IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003195

First-tier Tribunal Nos: HU/51070/2024
LH/01786/2024
EA/11057/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 15th October 2024

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

DD
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr S Peer, Counsel, Raymond Saul & Co
For the Respondent: Ms S Lecointe, Home Office Presenting Officer

Heard at Field House on 26 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or members of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

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1. I made an extempore decision at the hearing.

2. The Appellant is a citizen of Poland whose date of birth is 5 November 1979. The Respondent made a deportation order against the him following a conviction for possession with intent to supply class A and class B drugs. He was sentenced on 26 July 2022 to 33 months' imprisonment.

3. The Appellant was granted permission by the First-tier Tribunal (Judge Curtis) on 1 July 2024 to appeal against the decision of the First-tier Tribunal (Judge L K Gibbs) to dismiss his appeal against the decision of the Respondent on 30 January 2024 that the deportation order did not breach his rights under Article 8 ECHR. The grant of permission was limited to ground 1 only. Judge Curtis when granting permission said that it was arguable that Judge Gibbs failed to adopt the correct approach to Article 8 ECHR because having found that Exception 2, with reference to s.117C(6) of the 2002 Act, was not met the judge proceeded to dismiss the appeal without conducting a full proportionality assessment.

4. The Respondent relies on a response served under Rule 24 of the Tribunal (Upper Tribunal) Procedure Rules 2008 ("the Rules"). This was served on 11 July 2024 indicating that the Respondent does not oppose the Appellant's application for permission to appeal on ground one. It was accepted that the judge erred in-law by failing to consider s.117C(6) of the 2002 Act and Article 8 in line with NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662. The Respondent said that the matter could be retained by the Upper Tribunal on the basis of the findings of the judge in relation to s.117(5) at paragraphs 12 to 19 should be preserved.

5. At the hearing before me the represented Appellant did not rely on further evidence. Standard directions that had been issued to the parties. There was no application made under Rule 15(2)(A). At the start of the hearing, having communicated my decision that ground one was made out, I raised the issue of how to proceed with Mr Peer. He relied on his skeleton argument which said that the matter should be remitted to the First-tier Tribunal on the basis that there should be a rehearing. I did not agree with Mr Peer. The issue is very narrow. There is no reason to interfere with the findings made by the judge. There was no reason why I should not carry out a proportionality assessment under Article 8 on the basis of the evidence before and the findings made by the First-tier Tribunal. I proceeded to do so following submissions from the parties.

The findings of the First-tier Tribunal

6. The First-tier Tribunal accepted that the Appellant has a genuine subsisting relationship with his wife, who is identified as Z, and their two British citizen children who were born in the UK and at the date of the hearing before the First-tier Tribunal were aged 11 and 14. The Appellant's wife is a qualifying partner and the children are qualifying children, with reference to s.117D(1) of the 2002 Act. The Respondent conceded that it would be unduly harsh for the children to move to Poland but the Respondent's position before the First-tier Tribunal is that it would not be unduly harsh for the children and Z to remain in the UK without the Appellant.

7. The judge found that the Appellant and Z were credible witnesses and took into account that their evidence was not challenged by the Respondent. The judge placed weight on Z having established ties in the community and her evidence to the independent social worker that she has friends on whom she can rely for

emotional and practical support. The judge placed weight on the unchallenged evidence from the independent social worker whose report, dated 31 January 2023, was prepared when the Appellant was in prison. The social worker described the difficulties encountered by the Appellant's wife as a single parent and the impact on the children if their father is deported.

