Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06801/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 August 2018	**On 26 September 2018**

Before

THE HONOURABLE LORD BECKETT
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[N B]
~~(ANONYMITY DIRECTION NOT MADE)~~

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms A Musira, Solicitor from Thompson & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal to allow the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State on 27 June 2017 refusing his application for leave to remain on human rights grounds. The claimant is subject to deportation by reason of his criminal behaviour and the operation of Section 32(5) of the UK Borders Act 2007 and the deportation order was made on the same day as the decision to refuse his application on human rights grounds.

2. We begin by considering the decision of the First-tier Tribunal.

3. This explains, correctly, that the claimant was born in April 1984 and so is now 34 years old. He is a citizen of Angola. He arrived in the United Kingdom in December 1995 with his brother and father. It follows that he was then aged 11 years and that he has lived in the United Kingdom 22 years.

4. The claimant was given indefinite leave to remain in the United Kingdom in August 2004. According to the Secretary of State, the claimant did not have leave to be in the United Kingdom before then. He was known to the authorities as the dependant of his father who applied unsuccessfully for asylum but that application was made on 11 December 1995. It was refused and appeal rights were exhausted on 5 July 1998. He next came to the attention of the authorities in July 2003 when his father applied for Indefinite Leave to Remain and identified the claimant as his dependant. It was that application that led to his being given leave in August 2004.

5. The claimant applied for naturalisation in September 2013 but the application was unsuccessful because he had an unspent criminal conviction.

6. He got into trouble again. On 16 January 2015 he was sentenced to two years' imprisonment to be served concurrently on two counts on an indictment alleging the possession with intent to supply class A drugs.

7. The appeal before the First-tier Tribunal was on the sole ground that the decision was unlawful under Section 7 of the Human Rights Act 1998. It was the claimant's case that his deportation would put the United Kingdom in breach of its obligations under Article 8 of the European Convention on Human Rights.

8. The notice of appeal was marked in the appropriate box to indicate that the appeal was brought on human rights grounds. The so-called grounds of appeal are in reality narrative submissions but they make it clear that the complaint was against the decision to refuse leave to remain "under Article 8 ECHR &/ the Immigration Rules".

9. The First-tier Tribunal Judge made clear that he had considered all of the evidence including witness statements and letters set out in a bundle. He referred to well-known and appropriate authorities. He directed himself, uncontroversially, that the claimant had established a "private and family life" in the United Kingdom and that deporting the claimant would interfere with those rights in a way that potentially engaged the protection of the Article. At paragraph 8 of the decision he directed himself, correctly, that the starting point:

> "… has to be a consideration of the offence in the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but also in deterring others from committing them in the first place. There is a strong public interest in removing foreign citizens convicted of serious offences even where there is little or no evidence of future risk to the general public".

10. He then directed himself, again correctly, that the offence that led to the claimant's deportation was a serious offence punished with two years' imprisonment.

11. The judge noted the remarks of the sentencing judge, and particularly that the claimant was not a man of good character. He had previously been convicted of offences including possession of drugs. The judge noted positive attributes in the claimant and saw how he had taken to drink and drugs when he had to stop studying electrical engineering because he was the victim of crime.

12. The judge then noted the assessment of future behaviour as there being a "low risk of serious harm". The judge reminded himself at paragraph 10 that the public interest is in removing "foreign citizens" (he surely meant foreign criminals) but regarded a low risk of reoffending as something that could be weighed in the balance to the claimant's advantage.

13. It was the judge's view that deportation is more likely to be justified and therefore the consequences on the children would not be "unduly harsh" when there is a high risk of reoffending than when there is not.

14. The judge also noted, correctly, that the claimant faces further prosecution but there was nothing in that fact alone which should be used to the discredit of the claimant.

