



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21560/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 17 July 2018

Decision and Reasons Promulgated
On: 27 July 2018

Before

THE HON. MR JUSTICE LEWIS
UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BB
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Z Ahmad, Senior Home Office Presenting Officer
For the Respondent: Mr N Leskin, instructed by Birnberg Peirce & Partners

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing BB's appeal against the respondent's decision to refuse his human rights claim further to a decision refusing to revoke a deportation order previously made against him.

2. For the purposes of this decision, we shall refer to the Secretary of State as the respondent and BB as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Angola born on 4 March 1989. He claims to have entered the United Kingdom in November 1999, at the age of 10 years, with a friend of his mother's who passed him into the care of a Congolese national and he was accommodated by Enfield Social Services from October 2005. He was granted indefinite leave to remain on 14 June 2010. On 5 July 2012 he was convicted on two counts of robbery and was later sentenced to 12 months' imprisonment for each offence to run concurrently. The respondent commenced deportation proceedings and on 19 December 2012, following the appellant's failure to respond to a liability to automatic deportation notice served on him on 24 October 2012, a Deportation Order was signed against him. He was served with the reasons for deportation and the Deportation Order on 21 December 2012. He did not exercise his right of appeal against the deportation decision.

4. On 11 February 2013 the appellant made representations to the respondent in relation to his family and private life ties in the UK, referring to his mother and two sisters residing in the UK. That was treated as an application to revoke the deportation order and was refused on 3 April 2013. The respondent certified the claim under section 96(1) of the Nationality, Immigration and Asylum Act 2002 so that the appellant had no right of appeal against the decision. The appellant then made further representations which were treated as a human rights claim and further application to revoke the Deportation Order and was refused on 13 August 2014 and the claim certified as clearly unfounded under section 94 of the 2002 Act. Further representations were made by the appellant on the basis that he was a victim of trafficking but that was not pursued further.

5. On 23 June 2015 the appellant was convicted for possessing an offensive weapon in public and received a suspended sentence of eight months. He was also to undergo a mental health assessment and receive non-residential mental health treatment. On 10 November 2015 and 1 February 2016 further representations were made on the appellant's behalf in relation to his mental health issues. Medical evidence was submitted from Lambeth Mental Health unit. The representations were treated as a fresh human rights claim and were refused on 31 August 2016, with a supplementary refusal on 23 September 2017, giving rise to a right of appeal.

6. In the refusal letters the respondent noted that the appellant was receiving mental health treatment and that he claimed that he required the support of his family for his day to day living. The respondent noted that the appellant had no children or partner in the UK and therefore did not fall within the exceptions to deportation in paragraph 399(a) and (b). The respondent considered that paragraph 399A did not apply as it was not accepted that the appellant had been lawfully resident in the UK for most of his life. The respondent considered that there were no very compelling circumstances outweighing the public interest in deportation and that his deportation would not breach his Article 8 human rights. With regard to Article 3, the respondent noted that the appellant suffered from paranoid schizophrenia and that he had been receiving treatment for the condition in the UK.

Consideration was given to the psychiatric reports which had been produced. It was accepted that medical treatment was not available for the condition in Angola, but the respondent considered that the high threshold had not been met to make out a claim under Article 3.

7. The appellant appealed against those decisions and his appeal was heard in the First-tier Tribunal on 15 December 2017 by Judge Griffith and was allowed in a decision promulgated on 17 January 2018. The appellant's claim was that he had no ties to Angola except his grandmother who could not care for him and that he lived with his mother in the UK. His mother and sister gave oral evidence. Judge Griffith found their evidence to be inconsistent and unreliable, in particular as regards the appellant's grandmother's living conditions in Angola. She found that the high threshold had not been met for the purposes of Article 3 but that the requirements for Article 8 had been met. In so concluding the judge relied upon the case of *MM (Zimbabwe) v Secretary of State for the Home Department* [2012] EWCA Civ 279. She concluded that there were very compelling circumstances for the purposes of paragraph 398 of the immigration rules, given the appellant's dependency upon specific medication and support from his local mental health team and from his family in the UK and considering the absence of support in Angola. She accordingly allowed the appeal.

8. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had failed to give clear reasons why the appellant could not live with his grandmother or why he could not receive assistance from his family members such as his mother and sister and that the judge had speculated on the appellant's mental health at the time of the offences and had failed to consider the seriousness of the offences and attach the required weight to the public interest. There was a failure by the judge to give clear reasons as to how the appellant met the high threshold of very compelling circumstances.

