Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01015/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 January 2015	**On 30 January 2015**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN
UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF THE STATE FOR THE HOME DEPARTMENT

Appellant

and

MANMOHAN SINGH
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondent: Mr S Khan, Counsel instructed by Messrs Malik & Malik Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Appellant (hereinafter called the Secretary of State) against the decision of First-tier Tribunal Judge Wiseman, who sitting at Richmond on 14 October 2014 and in a determination subsequently promulgated on 13 November 2014 allowed the appeal of the Respondent (hereinafter called the claimant) a citizen

of Afghanistan born on 2 May 1981, against the decision of the Secretary of State dated 28 May 2014 to make a deportation order against the claimant by virtue of Section 32(5) of the United Kingdom Borders Act 2007.

Background

2. On 11 July 2011 the claimant was convicted at the Central Criminal Court on two counts of making false representations to make a gain for himself or another or to cause loss to another/expose another to risk, for which he received a sentence of 32 months' imprisonment on each count to be served concurrently.

3. This was not the first time that the claimant had been convicted of criminal offences. Indeed, on 22 February 2010, he was convicted at Isleworth Crown Court inter alia, of the same offence for which he was fined £1,515 and in relation to which there was a victim surcharge of £15 and the claimant was also ordered to pay compensation in the sum of £630.

4. At the same hearing, for failing to surrender to custody at an appointed time, the claimant was sentenced to a community order of 80 hours' unpaid work.

5. The claimant was also convicted on 30 September 2004 of driving a motor vehicle with excess alcohol and no insurance, in relation to which he was disqualified from driving from twelve months and fined.

6. The brief immigration history of the claimant is otherwise that he was granted exceptional leave to remain on 28 October 2005. On 26 January 2006, the claimant was granted a No Time Limit leave to remain.

7. Following the claimant's marriage on 11 March 2006, he submitted an application for naturalisation that was refused on 12 February 2008. On 19 February 2008 the claimant's son was born. A further application for naturalisation was refused on 17 July 2009. On 19 September 2009 the claimant's second son was born. Both children respectively aged 7 and 5 years at the time of the First-tier Tribunal's decision are British citizens. The claimant's wife, born on 1 January 1985 gained British citizenship on 15 August 2012 and has indefinite leave to remain.

8. On 4 November 2011, a Notice of Liability to Deportation was issued. On 9 December 2012, the claimant was detained under Home Office powers following his release from prison. On 13 December 2012, the claimant submitted a bail application subsequently granted on 19 December 2012. On 17 December 2012 a request for temporary admission was declined.

9. In his determination, the First-tier Judge noted that the Secretary of State accepted that the claimant had a genuine subsisting relationship with each of his two children but it was considered in their best interests to remain in the UK where they would be cared for by the claimant's wife. It was also noted that the Respondent had observed

that at the time of her decision the claimant was 33 years old and after discounting the period of time that he had spent in prison, the claimant had resided in the United Kingdom for approximately twelve years having spent the first eighteen years of his life in Afghanistan. It was not considered by the Respondent to be unreasonable to thus expect the claimant to be able to reintegrate himself in Afghanistan where he still had family.

10. It was noted by the Judge that the Respondent did not consider there to be any exceptional circumstances that would outweigh the public interest in the claimant being deported, notwithstanding the medical condition of the claimant's youngest son, in relation to which the Respondent noted that a medical report of 14 October 2014 stated that although the claimant's son had what was described as a slight delay in cognitive skills, he was making good developmental progress. Further and in any event the claimant's wife had maintained the appropriate level of care for their youngest son whilst the claimant was in prison and would continue to do so.

11. The refusal letter made no mention of a third child born to the claimant and his wife, but the determination at paragraph 32 does refer to three children and at paragraph 47 through the Presenting Officer's submission that the claimant and his wife "had deliberately had a third child, even though he must have been well aware of the risk of deportation at the time; he should not be allowed to create a situation in this way to lead to him being able to avoid deportation; his appeal should be dismissed".