15. The judge noted the claimant had a long period of living in the United Kingdom without getting into trouble, that he speaks English and there was no evidence of him ever being a burden on public funds. The judge then directed himself that the relevant questions were whether it was "unduly harsh to expect the [claimant's] fiancée and children to remain in the United Kingdom without the [claimant]".

16. The judge was satisfied that the claimant is exercising a parental role in the lives of his children. This finding was based on the oral evidence of the claimant and his fiancée which the judge clearly found persuasive as he was entitled to do and supporting evidence from other sources. The fact that the claimant's fiancée was at that time pregnant by the claimant reinforced the judge's finding. The judge noted the claimant's other family members are naturalised British citizens. He said the claimant had been involved in the lives of their children. He sees them every day and takes them to and/or from school so that his partner can hold down a job. The judge accepted that the claimant did not have any family in Angola. He believed the couple wished to marry.

17. The claimant's sons were then aged 8 and 9 years respectively. It is plain from other parts of the papers that the eldest son was born on 30 January 2009 and the youngest son on 24 January 2010.

18. The judge found that it would be unduly harsh for the children to leave the United Kingdom for Angola particularly as they had lived in the United Kingdom for all their lives. The judge also found that it would be unduly harsh for the children to remain in the United Kingdom without the claimant.

19. He then went on to allow the appeal.

20. We have to say that we cannot see how this decision can be justified. Although the judge directed himself correctly about the nature of the public interest and identified the possible way in which the appeal can be allowed (he clearly had in his mind Exception 2 under Section 117C(5) of the Nationality, Immigration and Asylum Act 2002) it is unclear to us how he reached that decision.

21. The First-tier Tribunal Judge who gave permission made it plain that he was giving permission to the Secretary of State on each ground but he indicated that he was uncertain about there being arguable merit in the ground that there were inadequate reasons for finding the effect of deportation on the children would be unduly harsh. The judge granting permission was more concerned with the second ground in that the judge had failed to give sufficient weight to the public interest in deportation and therefore had conducted an unlawful balancing exercise. We do not accept that there is a great difference between these grounds. What is "unduly harsh" in a particular case is illuminated by the strength of the public interest in removal.

22. Before us Mr Tufan relied on both grounds as he was entitled to do.

23. It was plainly set out in the Secretary of State's grounds that it was his complaint that there were no reasons for the finding and that it would be unduly harsh for the children to remain in the United Kingdom without the claimant and unduly harsh for them to go to Angola.

24. We are not impressed with the suggestion the children can go to Angola. They have spent all their lives in the United Kingdom. The judge was clearly entitled to conclude as he did that their best interests lay in remaining in the United Kingdom with both parents. We agree with that finding. However, as indicated above, there is an obvious error in the reasoning that should link the decision on the best interests of the children with the decision to allow the appeal. The best interests of the children are not determinative.

25. The Secretary of State's second ground concerning weight is not a hugely different point. It is the Secretary of State's case that the judge did not explain why the disruption to the lives of the children consequent on removal would be unduly harshness rather than the natural consequence of the need recognised in statute to deport a foreign criminal.

26. The claimants had served a Rule 24 notice and Ms Musira relied on that in its entirety. This characterised the grounds as a mere disagreement by the Secretary of State with the First-tier Tribunal's conclusions. This document shows that the judge did recognise the public interest in deporting foreign criminals. The decision also referred to the decision of the Supreme Court in **Hesham Ali (Iraq) v SSHD [2016] UKSC 60** but that was decided under the Rules not under the amended version of the 2002 Act and does not help us very much.

27. We asked Ms Musira to explain how the reasoning was adequate. It was an obvious question which she had no doubt anticipated but she could not provide a satisfactory answer. We are quite satisfied that the First-tier Tribunal Judge has not explained this decision adequately. It is not good enough simply to assert that, having identified the correct test, the claimant is able to satisfy it. Ms Musira accepted that it is not the law that every father of British national children can show that the consequences of deportation are unduly harsh. The phrase "unduly harsh" necessarily implies that some harshness is going to follow a deportation decision where children are involved. This is not a case where there was anything in the decision to suggest that the mother had particular difficulties in coping or that the children had special needs or anything that made it an out of the ordinary case. The decision is not explained. We set aside the decision of the First-tier Tribunal.

