Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU149002016

THE IMMIGRATION ACTS

Heard at Field House
On 20 July 2017

Decision & Reasons Promulgated
On 31 July 2017

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

MOHAMMED KHURAM SHEZAD
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Chakmakjian of Counsel instructed by MJ Immigration
For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This challenge is brought by the respondent in respect of the decision of First-tier Tribunal Judge J Robertson to allow this appeal against a deportation order made on 29 December 2016 under 5(1) of the Immigration Act 1971 and the refusal of the appellant's human rights claim. For ease of reference, I continue to refer to the parties as they were before the First-tier Tribunal.

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2. The appellant is a Pakistani national, born on 12 December 1973. He entered the UK in December 1996 with entry clearance to join a spouse and was granted indefinite leave to remain in December 1997. He has four children; the eldest is now 19 and the youngest is 7. They were a year younger at the date of the hearing before the First-tier Tribunal Judge.

3. On 9 November 2015, the appellant was convicted of theft and sentenced to 8 months in prison. He had no previous convictions. The respondent considered that deportation was conducive to the public good and in the public interest under paragraph 398 of the Immigration Rules. She accepted that he had a family and private life with his wife and children but considered it would not be unduly harsh for them to accompany the appellant to Pakistan, given his offending. She took the view that there were no very significant obstacles to his re-integration on return.

4. The appellant claimed that whilst working as a carer for a blind man named George, he *"borrowed"* money from him to pay his debts and had been unaware he had left him destitute. Although he had repaid about a third, he was convicted of theft. He maintains he has since continued to repay the money.

5. The appeal came before Judge J Robertson at Birmingham on 11 November 2016. She found that the appellant was now remorseful after his imprisonment, that there was a strong bond between the appellant and his family and that his deportation would be unduly harsh on the appellant's children and their family life. The appeal was allowed.

6. The respondent sought permission to appeal. On 16 May 2017, First-tier Tribunal Pullig refused permission but this decision was overturned by Upper Tribunal Judge Kebede on 6 June 2017. In granting permission, she considered that it was arguable that the judge failed to factor in public interest matters such as the appellant's criminality and risk of re-offending when undertaking the *"unduly harsh"* test in paragraph 399(a) and that her conclusions were, therefore, inconsistent with MM (Uganda) [2016] EWCA Civ 617.

The Hearing

7. The appellant was present at the hearing before me on 20 July 2017 when I heard submissions from the parties.

8. Mr Armstrong relied on three judgments which addressed the approach to the assessment of what was "unduly harsh" in the context of deportation: McLarty (Deportation – proportionality balance) [2014]

UKUT 00315, MM and another (Uganda) [2016] EWCA Civ 617 and K M O (section 117 – unduly harsh) Nigeria [2015] UKUT 00543.

9. Mr Armstrong submitted that there was a strong public interest in the deportation of foreign criminals and there had to be a compelling reason not to deport such individuals. He submitted that when considering the impact of the appellant's deportation on his children, *all* circumstances had to be considered including the offending. It was clear from the determination that this factor was not considered when the unduly harsh test was assessed. Further, he submitted that the judge did not consider the pre-sentencing report assessment of a medium risk of re-offending and she did not give weight to the fact that this was not a one-off offence but one which was committed over a six-week period. The judge misdirected herself in law and the decision should be set aside.

10. In response, Mr Chakmakjian submitted that the judge had set out the public issue factors at paragraphs 17-22. She assessed his criminality at length and it could not be the case that, when then considering proportionality, she had forgotten those factors. The determination had to be read as a whole. She undertook a balancing exercise when assessing family life after having clarified her approach at paragraph 16. Her approach was in accordance with MM and another. She considered the public interest first and then considered family life. No factors were disregarded.

11. Mr Armstrong submitted that the judge downplayed the appellant's criminality in her findings and did not have proper regard to his offending behaviour and the public interest. She failed to follow the correct test and the decision should be set aside.