12. At paragraph 59 of his determination the Judge appreciated that he had to consider in particular the provisions of paragraph 117C of the Nationality, Immigration and Asylum Act 2002 as implemented by the Immigration Act 2014.

13. The First-tier Judge proceeded to conclude there was no doubt that the situation in Afghanistan upon his consideration of the background material and relevant country guidance case law, was that the situation in Afghanistan was such that it would be "a wholly unrealistic proposition in the circumstances to suggest that the family should travel back to Afghanistan" and the Judge recognised in fairness that the Respondent did not suggest to the contrary.

14. In that regard at paragraph 60 of his determination the Judge had this to say:

> "There are perhaps two separate points to make at this stage; the first is that the refusal letter itself concedes that the starting point should be that the British wife and children will remain in the United Kingdom and that it would be unreasonable to expect them to leave. That is a very sensible concession (particularly bearing in mind the health issues relating to D) and at least reduces the number of other matters that have to be considered. Of course in theory any family could travel together in order to remain together, but it is sensible for the case to be dealt with on the basis that it is unreasonable to require it. As a matter of record of course I think the Appellant himself is only not a British citizen now because he had committed a significant motoring offence quite a number of years ago and he was excluded when the family were gaining that citizenship".

15. At paragraph 65 the Judge pointed out that:

> "There is no such thing as a victimless crime and I have no doubt that these frauds caused problems for many people and particularly if there were individuals who actually had their genuine cards misused. Even if that was not the case, someone must have lost out substantially during the course of all this criminal activity which was of course being carried out for the financial advantage of some individuals even if not the Appellant".

Moreover in particular at paragraphs 70 to 72 of his determination the Judge reasoned as to why he had concluded that the removal of the claimant would be disproportionate and in that regard although he made no specific reference to it it is clear that the Judge had in mind the Exception provisions as set out over Sections 117C(4) and (5) respectively.

The Legal Framework

16. On 28 July 2014, Section 19 of the Immigration Act 2014 was brought into force that amended the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A that contains Sections 117A, 117B, 117C and 117D.

17. For the purposes of this case and the challenge raised by the Secretary of State, it would be as well to refer to the provisions of Section 117C that is headed "Article 8 additional considerations in cases involving foreign criminals".

18. The Section states that the deportation of foreign criminals is (1) in the public interest; (2) the more serious the offence committed by a foreign criminal the greater is the public interest in deportation; (3) that in the case of a foreign criminal who has not been sentenced to a period of imprisonment of four years or more, the public interest requires the foreign criminal's deportation unless Exception 1 or Exception 2 applies.

19. It is in relation to those Exceptions, that the Secretary of State maintains that the First-tier Judge materially erred in law.

20. 117(4) explains that Exception 1 applies where–

    (a) the foreign criminal has been lawfully resident in the UK for most of his life,

    (b) he is socially and culturally integrated in the UK, and

    (c) there would be very significant obstacles to his integration into the country to which it is proposed that he is to be deported.

21. Section 117C(5) explains that Exception 2 applies where the foreign criminal has a genuine subsisting relationship with a qualifying partner, or a genuine and

subsisting parental relationship with a qualifying child, and that the effect of the foreign criminal's deportation on the partner or child would be unduly harsh.

22. A "qualifying partner" means a partner who was a British citizen or settled in the UK within the meaning of the Immigration Act 2014.

23. A "qualifying child" means a person who is under 18 and who was a British citizen or resident in the United Kingdom for a continuous period of seven years or more.

24. Part 13 of the Immigration Rules (deportation) had been amended to reflect these provisions that are tightened up as to when it is reasonable to expect a child to leave the UK or to be separated from a foreign criminal who has a parental relationship. It is thus for Judges to decide whether there are exceptional reasons warranting departure from the Immigration Rules. Where there are, then the Judge will have to consider the public interest question. That includes the factors listed in Sections 117B and 117C.

25. Public interest considerations are set out at Section 117B and are applicable in all cases. Such considerations include the fact that the maintenance of effective immigration control is in the public interest.