28. Mr Tufan submitted that it would be appropriate in that event to return the case to be decided again in the First-tier Tribunal. Ms Musira agreed with that but we do not. We have considered the papers before us in an effort to see if there is anything in the evidence which if believed might persuade the Tribunal to allow the appeal. We cannot find anything.

29. The Home Office file includes a letter from the claimant dated 23 July 2015 from prison. It is a plea that he is not deported and refers to deportation causing "great hardship within our family and community".

30. He spoke of his love for his partner and his concern of how the children would be brought up without their father being present. He also said how his own family were in the United Kingdom. There is a further letter dated 17 February 2016. There is a letter from the claimant setting out further representations dated 19 June 2015. There he says his life would be in danger in the event of his return but he has not made an asylum claim and did not bring the appeal on Article 3 grounds. No weight should be attached to that submission.

31. The letter also points out the difficulties the partner and children would have in establishing themselves in Angola but that is not controversial. We do not expect the claimant's family to remove but to manage without him.

32. The claimant expressed his shame and remorse but there is nothing that might support a finding that the harshness consequent on removal is undue.

33. On 18 May 2017 there was a letter from MQ Hassan Solicitors arguing for the claimant not to be deported. It asserts the claimant is integrated into society in the United Kingdom to the point where he cannot be expected to go to Angola. It also relies on the relationship with the children but does not bring out anything that would support a finding that the harshness would be undue.

34. We do appreciate what is involved here. We do realise that removing a father from frequent contact with his partner and children is going to have a detrimental effect on them and they are wholly innocent of any deficiencies on his part.

35. The bundle prepared for the First-tier Tribunal hearing includes an undated statement signed by the appellant.

36. The appellant talks about some of the difficulties he experienced growing up. His parents' marriage broken down. It was when he was living with his mother that he started to misbehave. His mother was working hard holding down two jobs.

37. He met his partner in 2003 and they have been together since. He talks about his own criminal behaviour.

38. He had been convicted of driving a vehicle while unfit and also whilst uninsured. He was fined and disqualified from driving. He was fined for possessing cannabis. He was caught driving whilst disqualified. He was fined and disqualified from driving for eighteen months for driving whilst unfit and uninsured in December 2004. He was later in trouble when he was fined for possessing cannabis. In 2007 he was convicted on two counts of possessing cannabis and sentenced to a twelve-month community order and 100 hours of unpaid work. He did not complete that order entirely satisfactorily and was convicted of breaching the order and was given an order to do more work. In March 2008 he was convicted of driving with excess alcohol and possessing cannabis and driving whilst disqualified and he was ordered to do 150 hours' unpaid work and further disqualified from driving. He did not do that entirely satisfactorily because he had to do a further ten hours of unpaid work because he was convicted of breach of a community order. In March 2009 he was convicted of driving whilst disqualified and whilst uninsured and for that he was sentenced to twelve weeks' imprisonment suspended and other orders.

39. We note that he tried to excuse that behaviour by saying that his partner was pregnant and an ambulance had not been able to help them. He was sentenced as indicated. In 2009 he was convicted of breaching a suspended sentence that ended in him spending 28 days imprisoned in Brixton (or two weeks, it is not clear). In July 2009 he was convicted at the Camberwell Green Magistrates' Court for something described as "breaches of suspended sentence" and the result of that was his being sentenced to 28 days' imprisonment.

40. He talked about his strong relationship with his partner and they wished to be married.

41. He confirmed that they did not live together but said this was a bail condition. He did take the boys to school and spent time with them every day.