8. The judge found as follows:

a) Z and children visited the Appellant when he was in prison on a regular basis and the Appellant's contact with his family was maintained during this period.
b) The children have lived with both of their parents for the entirety of their lives, save 18 months when he was serving his sentence.
c) The Appellant returned to the family home in the summer of 2024.
d) It is in the children's best interests to remain as a family unit.
e) The Appellant is genuinely remorseful for his actions, which he attributes to a loss of income following COVID and the need to support his family.
f) The Appellant's children were negatively affected by his imprisonment and they are much happier now that he is at home.
g) Deportation will have an immediate and negative effect on the children's emotions. This does not meet the level of unduly harsh.
h) While it may be more difficult for Z, as the sole physically present parent, the children are older now and she coped while the Appellant was in prison.
i) According to the social worker behavioural or anger issues may occur or increase as a result of deportation. The judge noted that this had not occurred when the Appellant was in prison.
j) There was no evidence in the form of school or medical reports that either child manifested emotional or behavioural difficulties in their father's absence.
k) The Appellant's deportation would not be unduly harsh for the children or for Z.
l) It will be initially very upsetting for them but contact could be maintained through regular visits. The children are of an age where they could maintain daily contact through modern means of communication and this was a reasonable option for them.
m) The Appellant's deportation would be contrary to the children's wishes and will cause distress.
n) The Appellant is facing the consequences of his own actions.

The law

9. I will summarise the relevant paragraphs of NA in so far as that are relevant to a medium offender.

10. Medium offenders can escape deportation if they come within Exception 1 or Exception 2 (s. 117 (C) (4) and (5)). If they do not come within Exceptions 1 or 2, they can only resist deportation if there are very compelling circumstances over and above those described in Exceptions 1 or 2, with reference to s.117C(6) of the 2002 Act. If the Appellant falls within either exception his claim succeeds. If he does not, like this Appellant, then the Tribunal should consider whether there

are very compelling circumstances over and above those described in the exceptions. The Court of Appeal concluded at paragraph 32 in relation to a medium offender, that:

> "if all he could advance in support of his Article 8 claim was a 'near miss' case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were very compelling circumstances, over and above those described in Exceptions 1 and 2."

11. The Tribunal must look at all matters relied on in order to determine the issue. There is no exceptionality requirement however it inexorably follows that cases, where there are sufficiently compelling circumstances to outweigh the public interest, will be rare in the context of deportation and that commonplace incidents of family life, including the natural love between parents and children will not be sufficient. The best interests of the children carry great weight. However, it is a consequence of the Appellant's offending that he may be separated from his children for many years, which will be contrary to their best interests. This is not usually a sufficient compelling circumstance to outweigh the high public interest. A state has a margin of appreciation bearing in mind that the ECHR is intended to reflect a fair balance between individual rights and the interests of the general community. Regard should be had to Strasburg jurisprudence.

Submissions

12. Mr Peer identified what he says are very compelling circumstances. He said that the Appellant came to the UK in 2005 and therefore it is accepted that he has been here for nineteen years. Mr Peer submitted that it would be very difficult for the Appellant to reintegrate in Poland, bearing in mind how long he has been here. It was submitted on behalf of the Appellant that he has British children here who have resided in the UK since they were born and that it is their best interests for their father to remain here. Mr Peer referred me to the long-term effects raised by the independent social worker. He stated that although the Appellant's wife may have coped whilst they were separated during the period of imprisonment, this was not necessarily the case in the long-term situation. It was not disputed that Z had visited and the children had visited the Appellant in prison. Mr Peer relied on the Appellant having strong tied to the UK.

13. Ms Lecointe, in submissions, relied on the deportation decision. Ms Lecointe stated on behalf of the Respondent that the Appellant had been issued a registration document in 2007 and therefore she was not in a position to confirm that he came here in 2005

Conclusions

14. I take into account that there are matters that are in the Appellant's favour, including the length of time he has been in the UK (I accept that he has been here since 2005) and the relationship with his children and Z and the effects of deportation on them. I take into account that the Appellant was granted indefinite leave to remain in the UK. He has been in the UK lawfully since 2007. I take into account the favourable findings made by the First-tier Tribunal. However, the factors in favour of deportation outweigh the factors against. I remind myself that the deportation of foreign criminals is in the public interest and I attach weight to the very serious offences committed by the Appellant

reflected in the sentence that was imposed. I remind myself of what the Court of Appeal said about common incidents of family life, including life between parents and children and that these will not be sufficient to outweigh the public interest. The factors in the Appellant's favour do not amount to very compelling circumstances in the context of s.117C (6). The matters relied on by the Appellant do not go further than common incidents of family life. The effect of deportation is a consequence of the Appellant's own actions. I reject the submission that the children are being punished by the judge or by the Respondent. It is a consequence of his own actions.

Notice of Decision

15. I dismiss the appeal under Article 8.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 October 2024