9. Permission to appeal was granted in the First-tier Tribunal on all grounds.

10. At the hearing before us Ms Ahmad expanded upon the four challenges to the judge's decision. Mr Leskin submitted that the judge made proper findings of fact as to the appellant's level of dependency upon his family members, the judge had explained why the appellant's grandmother could not provide him with assistance, the judge had properly found the appellant's offence was at the lowest end of the scale and that the judge had followed the presenting officer's submission that the appellant could have been in the early stages of mental illness when he offended and in any event did not give that much weight in her proportionality assessment. There was no suggestion in the evidence that the appellant would re-offend.

11. We advised the parties that in our view the judge had made errors of law in her decision and that the decision could not stand and had to be set aside.

12. Section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provides that the deportation of foreign criminals is in the public interest. In cases, such as the present, where the foreign national criminal has not been sentenced to a period of imprisonment for four years or more, the public interest requires deportation unless the

exceptions in section 117(C) of the 2002 Act apply. The position is reflected in Rules 398 to 399B of the Immigration Rules. The relevant exception is reflected in rule 399A, and requires that the person has been lawfully resident in the UK for most of his life, he is socially and culturally integrated in the UK, and there would not be very significant obstacles to his integration into the country to which he is to be deported. Here the exception does not apply (as the appellant has not been lawfully resident in the UK for most of his life). In those circumstances, the public interest in deportation will only be outweighed where there are very compelling circumstances: see rule 398.

13. We recognise that the judge correctly identified the relevant principle at paragraph 69 of her judgment. However, the judge had, correctly, to consider the public interest in deportation which involved, amongst other things, a proper assessment of the seriousness of the offences. We find merit in the respondent's challenge to the judge's findings on the appellant's offending. We accept the respondent's submission that the judge did not give sufficient weight to the seriousness of the offending and to the weight to be accorded to the public interest as a result. The judge referred to the offending in 2012 as at the lower end of the scale and that appeared to be the only consideration in relation to the nature of the offending to which she had regard. There was no engagement with the reasons for the length of the sentence or the remarks of the sentencing judge as to the seriousness of the offences. Furthermore the judge placed weight upon the fact that "it was possible that" the appellant may have been suffering from unidentified mental health issues at the time of offending whereas there is no medical evidence confirming that he was and, on analysis, no more than speculation by one of the medical experts, Dr McNulty, in his report in that regard. In addition, we bear in mind that suggestion was apparently contradicted by the evidence recorded in the judge's decision at [24] and [40], which the judge did not address in her decision. All of these matters were relevant to the question of the public interest and we therefore accept the respondent's submission that the judge erred in her assessment of the weight to be given to the public interest.

14. We further find that the judge has not properly approached the assessment of the factors weighing in the assessment of proportionality. The appellant has relied upon the Court of Appeal decision in *MM (Zimbabwe) v Secretary of State for the Home Department* [2012] EWCA Civ 279. It is correct that the Court of Appeal envisaged in that case that the absence of medical treatment in the country to which the person was to be deported could, exceptionally, be potentially relevant to a claim under Article 8 (even where the claim had failed under Article 3) where that was an additional factor to be weighed in the balance: see paragraph 23 of the judgment with other factors which themselves engaged Article 8. The Court, however, went on to emphasise at paragraph 24 that the question remained whether the appellant had established that deportation would infringe his Article 8 rights. The judge here does not explain how the circumstances, relating to, essentially, the well-being of the appellant, provided very compelling circumstances to outweigh the public interest in deportation. Furthermore, the judge did not give any consideration to the assistance the appellant's mother and sister could provide in his integration into Angola. Nor did she attempt to assess what assistance the grandmother in Angola could provide.

15. For all of these reasons we agree with the respondent that the judge's reasons for concluding that there were very compelling circumstances were materially flawed. We therefore set aside the decision in its entirety. We do not consider that we are able to preserve any of the findings. In the circumstances, and given that there needs to be fresh fact-finding, it seems that the appropriate course would be for the matter to be remitted to the First-tier Tribunal to be heard afresh.

DECISION

16. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed and the decision is set aside.

17. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Griffith.

Signed:



Upper Tribunal Judge Kebede

Dated: 20 July 2018