Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number: PA/08755/2019

THE IMMIGRATION ACTS

Heard at Field House (via Skype)
On 21 May 2021

Decision & Reasons Promulgated
On 14 June 2021

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DOUBT PHIRI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Avery, Senior Presenting Officer
For the Respondent: Ms Butler, Solicitor, Fountain Solicitors (Manchester)

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals, with permission granted by a judge of the First-tier Tribunal ("FtT"), against FtT Judge Cox's decision to allow Mr Phiri's appeal against the refusal of his human rights claim.

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2. To avoid confusion, I will refer to the parties as they were before the FtT: Mr Phiri as the appellant and the Secretary of State for the Home Department as the respondent.

Background

3. The appellant is a Zimbabwean national who was born on 4 January 1983. He first came to the attention of the UK authorities when he attended the Asylum Screening Unit in Liverpool on 12 March 2009. He left before completing a screening interview but after having been served with a notice to an illegal entrant.

4. The appellant was treated as an absconder and his asylum claim was deemed to be withdrawn. A few months later, on 25 November 2009, he claimed asylum at the Asylum Screening Unit in Croydon. He accepted that he had previously claimed asylum. He underwent interviews and it was decided that his claim should be treated as a fresh claim under paragraph 353 of the Immigration Rules.

5. That claim was refused on 4 January 2010, however, and the appellant lodged an appeal. The appeal was dismissed by FtT Judge Levin on 6 April 2010 and the appellant was refused permission to appeal against his decision. He became appeal rights exhausted on 5 July 2010.

6. The appellant made further applications to the respondent and he was eventually granted leave to remain on the basis of his family life in the UK until 3 December 2015. His application to extend that leave was rejected over a fees issue on 3 December 2015.

7. On 4 December 2015, the appellant was convicted by a jury at Liverpool Crown Court of two sexual offences. The first was sexual assault on a female by penetration. The second was rape of a female aged 16 years or over.

8. The offence occurred on 14 July 2014. The appellant met a young woman for a first date. They drank alcohol and then went to a park near her home to smoke cannabis together. The appellant penetrated the victim with his fingers without her consent and then raped her. Sentencing the appellant to a total of seven years' imprisonment, HHJ Wright noted that the encounter had been painful for the victim; that she had believed herself to be pregnant as a result of it; and that she had been left emotionally scarred.

9. The respondent made known to the appellant that it was her intention to deport him from the United Kingdom. This caused him to make a protection and human rights claim on 1 July 2016.

He stated that he had a British partner and three British children, born in 2010, 2013 and 2015, and that he had a strong bond with his family. He also stated that he had a daughter from a previous relationship, who had been born in 2007. He made reference to the political situation in Zimbabwe. He stated that he had made the UK his home and that he was appealing against his conviction. A letter from the appellant's partner accompanied the appellant's representations. She confirmed in that letter that he was a good father and that she continued to visit him in prison. Also attached to that letter were the children's birth certificates, evidence of the public funds they received as a family, and details of the Sky television package to which they had subscribed.

10. After an exchange of further correspondence, the respondent refused the asylum and human rights claims on 2 September 2019, on which date she also made a deportation order against the appellant. She considered that the appellant had committed a particularly serious crime and that he represented a danger to the community of the United Kingdom, such that s72 of the Nationality, Immigration and Asylum Act 2002 applied. The respondent did not accept, in any event, that the appellant was at risk on return to Zimbabwe. The respondent accepted that the appellant had a genuine and subsisting relationship with his partner and children but not that it would be unduly harsh to deport him from the United Kingdom.

The Appeal to the First-tier Tribunal

11. The appellant appealed to the FtT, contending that he would be at risk on return to Zimbabwe and that his removal would be in breach of Article 8 ECHR. His appeal was heard by the judge, sitting in Bradford, on 6 January 2021. The appellant was represented by Ms Butler, as he was before me. The respondent was represented by a Presenting Officer. The judge heard oral evidence from the appellant and submissions from both representatives before reserving his decision.

12. The judge's reserved decision is lengthy and carefully structured. He found that the appellant had failed to rebut the presumptions in s72 and that his appeal fell to be dismissed on protection grounds accordingly: [35]-[40]. He nevertheless found that the appellant would not be at risk of ill-treatment on return to Zimbabwe: [41]-[46].