The Proceedings

26. The Secretary of State successfully obtained permission to appeal the First-tier Tribunal's decision, the grounds of which in summary took issue with the First-tier Judge's reasoning in terms of Exception 1 under s.117C(4) and Exception 2 under s.117C(5). It was further contended that the Judge was in error in concluding that the claimant's circumstances were sufficient to outweigh the public interest in favour of deportation.

27. In granting permission to appeal First-tier Tribunal Judge Brunnen considered inter alia that the Judge implicitly found at paragraph 68 of his determination that the claimant did not fall within Exception 1 in s.117C(4) and made no findings as to whether Exception 2 in s.117C(5) applied. It was thus arguable that the Judge's approach to the appeal was in error and/or that he failed to give sufficiently clear reasons for his decision.

28. Thus the appeal came before us on 21 January 2015 when our first task was to decide whether or not the determination of the First-tier Tribunal Judge contained an error or errors on a point of law such as may have materially affected the outcome of the appeal.

29. Having considered the parties' submissions with care we were able to inform them that we did not consider that the previous decision involved the making of an error on a point of law material to the outcome of the appeal and that we would order that it should stand. We shall now give our reasons for so finding.

Assessment

30. It became readily apparent at the outset of the hearing that there was common ground between us and the parties that the safety of the First-tier Tribunal determination was predicated on whether it was open to the First-tier Judge to find for the claimant under the provisions of Exception 2 in s.117C(5).

31. It was indeed apparent to us, with due respect to the First-tier Judge who granted permission to appeal, that contrary to his understanding, the Judge did make findings as to whether Exception 2 applied in the particular circumstances of this case, over paragraphs 70 to 72 of the determination. Further, that whilst the Judge did not make specific reference to the provisions of paragraph 399 of the Immigration Rules that they were essentially reflected within the provisions of Exception 2.

32. It would be as well therefore to set out below what the Judge had to say over paragraph 70 to 72 as follows

> "70. (The claimant) does appear from the lengthy reports I have read to play a very significant role in the life of his family and in particular with D. The double requirement to look at now under **the new wording of the Immigration Rules** is 'it would be unduly harsh for the partner to remain in the UK without the person who is to be deported' and whether 'it would be unduly harsh for the child to remain in the UK without the person who is to be deported' (Our emphasis).
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> 71. I think one only really has to read the key reports to form the view that both these situations would be 'unduly harsh'. I have to say that the refusal letter grossly understates the nature of the illness from which D suffers and almost gives the impression that he is simply receiving medication for a condition that causes little problems. However, it is clear that Sturge-Weber syndrome is a serious neurological disorder in children involving certainly developmental delays and mental retardation. It does not appear to be curable and can lead to further problems as a child gets older. To sum up the reports as suggesting that 'he is progressing well and improving as he matures' would be a bold assessment by a medical specialist but is almost meaningless coming from an immigration caseworker.
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> 72. There are many pages of reports that cannot sensibly be summarised but I have no difficulty in finding that it would be unduly harsh for the child to remain in the UK without the Appellant and indeed unduly harsh for his wife who has two other children to look after including a young baby. Although she does have support from her in-laws at the moment, that cannot in any way replace the presence of the father of three young children and in any event an unreasonable obligation to place upon third parties in anything other than the short term as they might seek their own accommodation and have further family commitments themselves".

33. We did indeed together with the parties' representatives, consider the plethora of medical reports and assessments, within the claimant's bundle that were before the

First-tier Judge from which it was apparent that as we find, it was properly open to him to conclude having read the "key reports", to form the view that in applying the provisions of paragraph 399 of the Immigration Rules and those within Exception 2 under s.117C(5), against the backdrop of the facts as found, it would be unduly harsh for the children not least D, to remain in the UK without the claimant and unduly harsh for the claimant's wife to remain in the UK without him. Such was of course reflected in the Judge's concluding remarks in this regard at paragraph 72 of his determination (above).