42. When he was able to he was in regular work.

43. He would have no support in Angola. It is right that he made plain that he was ashamed of himself and wanted a new start.

44. Parliament has decided that heavy weight has to be given to the desirability of removing a foreign criminal and that harshness is to be expected. There is nothing here that can support an "unduly harsh" finding.

45. There are supporting statements from his parents. There is a statement from the partner. This rather confusingly refers to being made in support of "my son's immigration appeal against the deportation order" but this must be a word processing error. The body of the statement is plain enough and supports the claimant's case. It does not indicate anything which we find capable of elevating the matter into an "unduly harsh" case.

46. There is a letter from the partner dated 23 July 2015 in which he expresses her concern about how they will cope. It was difficult enough when the claimant was away in prison and she feared for the future and how the boys would manage without his influence.

47. There are school reports and there are short manuscript notes from the children expressing their love of their daddy. There are also supportive letters from family and friends.

48. We have considered all of these things and are very aware of the impact of removing a father from a family but that is what Parliament has decided has to be done unless the harshness is undue.

49. The claimant is not simply somebody who has committed a criminal offence which resulted in his imprisonment. He has committed other offences. He has shown himself to be disinclined to conform to social norms. Motoring offences are nothing to be proud of and these offences are of the serious kind involving irresponsible use of a car when in an unfit state without permission and not respecting court orders. We do not give a great deal of weight to these things. They have not precipitated the deportation decision but they are part of the story and to the extent they are relevant they are entirely to the detriment of the claimant's case.

50. We have to apply Part 5A of the Nationality, Immigration and Asylum Act 2002. We have to bear in mind that their public interest requires deportation. There are exceptions. Exception 1 applies to someone who has been lawfully resident in the United Kingdom for most of his life. The claimant has not. That is enough to defeat the claim under Exception 1 and it was not brought under Exception 1.

51. We accept the claimant could show that he was socially and culturally integrated in the United Kingdom although his repeated offending does create some cause to hesitate about concluding that. There would be difficulties in returning to Angola but he has not made out "very significant obstacles".

52. More importantly, in any event he cannot rely on Exception 1 because he has not got the necessary residence.

53. Exception 2 applies where there is a genuine and subsisting relationship with a qualifying partner or parental relationship with a qualifying child and the effect of deportation would be unduly harsh.

54. As far as the partner is concerned she allowed the relationship to develop when she knew he was getting into trouble. She is entitled to be in the United Kingdom but she does not have to be. She can choose.

55. As is explained above, the harshness on the children *cannot* be unduly harsh on the evidence that is before us.

56. We look as well to see if there are "very compelling circumstances" which might still justify a decision to allow the appeal. We can find none. The claimant is a foreign criminal with strong roots in the United Kingdom and no strong roots in the country of nationality choosing to commit criminal offences with the consequence that the public interest requires his deportation. There are exceptions but they do not apply here.

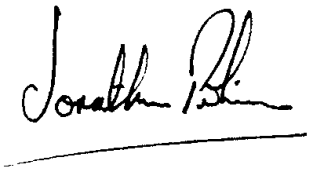
57. We also consider if there was any significance in the claimant's partner being an EEA national. We note that this has been considered by the Secretary of State. He is the unmarried partner of an EEA national. Any rights as an extended family member are weaker than the comparable rights of a family member. It might be different if the claimant had a residence card but he has not. The case has not been brought on the basis that there is a right to remain under EEA law the grounds do not allege an EEA right and nor could they. If there is a point to be made it needs to be made by another route.

58. It follows that putting everything together we do not see how, even if everything is accepted at its highest, this is an appeal that can possibly succeed.

59. We not only set aside the decision of the First-tier Tribunal because of lack of reasoning, we substitute a decision dismissing the appeal.

Notice of Decision

The Secretary of State's appeal is allowed. We substitute a decision dismissing the claimant's appeal against the decision to refuse him leave to remain on human rights grounds.



Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 24 September 2018