IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00893/2014

THE IMMIGRATION ACTS

Heard at Nottingham Magistrates' Court	**Decision & Reasons Promulgated**
On 11 February 2015	**On 2 March 2015**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

KM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss S Khan, instructed by Parker Rhodes Hickmotts Solicitors
For the Respondent: Mr G Harrison, Senior Presenting Officer

DECISION AND REASONS

INTRODUCTION

1. I have made an anonymity order as this case involves children. Accordingly, the disclosure or publication of any information relating to these proceedings or any matter likely to lead members of the public to identify any person referred to in these proceedings is prohibited.

2. This is an appeal against the determination of First-tier Tribunal Judge Kelly who dismissed the appeal against the decision to make a deportation order dated 15 May 2014 following the appellant's convictions of various offences relating to a firearm, criminal property and to benefit payments. He is a national of DRC.

3. The challenge is in part as to the adequacy of reasons for the judge's finding on the protection issue he was required to consider. The second ground is no longer pursued as explained below. The third relates to the consistency between the findings of fact on the impact of the appellant's deportation on his family in the UK and the judge's conclusion reached under the Rules that it would not be unduly harsh for the family to remain behind.

4. The trigger to the immigration decision was the appellant's criminal behaviour. He was sentenced to 3 years and 3 months imprisonment following his conviction of the firearm offences at Sheffield Crown Court on 26 June 2012. He was also sentenced there on 17 May 2013 to 21 months on a number of counts relating to criminal property and benefit payments following his conviction in Doncaster Magistrates Court on 11 January 2013.

5. The appellant arrived in the UK in 1989 and he was granted leave to remain in line with his parents in 2000. His application for British Citizenship was refused in 2008 because of his extensive criminal history since 2001. He married an Irish National who lived in the UK in 2011. The family unit comprises two children; the appellant's son and a step child.

6. The marriage led the respondent to treat the appellant as a family member of an EEA national and subject to the 2006 Regulations. Accordingly there was no automatic deportation order under the UK Borders Act 2007. At the hearing in the FtT, Ms Khan conceded that there was no evidence that the appellant's wife was a qualified person under regulation 6. The judge therefore considered the case under the Immigration Rules. There is no challenge to this approach have been taken.

7. There are two letters from the respondent giving reasons for the decision to make a deportation order. The first dated 28 May 2014 explains why the respondent considered the appellant was an exception to automatic deportation as this would breach his rights as a family member of an EEA national. As explained above, this was not the basis on which the judge considered the case and there is need to dwell on why the respondent concluded that deportation was justified under regulation 21.

8. Article 8 was also considered in this first letter. Family life with the appellant's wife, the step-child (born 2005) and the child (born 2011) was accepted but it was considered that interference would be proportionate. The children's best interests were for the family unit to remain in the UK however these were outweighed by the offending and the public interest.

9. Prior to the decision to make a deportation order, on 21 January 2014 the appellant claimed asylum (for which he was interviewed on 4 and 10 June 2014). This claim was refused for reasons given in a further letter from the respondent dated 24 July 2014. This letter reveals that the respondent considered that the appellant was excluded from protection because of the danger he presented to the community and concluded that section 72 (2) of the Nationality. Immigration and Asylum Act 2002 applied. The case was however considered under article 3.

10. The matter of exclusion was not in issue before the judge. The protection claim advanced is summarised at [7] of the determination. It was on the basis that if identified with a criminal record, the appellant would be at risk of detention. Such detention has been conceded by the respondent to breach Article 3 as recorded in *BK* (Failed asylum seekers) DRC CG [2007] UKAIT 00098 and reiterated in the current Country Policy Bulletin relating to the DRC dated 18 February 2014. The appellant could not be expected to lie about why he was deported. Reliance was placed on the decision of Phillips J in *R (on the application of P) and another v SSHD*[2013] EWHC 3879 which concerned the point at issue in these proceedings: whether persons returned to the DRC against their will are at real risk of ill treatment contrary to Article 3 simply by reason of their status as (a) failed asylum seekers or (b) criminal deportees.

11. The Article 8 case is summarised at [8] in the determination. In short, reliance had been placed on 24 years integrated UK residence, an absence of meaningful ties to the DRC and the family life referred to above; it would be unreasonable to expect that this could be carried on abroad. The offending, though serious, was a thing of the past.

12. The respondent's case relied on evidence that investigations by other European and other countries showed no evidence that returnees had been ill treated on return. Whilst they might be questioned they are only detained for a short period as part of normal immigration controls. These investigations had followed a reported remark by the DRC ambassador to the UK in July 2012 that was a key feature in *P.* This was in terms that people having committed "terrible crimes in this country have to be suitably punished when they return to Congo".