34. Mr Tarlow took issue with the Judge's finding at paragraph 71 that "Sturge-Weber syndrome (was) a serious neurological disorder in children involving certainly developmental delays and mental retardation". Indeed, our careful consideration of the medical evidence that was before the First-tier Judge, does not suggest that such, was specifically stated within them. It is however clear to us, as no doubt it was to the First-tier Judge, that when one looks at the reports overall, it is self-evident that D is very clearly a person suffering not least from significant learning difficulties, cognitive development, language skills and physical balance as well as seizures such as to demonstrate, as indeed the First-tier Judge concluded, that the claimant's son D, was clearly suffering from a "serious neurological disorder …". We find therefore that looking at the medical evidence holistically, it was open to the First-tier Judge to reach that conclusion.

35. It is apparent that the seriousness of D's condition is not least reflected in the involvement of the sheer number of medical experts involved in his care and continual assessment. We note that this includes in no particular order, a Consultant Opthalmologist, a Consultant Paediatric Neurologist, a Clinical Nurse Specialist, a Clinical Psychologist, a Speech and Language Therapist, a Physiotherapist and Trainee Clinical Psychologist as well as of course the claimant's son's GP.

36. Notably, Mr Tarlow informed us, whilst he relied on the grounds before us and was not in a position to concede the appeal, his formal position was that the Judge's findings at paragraph 70 to 72 (above) were unsustainable. Mr Tarlow concluded "I say no more than that".

37. It is also right to say that there was common ground between us and the parties, that the Judge was in error of law in concluding within his determination that Exception (1) under Section 117C (4) applied in this case in that as Mr Khan conceded, it could not be reasonably said, without more, that in light of the claimant's criminal convictions, the criteria under (b), that the claimant was "socially and culturally integrated in the UK" could possibly be met. In that regard and for the sake of completeness we point out that the criteria at (a) to (c) that are required to be met in order for Exception 1 to be found to apply, are cumulative and thus a failure to meet any one of those criteria will effectively be fatal to its compliance.

38. Thus we find that the Judge's conclusion that the claimant was so integrated was not only unsustainable but indeed was lacking in any adequate explanation for that conclusion.

39. Further we find there to have been no or no adequate explanation or consideration to satisfactorily demonstrate that the claimant would meet "very significant obstacles" to his reintegration into Afghanistan in circumstances where he would be returning as a single man and where he continued to have family. To that extent we thus agree with the Secretary of State's criticisms of the determination. The issue however, for us is whether that error of law was material.

40. It was as we have found, properly open to the Judge to conclude on the application of the facts as found that the claimant met the requirements of Exception 2. It was apparent to the Judge that the claimant took an active role in the care of the children and although it was observed by the Secretary of State in her refusal letter, that the claimant's wife appeared to have coped whilst the claimant was in prison, that of course was before the extra dimension of a third child having been born to the couple since the claimant's release from prison.

42. Whilst we appreciate that exceptional circumstances are fact sensitive and whilst it may be that a Tribunal differently constituted might have reached a different decision from the First-tier Judge in this case, we are nonetheless and for the above reasons, quite satisfied that the First-tier Tribunal Judge applied the proper test in terms of Exception 2 under Section 117C(5) and that it was thus properly open to him to conclude that there were exceptional circumstances both under that Section and under the equivalent Immigration Rule.

43. It is also apparent to us as reflected not least at paragraph 65 of the Judge's determination to which we have above referred, that he was properly mindful of the public interest in the balanced approach that he took in the particular circumstances of this case as found.

44. The public interest requires a foreign criminal's deportation unless Exception 1 or Exception 2 applies and in this case the First-tier Judge, for reasons supported by and open to him on the evidence concluded that the criteria within Exception 2 were in the case of this claimant, properly met. Such a finding was thus and as we have found, sustainable in law.

45. Therefore, although there was an error of law in this case and the Secretary of State was as we find, perfectly entitled to bring the appeal as she did, we are equally satisfied that the decision was not affected by that error of law and therefore we dismiss the Secretary of State's appeal.

Decision

The making of the previous decision involved the making of no error on a point of law material to the outcome of the appeal and we therefore order that it shall stand.

Signed Date

Upper Tribunal Judge Goldstein