13. As regards Article 8 ECHR, the judge considered the respondent to have made an appropriate concession about the existence of a family life between the appellant, his partner and their children: [55]. The judge reviewed the authorities on Article 8 ECHR and deportation at [59]-[64]. He considered the appellant to have

committed a very serious offence: [66]. The fact that the appellant continued to maintain his innocence and had not addressed his offending behaviour served to increase the public interest in his deportation: [67].

14. At [68]-[91], the judge explained why he considered that the effect of the appellant's deportation on his children would be unduly harsh. At [92], however, he considered that the effect on the appellant's partner would not be unduly harsh. He then proceeded to consider whether there were very compelling circumstances which overcame the public interest in the appellant's deportation. He stated that he had found this difficult and that the issues were 'finally balanced': [93]. He noted again that the appellant had committed two very serious offences and that his decision to maintain his innocence served to 'enhance the already elevated threshold'. The judge then gave the following reasons for finding that there were very compelling circumstances:

> "[95]Nevertheless, in my view the factors that tip the appeal in the Appellant's favour are the nature of the Appellant's relationship with his family (particularly his children) and the likely impact his deportation will have on their future financial circumstances.
>
> [96] I appreciate that [the appellant's partner] is misguided in her belief that the Appellant is innocent. Nevertheless, what is striking in this appeal, is that the Appellant's defence to the charges was that the victim had consented to a sexual relationship and yet [the appellant's partner] has continued to support him. In fact, she encouraged the children to maintain a relationship with the Appellant during his imprisonment and then welcomed him back to the family home. In my view, a reasonable inference to draw from these matters is that she recognised the significance of his role within the household, not only on a practical day to day basis, but as she noted, the importance of his role as a father to the children for their future development and well-being. In my view this is telling and had been as [sic] significant factor weighing in the Appellant's favour. Since not only does it clearly demonstrate the very close relationship that the Appellant has not only with his children, but also his importance to their future development.
>
> [97] Further, it is highly likely that they will remain reliance on public funds for the foreseeable future and his partner is unlikely to be able to find any meaningful employment. In my view, she is likely to struggle to find any employment in the current circumstances, especially as she has been out of work for over 8 years. I appreciate that there are many single families in the UK, who face similar difficulties. Nevertheless, it helps tip the balance in his favour.
>
> [98] Having carefully considered all the evidence and having regard to the enhanced public interest in the appellant's

> removal, I am satisfied that there are very compelling circumstances, over and above those described in exception 2. In this context, I also attached weight to my finding that his partner will face significant difficulties (albeit that the impact on her personally would not be unduly harsh).

The Appeal to the Upper Tribunal

15. The respondent sought permission to appeal in grounds which span thirteen paragraphs but raise what is, in substance, a single complaint. The submission made is that the judge gave legally inadequate reasons for concluding that there were very compelling circumstances which outweighed the strong public interest in the appellant's deportation.

16. Permission was granted by FtT Judge Adio, who considered it arguable 'that there is an error of law in the application by the judge of the relevant considerations'.

17. In a response to the grounds of appeal under rule 24 of the Upper Tribunal Rules, Ms Butler submits that the judge gave adequate reasons for his findings and that the respondent's grounds amount, in truth, to nothing more than a disagreement with his assessment.

18. In his submissions, Mr Avery relied on the grounds of appeal and submitted that the judge's decision was inadequately reasoned or otherwise irrational. What was fundamentally missing, he submitted, was anything which could even begin to be identified as a very compelling circumstance which outweighed the deportation of this particular appellant. The test was obviously more exacting than the test of undue harshness but the judge's analysis of whether there were very compelling circumstances merely harked back to his analysis of undue harshness. What was clear from the authorities was that the analysis required by s117C(6) of the 2002 Act was a proportionality consideration. Here, however, the judge had failed to weigh various matters against the appellant in that balancing exercise, including the seriousness of the appellant's offending, his lack of remorse and the fact that he had upheld the certificate under s72 of the 2002 Act. Nothing had been said by the judge in the relevant section of his decision to show that those matters had been taken into account. Nor had he identified any factors which set the case apart from one in which the consequences of deportation were as expected.