13. As with the appellant's case, there is a clear and correct summary of the respondent's position is clearly set out in the determination.

DID THE TRIBUNAL MAKE AN ERROR OF LAW?

14. I am grateful to Ms Khan and Mr Harrison for their detailed submissions. The focus of permission granted by First-tier Tribunal Judge Chambers was on the protection issue but none of the three grounds advanced is excluded. I take each therefore in turn.

15. The first relates to the adequacy of reasons on the protection claim. In particular it is argued that the judge was invited to find, as not reliable, a letter from the FCO following a meeting with the *Directeur Generale de Migration* that was incorporated in the country bulletin when

compared with the evidence from the ambassador and the findings in *P.* The judge had simply accepted the contents of the bulletin without engaging with the arguments; he should have explained why he was accepting the evidence especially in the light of the strong view expressed by Phillips J.

16. Miss Khan took me through the judgment of Philips Judge in *P* and referred me also to the oral submissions that she had made to the FtT regarding the reliability of the FCO letter concerning the meeting with the Directeur Generale du Immigration as follows:

    (i) The letter was from an unknown source, the Directeur did not consent for his name to be disclosed and there was no reason given why this was the case.

    (ii) The statement by the Directeur that any questions put to returnees were related to identity only directly conflicted with the country guidance case in *BK*.

    (iii) The Directeur denied that people were ever detained at the airport which again conflicted with *BK*.

    (iv) The evidence from the country bulletin also contradicted the evidence from the Directeur because some countries did confirm people were questioned and could be detained at the airport.

17. *R (Iran) & Ors v SSHD* [2005] EWCA Civ 982 provides relevant guidance on the range of error of law challenges that were then made to decisions of the AIT and continues to be the basis for approaching challenges to decisions by the First-tier Tribunal. It was observed by Brooke LJ at [13]:

> "The second preliminary matter is this. Adjudicators were under an obligation go to give reasons for their decisions (see Regulation 53 of the Immigration and Asylum Appeals (Procedure) Regulations [2003], so that a breach of that obligation may amount to an error of law. However, unjustified complaints by practitioners that are based on an alleged failure to give reasons, or adequate reasons, are seen far too often. The leading decisions of this court on this topic are now *Eagil Trust Co Limited v Piggott-Brown* [1985] 3AllER 119 and *English v Emery Reimbolde & Strick Limited* [2002] EWCA Civ 605, [2002] 1WLR 2409. We will adapt what was said in those two cases for the purposes of illustrating the relationship between the adjudicator and the AIT. In the former Griffiths LJ said at page 122:
>
> > "[an adjudicator] should give his reasons in sufficient detail to show the [IAT] the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on [an adjudicator], in giving his reasons, to deal with every argument presented by [an advocate] in support of his case. It is sufficient if what he says shows the parties and, if need be, the [IAT], the basis on which he has acted, and if it be that the [adjudicator] has not dealt with some particular argument but it

> can be seen that there are grounds upon which he would have been entitled to reject it, [the IAT] should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion."

In *English* Lord Phillips MR said at paragraph 19:

> '[I]f the appellate process is to work satisfactorily, the judgment must enable the [IAT] to understand why the [adjudicator] reached his decision. This does not mean that every factor which weighed with the [adjudicator] in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the [adjudicator's] conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the [adjudicator] to identify and record those matters which were critical to his decision. If the critical issue is one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.'"

18. In the case before me, the judge set out the basis on which the respondent contended the appellant would not be at risk over a number of paragraphs in the determination. This included a reference to the country guidance decision in *BK* which bears this head note:

> "On return to the DRC failed asylum seekers do not per se face a real risk of persecution or serious harm or treatment contrary to Article 3 ECHR. In so finding this decision updates and reaffirms existing country guidance."

19. The decision in *P* is dated 9 December 2013. It was in the context of judicial review proceedings by two applicants. Phillips J was concerned with the risk to a failed asylum seeker and the risk to criminal deportees. As to the latter category, he considered two propositions were not seriously in dispute. The first was that criminal deportees to the DRC if identified as such will be detained on arrival for an indeterminate period. This was in the light of an official statement by the DRC Ambassador that, "People who are being deported for having committed crimes in the UK are held in custody for a period of time to allow the Congolese justice system to clarify their situation".

