, and the latter involving considerations of lawful residence for most of one’s life, social and cultural integration and very significant obstacles to integration in the country of return.
21. Similarly, there is no explicit reference in the FtJ’s decision to s.117C of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) which sets out the public interest considerations that are required to be taken into account.
22. In her decision the respondent expressed the view that the appellant’s offending had caused serious harm, with reference to the drugs offences. It is also said at [48] of the respondent’s decision that the appellant is a persistent offender (although in terms of para 399(c) does not actually use the phrase “who shows a particular disregard for the law”, but again s117D(2)(c)(iii) of the 2002 Act does not use that phrase either).
23. The point is, the respondent’s decision is anchored within the framework of the Rules, but the FtJ’s decision is not. If the FtJ had considered para 399A he would have appreciated that the ability of the appellant to come within any of the subparagraphs was contested by the respondent. It was said that he had not been lawfully resident for most of his life, was not socially and culturally integrated and that there would not be very significant obstacles to integration in Jamaica, for the reasons given from [36] onward of the respondent’s decision.

24. It is true that the FtJ made some findings which could or would have a bearing on those issues but not many, and not many of substance. Thus, there is a finding that he has no relatives in Jamaica, and that he has lived here for most of his life. However, those limited findings do not represent a proper consideration of the relevant issues under para 399A and do not engage with the respondent's decision in that respect.
25. I do not consider that the FtJ's reference to "very compelling circumstances" amounts to a lawful consideration of such circumstances within the scope of para 398(c). That part of the Rules contemplates that there may be such circumstances which outweigh the public interest in deportation where paras 399 or (here) 399A do not apply. In the first place the FtJ does not advert to the Rule. Secondly, as already seen, there is no analysis of para 399A such that he could then go on to consider whether there were very compelling circumstances.
26. Further, the very compelling circumstances that the FtJ purported to find amount to very little in relative terms when one considers the public interest considerations in play. The risk of reoffending is but one part of the assessment, and it is by no means the most important aspect of the public interest in deportation. The FtJ's decision does not consider the deterrent effect of deportation in what could be said to be his wider Article 8 assessment. Whilst there is reference to the offences that the appellant committed, there is no apparent recognition of the harm done by the supply of illicit drugs as explained in the respondent's decision. Merely to state that the offences are serious does not represent real engagement with the public interest factors in play.
27. In the light of the matters I have set out above, I am satisfied that the FtJ's decision involved the making of an error on a point of law such as to require his decision to be set aside.
28. I note that in the grant of permission it is pointed out that there was 'nexus' evidence that was not considered at all by the FtJ. There is such evidence which is at A1-4 of the respondent's bundle that was before the FtJ. However, the respondent's grounds make no complaint about any failure of the FtJ in taking that evidence into account. Further, I cannot see that it is relied on in the respondent's decision. I do see however, from the FtJ's manuscript record of proceedings that the appellant was asked questions in cross-examination in relation to that evidence and it looks as if it featured in the respondent's submissions before the FtJ.
29. However, given that it was not a matter relied on by the respondent in the grounds seeking permission and there was no application to amend the grounds, any apparent error of law in this respect on the part of the FtJ is not a matter that I have taken into account in my conclusions.
30. Having found an error of law and having decided that the decision of the FtJ must be set aside, the appropriate course is for the appeal to be remitted to the FtT for a hearing *de novo* before a judge other than First-tier Tribunal Judge Heatherington, with no findings of fact preserved. I say that no findings are to be preserved because the FtJ's findings are either insufficiently reasoned or otherwise legally flawed.

Decision

31. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Heatherington with no findings of fact preserved.

Upper Tribunal Judge Kopieczek

dated 19/06/18