19. Ms Butler submitted that the respondent's grounds represented nothing more than disagreement with the result. The judge was plainly aware of the public interest in the appellant's deportation and the respondent had failed to establish either that the reasons given were legally inadequate or that the outcome was

perverse. The judge had taken relevant authority, including *HA (Iraq) v SSHD* [2020] EWCA Civ 1176; [2021] 1 WLR 1327 into account. There was a suggestion in the respondent's grounds that the conclusions of the Independent Social Worker were in some way 'generic' but that was plainly not so as the report had been written about this particular family. I asked Ms Butler whether she was able to assist me in understanding how and why the judge had attached weight to the appellant's family being on benefits. She referred me to [21]-[22] of her skeleton argument before the FtT, in which it had been submitted that the appellant would be able to secure employment and contribute to the family income in the event that he remained in the UK. Whilst there was no express finding that the appellant would be able to secure employment in the UK, that appeared to be the basis upon which he had proceeded. The evidence in support of that apparent conclusion was the report of the ISW and the appellant's own evidence.

20. Ms Butler submitted that the judge had considered whether the appellant would be able to support his children from Zimbabwe and had concluded for good and proper reason that he could not. She also submitted that the judge had been entitled to conclude that the appellant would not be an additional drain on public funds if he remained in the UK. That finding was not at odds with what had been said by the Supreme Court in *Rhuppiah v SSHD* [2018] UKSC 58; [2019] Imm AR 452, she submitted.

21. In reply, Mr Avery submitted that it was not easy to understand the basis upon which the judge had reached his decision in this case that there were very compelling circumstances. The assessment of whether there were very compelling circumstances was a short part of the decision and the judge had failed in that section to undertake any sort of balancing exercise. Mr Avery reminded me that the challenge was to the judge's assessment of whether there were very compelling circumstances and did not encompass a challenge to the conclusion that the effect of the appellant's deportation on his children would be unduly harsh.

22. I reserved my decision.

Statutory Framework

23. Sections 117B and 117C of the Nationality, Immigration and Asylum Act 2002 provide as follows:

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where —

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

Analysis

24. The First-tier Tribunal (IAC) is an expert Tribunal charged with administering a complex area of law in challenging circumstances. It is probable that in understanding and applying the law in its specialised field the Tribunal will have got it right. The decision of the FtT is to be read as a whole. Its reasons are not to be subjected to an unduly critical analysis on appeal. Its decision is to be respected unless it is quite clear that it misdirected itself in law. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.

25. The importance of these dicta (of Lord Hope and Baroness Hale in *SSHD v AH (Sudan)* [2007] UKHL 49; [2008] Imm AR 289) is underlined in recent decisions of the Court of Appeal including *UT (Sri Lanka) v SSHD* [2019] EWCA Civ 1095 and *Lowe v SSHD* [2021] EWCA Civ 62. I have borne what was said in those cases firmly in mind and have also reminded myself that the judicial restraint should be exercised when evaluating a submission, as made by Mr Avery in this case, that the reasons given by the FtT are legally inadequate to justify its conclusion*: R (Jones) v FtT and CICA* [2013] UKSC 19; [2013] 2 AC 48, cited by Floyd LJ (with whom Coulson LJ agreed) at [26] of *UT (Sri Lanka)*.

26. Ms Butler submits orally and in her rule 24 response that the respondent fails to identify, let alone to establish, a single legal error in the decision of the FtT. She submits that the reasoning of the FtT is cogent and demonstrates a keen knowledge of the law and a detailed analysis of the facts. In many respects, I accept those submissions. The judge's decision is clearly the product of careful reflection. He evaluated the oral evidence before him with care, and with the benefit of a Social Services assessment and a detailed report from an Independent Social Worker named Ms Harris: [22]-[34]. He undertook an individualised assessment of the best interests of the appellant's children and a holistic assessment of the family's circumstances in considering whether (as a precursor to his analysis of whether there were very compelling circumstances) the effect on the partner and children would be unduly harsh: [72]-[92].