20. The second proposition was that detention was likely to be in conditions which contravened Article 3 of the ECHR. Phillips J reached this conclusion at [52] of his judgment:

> "52. In the case of criminal deportees to DRC, it is clear that they will be interrogated on arrival, no doubt by a professional, skilled and experienced immigration official. According to the French Embassy, those officials are specifically looking out for criminal deportees and no doubt able to probe for information and look

for signs which would demonstrate that a returnee has been imprisoned in the United Kingdom. There would seem to be an obvious and serious risk that a criminal deportee such as *P* would not be able to hide the fact of his conviction in the face of interrogation designed to elicit that very fact.

53. Further, it must be assumed that immigration officials in the DRC are able to conduct internet searches in relation to a person they are interrogating. There must be a real and substantial risk that an offence which attracted a custodial sentence of twelve months or more (so as to give rise to automatic deportation) will have been reported in some form, even if the case did not generate substantial publicity. It would not seem to matter whether the DRC nationality was mentioned in any report if the person was named. It is also relevant to note in this context that the FFM report recorded evidence from the police in Kinshasa that the DGM sends a team to the United Kingdom to identify Congolese who are to be returned to the DRC and that 'the same team who had identified them abroad (including the UK) welcome them here'."

21. The Country Policy Bulletin which was published shortly after the decision in *P* acknowledges the risks identified in *P* but explains that further information had been obtained from consultations on returns with Inter-Governmental Consultations on migration, asylum and refugees (IGC) member states and the DRC authorities. Reference is made to the IGC responses indicating that some (member states) return Congolese nationals who have committed crimes and that removals without known difficulties have been undertaken.

22. The Bulletin also refers to a meeting between the FCO and the DGM in January 2014 recorded in a letter dated 23 January 2014. It is on the letterhead of the British High Commission in Nairobi and refers to a meeting with the Directeur Centrale de la Chancellerie at the DGM in Kinshasa a few days previously. The name of the Directeur has been deleted as is the name of the author of the letter whose post is given as First Secretary Political Migration (MDO) East and Central Africa and Somalia. Specifically, paragraph 2 of the letter deals with a response to a question whether returnees are questioned on arrival. The reply is:

> "Any questions put to returnees are related to identity only. No other questions are asked, as DGM are concerned only with nationality and identity."

23. In response to a further question relating to the circumstances in which a returnee be detained, the answer indicates that there are no recorded cases of detention upon return. All enquiries seeking to determine a national's criminality are conducted prior to documentation as a Congolese national.

24. Judge Kelly set out his conclusions on the evidence at [40] which I quote in full.

> "I begin by considering whether the appellant is at risk of suffering inhuman or degrading treatment upon return to the DRC I bear in mind that *P (DRC) v SSHD [2013]* EWHC 3879 (Admin) is not a country guidance case and that the court's factual findings cannot therefore be considered as being of general application. Moreover, those findings were based on very different evidence to that which has been placed before me. In particular, it is clear from its judgment that the Court in *P* was strongly influenced by remarks made by the DRC Ambassador to the United Kingdom. However, there is evidence before me that this particular official played no part in the process of returning its nationals to the DRC, and his remarks have been subsequently contradicted by the official with relevant responsibility; that is to say, the 'Directeur Generale de Migration' [DGM]. Furthermore, the DGM's claim that his interest in criminal activity arises only in respect of those returning with an outstanding arrest warrant or in the DRC, that any criminal conviction that has occurred outside the DRC is of no relevance to an arrest warrant process, and that there is no facilities for detaining returning Congolese nationals or for monitoring them upon return, is fully supported by evidence emanating from the other countries (including France) who have investigated the consequences of returning DRC citizens convicted of criminal offences in their respective countries. I have attempted to summarise that evidence at paragraphs 10 to 14 above, and will not repeat it here. It will suffice to say, at this stage, that I have no real doubt that that the appellant would not be at risk of suffering torture or any other form of inhuman or degrading treatment upon his return to the DRC, whether by reasons of his criminal convictions in the United Kingdom or otherwise."

25. It cannot be said the judge did not engage with the evidence. He was clearly alive to the difference between the position found by Phillips J and that now asserted in the country bulletin. A reader has a clear idea from the reasons given why the judge preferred the evidence accompanying the bulletin. His reasoning is short but there is nothing to indicate that the judge did not carry out the evaluation of the evidence that he was tasked with. I do not consider anything material turns on the deletion of the names in the letter from the High Commission as the posts are clearly identified.

26. The second aspect on which Miss Khan bases her challenge refers to the conclusion in *BK*, in particular at paragraph [324]. This paragraph relates to the nature of the requests/demands for bribes once a person has transferred to detention facilities elsewhere. I am unable to find in [324] support for the argument which Miss Khan states she made before the judge.