12. At the conclusion of the hearing I reserved my determination, which I now give.

Findings and conclusions

13. Mr Armstrong relied upon the head note of McLarty. This emphasises Parliament's view on the deportation of foreign criminal; noting that the scales are tilted strongly in favour of deportation and that for them to swing in an appellant's favour, there must be compelling reasons which must be exceptional. Where such circumstances are said to exist, they must be weighed against the public interest. The appellant in that case was a Jamaican national with indefinite leave to remain married to a British national and they had four children aged between 3 and 10. He was convicted of fraud arising out of the rental of a motor vehicle and drugs offences. The First-tier Tribunal allowed the appeal and the determination was criticised for failing to clarify to what

extent, if at all, the serious nature of the crime and the wider public interest in deportation were factors in the Tribunal's findings. The court found that the determination lacked reasoning. It held that where the two important countervailing principles of the public interest in deportation and the family interests of the appellant collide, fairness requires that the Tribunal to provide full and proper reasons in relation to its consideration of both these factors. The Tribunal was found to have erred because only half of the task was said to have been performed. The Tribunal identified factors in favour of the appellant but then proceeded to a finding on proportionality without working through the essential step of measuring those factors against the general and specific public interest considerations arising. The Tribunal had failed to apply itself to the proportionality test in that factors in favour of the appellant had not been balanced against the public interest.

14. In MM and another, the Court of Appeal focused on the meaning of unduly harsh in paragraph 399 of the rules and s.117C(5) of the 2002 act in the context of the removal of foreign criminals under s.32 of the Borders Act 2007. MM, a Ugandan national, had held indefinite leave to remain since 2003 and he had a daughter born in December 2004 who was a British citizen. He was convicted of drugs offences. In allowing his appeal, the Tribunal had placed weight on the family relationship, the best interests of the daughter and the devastating impact deportation would have on her emotional development. The Tribunal also took note of the appellant's long residence and the fact that he had been drug free since going to prison. The other appellant was KO, a Nigerian convicted of conspiracy to make false representations who had a wife, four children aged between 2 and 10 years and a step child of 17 who regarded him as her father. The First-tier Tribunal had considered that his deportation would be unduly harsh on the children and that it was not in the public interest to take away the stability of the close family, potentially causing them damage. The Court of Appeal held that the question of undue hardship had to be decided with regard to the force of public interest in deportation and that what was due or undue depended on all the circumstances, not merely the impact on partners or children. It found that the relevant circumstances certainly included the criminal history.

15. All these cases have a common theme; that of a strong family life with wives and children and a lengthy period of residence in the UK. Indeed, it is often the case in deportation appeals that appellants have established private and family life in the UK. That is not an exceptional or unusual factor although particular circumstances may be.

16. Mr Chakmakjian pointed to the judge's references to the serious nature of the appellant's offending and I do not dispute that she set out his background in her determination (at paragraphs 17-22). She also set out the oral evidence and summarised the written statements

and the submissions made. At paragraph 16 she directed herself as to the factors she had to consider when conducting a proportionality assessment. Mr Armstrong did not suggest that she failed to refer to any relevant factors in that paragraph; his case is that there was no engagement with the public interest factors in the judge's conclusions.

17. The appellant did not enter a plea of guilty and the trial involved his victim, a blind and vulnerable man, having to go through the process which the sentencing judge concluded he found very intimidating and distressing. The judge noted that the appellant had had a severe gambling habit which he kept a secret from his family, that he had been the victim's carer for a period of time and that over a six-week period he had exploited his loyalty and friendship by withdrawing monies from his account so that he did not even have funds to buy food. The judge took account of the appellant's previous good character and the repayment of a large part of the money but nevertheless found the offence to be so serious that only a custodial sentence was justified.

18. In her determination, the First-tier Tribunal Judge noted the judge's sentencing remarks (at 17). She also noted this was not a one off offence but had been repeated over a period of six weeks and that the sentence had not been suspended as recommended by the Probation Officer in the pre-sentencing report (at 18). She found there were several factors which led to the appellant's financial problems and the offence; specifically, his lack of employment and health issues. She found, however, there was no evidence before her of the gambling problem the sentencing judge had referred to; noting that the witnesses had all denied such a problem and that the PSR "*only*" referred to buying scratch cards and lottery tickets (at 19). The judge noted that the appellant had been assessed as having a medium risk of re-offending, as long as he continued contact with his victim; otherwise it would be low. She considered that as the appellant's wife was now working and the appellant had not had contact with his victim, the risk was low (at 20). She noted the appellant's alleged remorse and accepted he was ashamed and embarrassed. She noted that he had undertaken a rehabilitation programme (although there is no evidence of this). She found, however, that his lack of remorse at the time of the offence was a strong factor against him (paragraph 21). She took account of his lawful residence, his integration into the British way of life, although that is not expanded upon, but considered, nonetheless, that it was in the public interest to deter others by deportation where crimes had been committed even when there was remorse and a low risk of re-offending (at 22). At paragraphs 17-22, the judge, therefore, set out the factors for the respondent and against the appellant.