27. Paragraph [324] is also referred to in support of the third limb of the First-tier Tribunal's submissions which contrasted the findings in *BK* with that of the Directeur who denied that people were never detained at the

airport. Paragraph [324] refers to detention away from the airport. Here again I am unable to find support for this strand of argument.

28. The final point Miss Khan explains she made to the judge referred to a contradiction in the evidence from the Directeur because some countries had confirmed that people were questioned and could be detained at the airport.

29. In the course of her submissions before me Miss Khan referred to statement by the judge referring to support of the Directeur's position by evidence emanating from other countries including France. Initially it appeared that France had not found this was the case but closer examination of the bulletin in particular [4.7] includes reference to the French representative having stated that the embassy had not heard about returnees facing difficulties at the airport or being detained after arrival.

30. I am not satisfied that the judge erred on the basis claimed and has given adequate reasons for his conclusions on the evidence and the submissions before him. There is no perversity challenge and although another judge might have come to a different conclusion that does not indicate error in this case on the basis alleged.

31. Accordingly I find no error on this ground as advanced.

32. The second ground argues that the judge had erred by not allowing the appeal under the provisions amending the 2002 Act by Immigration Act 2014 in particular "the exception" in section 117C(5) which it is argued was met on the evidence and that there was no need to consider whether it would be unduly harsh to separate the family. Ms Khan after reflecting explained that she did not pursue this ground which had been formulated early on after the new legislation and Rules.

33. The third ground argues that the judge had erred in his assessment of "unduly harsh" under the Rules. With reference to paragraph 399 and the finding that it would be unduly harsh for the appellant and his family to live outside the UK, it is submitted that the "very significant degree of heartache and hardship" the judge had found the appellant's wife and children would suffer was sufficient to meet the requirements of the rule that it would be unduly harsh for the family to be separated. It is also argued the factor of the offending should not feature in the assessment of whether deportation would be unduly harsh in splitting the family. This second limb was conceded as misconceived by Ms Khan and she accepted that there is a proportionality exercise in the assessment.

34. Returning to the first limb, at [27] the judge set out the relevant provisions of the Rules and there is no need to repeat them here. It is not disputed that the appellant's offending brought him within paragraph 398(b). The issue for the judge was to decide whether paragraph 399(b) or (c) applied. There was no dispute as to the family life at stake and accordingly it was for the judge to decide whether it would be unduly harsh for the children to go to the DRC and/or for their mother, the latter because of compelling circumstances over and above

those described in paragraph EX.2. If the judge found that to be the case, the second question for him to decide was whether it would be unduly harsh for the children to remain in the United Kingdom without the appellant or for their mother to remain here.

35. The judge gave clear reasons why he considered there would be very significant difficulties that would be faced by the appellant and his wife continuing their family life together outside the United Kingdom. He concluded that it would not be unduly harsh for the children and their mother to remain in the United Kingdom without the appellant. His reasons included the observation by the appellant's wife when asked how she had managed whilst the appellant was serving lengthy periods of imprisonment: “You just have to get on with it”.

36. At [46] the judge went on to consider the impact on the family of the appellant's deportation in these terms:

> “None of the above means that the appellant's wife and children would not nevertheless suffer a very significant degree of heartache and hardship by remaining in the United Kingdom without the appellant. However the question of whether it would be undue hardship must depend to a large extent upon the seriousness of the appellant's history of offending and likelihood that he will repeat it. The potential consequences of the appellant's recent offending has been very serious indeed. One shudders to think what use was intended for the sawn-off shotgun and ammunition that the appellant was seeking acquire and transport to London. Moreover, I have found that he poses a high risk of causing serious harm to members of the public ... The consequences to his family of the appellant's removal would not therefore, in my judgement, be unduly harsh when balanced against the level of protection that it would afford to the UK public.” (The emphasis was made by the judge)

37. Whether deportation would be unduly harsh involves subjective and objective factors. I find no merit in Miss Khan's argument that the conclusions on the serious impact of the appellant’s deportation on the family members were enough for the unduly harsh test to be met. That impact cannot be detached from the proportionality exercise which involves consideration of the criminal offending. In my view the judge gave clear and sustainable reasons for concluding that deportation would not be unduly harsh through the lens of the rules as he was required to.

38. Accordingly I find that the judge did not err in law as claimed and dismiss this appeal.

Signed Date 27 February 2015

Upper Tribunal Judge Dawson