19. The judge then proceeded to consider the appellant's family life. She identified that he had four children aged between 18 and 6, all born in

the UK and all British citizens, that the appellant was hardworking and supportive and played an active role in the upbringing of the children (at 24). She then stated: "*The main issue was the effect of the deportation on the family*", noting that either the family accompany the appellant to Pakistan or stay here without him (at 25). She found that the appellant's wife (who is in fact his first cousin) was also born in the UK, that she has family here, that she has only visited Pakistan twice (in fact her statement confirms she had been there for 6 weeks for her marriage and twice since but there is no information on earlier visits), that the children have visited once or twice, that they only speak English and that there would be a language and cultural barrier if they moved to Pakistan (at 26-27). She found that the appellant's wife would find it difficult to cope without him and that their son would be unable to motivate himself to complete his A Levels (at 28). She noted that some assistance had been provided by the appellant's brother-in-law. She observed that the family had suffered stress due to health and financial reasons even before the appellant's crimes (at 28). She took account of a clinical psychology report which suggested that the appellant’s deportation could lead to mood difficulties and disruptive behaviour amongst the children, that they would miss the support their father provided and that the wife's mental state would deteriorate. The report notes the family's cultural background and traditions (at 29).

20. The Judge noted that whilst the appellant's wife found it difficult to cope whilst the appellant was in prison, she was able to work and she received assistance from her brother; such help could continue were the appellant to be deported (at 31).

21. The judge found that the two older sons felt they had to take responsibility for the family during their father's incarceration (at 32). She concluded that there was a strong family bond, that the family had suffered stresses in the past, that the appellant was central to the cohesion of the family and that a long term absence was different to the shorter absence the family dealt with when he was in prison. She noted that the report stated that removal would impact negatively on the children (at 34). She then concluded that paragraph 399(a) was applicable as the effect of deportation would be unduly harsh on the children and on family life so that the latter outweighed the public interest (at 34).

22. Notwithstanding the judge's direction at paragraph 16, she has failed to approach the balancing exercise correctly. Whilst she identified factors for the respondent and for the appellant, there is no attempt to then undertake any kind of balancing exercise. The conclusions do not suggest that there has been any attempt to weigh up the factors identified in the sub-headings of Public Interest and Family Life. What the judge has done is identify factors in the public interest and those on the side of the appellant but there has been no weighing up of the

two and certainly no consideration of the former when the conclusion of undue harshness for the family was reached at paragraph 34. Indeed, it is unclear how the conclusion was reached or why, given all the compelling factors against him, the judge decided that family life outweighed the public interest. It is plain from the case law relied on by the respondent, that *all* factors must be considered when that conclusion is reached but the determination suffers from a lack of such an assessment and the judge fell into the trap identified in McLarty of failing to balance the factors in favour of the appellant against the public interest. Simply identifying the factors for and against the appellant is not enough. Her statement in paragraph 25 of what she described as the main issue only serves to reinforce her error.

23. Further, the judge's acceptance of certain matters pleaded on the appellant's side are unreasoned. Her finding that the children have no knowledge of Pakistani cultural norms and that the family is completely Westernised is not supported by the observation by the author of the psychological report who commented on the family's traditional and cultural background, by the appellant who claimed in his witness statement that his children went for religious instruction to the mosque and by the fact that the appellant's marriage was traditionally arranged and took place in Pakistan. The judge’s rejection of the gambling habit identified by the sentencing judge was also unreasoned. She found that there was no evidence because the witnesses all denied it however she failed to take account of the fact that the sentencing judge had found that it had been hidden from the appellant’s family.

24. There is also no explanation for why the judge found that the factors pleaded for the appellant were so exceptional and compelling as to outweigh the public interest, particularly when she, herself, listed a wealth of factors against him. Issues of family life and of wives and children having difficulty managing without the husband/father may be found in a large number of deportation cases. The judge is required to explain why the appellant's case is different.

25. The respondent's challenge to the determination is, therefore, made out. I conclude that the judge made errors of law such that her decision must be set aside and re-made by another judge of that Tribunal at a future date.

26. Decision

27. The First-tier Tribunal made errors of law. The decision is set aside and shall be re-made afresh by another judge of the First-tier Tribunal at a date to be arranged.

Signed

Upper Tribunal Judge Kekić

Date: 26 July 2017