27. The judge also demonstrably placed Part 5A of the 2002 Act at the heart of his analysis and he appreciated, for example, that the public interest in the deportation of an offender varied depending on the seriousness of the offence. He evidently understood and attached weight to the multi-faceted nature of the public interest in the deportation of foreign criminals, as is clear from [93]. The judge also cited relevant authority and extracted relevant principles from that case-law, as is clear from the references to *KO (Nigeria) v SSHD* [2018] UKSC 53; [2019] Imm AR 400, *Hesham Ali v SSHD* [2016] UKSC 60; [2016] 1 WLR 4799, *NA Pakistan v SSHD* [2016] EWCA Civ 662; [2017] 1 WLR 207, *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213 and *HA (Iraq) v SSHD* [2020] EWCA Civ 1176; [2021] 1 WLR 1327.

28. When I come to analyse the judge's consideration of whether there are very compelling circumstances which outweigh the strong public interest in the appellant's deportation, however, I am driven to the conclusion that he erred in law in several respects. Those errors are as follows.

29. Firstly, although the judge was alert to some of the facets of the public interest in the deportation of this appellant, he omitted a crucial consideration from the 'balance sheet' of the proportionality analysis required by s117C(6) of the 2002 Act. The appellant is not simply a foreign criminal who received a sentence of seven years for a particularly serious offence. He is also a man who, on the findings reached by the judge at [35]-[40] of his decision, had failed to rebut the presumptions in s72 of the 2002 Act. The judge found, in other words, that the appellant was unable to rebut the presumptions that he had committed a particularly serious crime and that he represented a danger to the community of the United Kingdom. It was these conclusions that required the judge to dismiss the appeal insofar as it was brought on asylum grounds. Both of those conclusions,

but particularly the latter, were evidently relevant to the balancing exercise required by s117C(6) of the 2002 Act. There was no reference to those considerations in the relevant section of the decision and I am unable to assume (in contrast to the approach of the Court of Appeal in *UT (Sri Lanka)*, at [25]) that the judge had not lost sight of this point in undertaking the proportionality assessment at the end of his decision. There is simply no indication in the relevant section of the decision that the judge turned his mind to the fact that the appellant was excluded from the Refugee Convention as a result of his criminality and the ongoing risk that he was held to pose to the United Kingdom.

30. Secondly, the basis upon which the judge found that the family's financial circumstances helped to 'tip the balance' in the appellant's favour is not clear from his decision. Aspects of the judge's decision suggest that the family would remain on Universal Credit whether or not the appellant remained in the UK. That appears to be the approach adopted by the judge at [97], which I have reproduced above. This caused the respondent to query in her grounds of appeal how the maintenance of the status quo could justify a conclusion that the appellant's deportation would bring about unduly harsh consequences or very compelling circumstances. Other parts of the judge's decision suggest that the appellant's presence would somehow be of financial benefit to the family.

31. This was clearly a point which concerned the judge, as is apparent from the references to it at [83], [85], [91], [95] and [97]. I asked Ms Butler to explain the origin of the judge's concern. She was able to take me to paragraphs [21]-[22] of the skeleton argument she had relied upon before the FtT. Under the heading 'Financial consequences', she submitted as follows:

> "[21]It is in the children's best interests for their father to be granted leave so that he may contribute financially to the household.
>
> [22] As set out at section 9, page 29 of the Independent Social Worker report:
>
>> [The appellant's partner] advised that he only other support available was from her mother, who works three jobs and therefore has limited availability. This support would not match what Mr Phiri can provide."

32. What the judge made of this submission is at its clearest in his [85], where he concluded that the appellant 'may be able to find employment' or his partner may be able to 'pursue her career within childcare' in the event that he remained in the UK. These were merely possibilities and speculations, however. The judge referred briefly to the appellant's employment history at [53] but

he has not been permitted to work since he was released from detention and it is evidently likely that a man with a conviction such as his, who is required to sign the Sex Offenders Register for life, will have some difficulty in securing employment in the UK. The judge took no account of that. Nor did he consider the likelihood of the appellant's partner securing employment in childcare; a field in which she has not previously worked. The judge's error was therefore to elevate what began at [85] as a mere possibility that the appellant or his partner might be able to secure employment and reduce their dependency upon public funds into a finding that the appellant's deportation would have a 'likely impact … on their future financial circumstances', as he stated at [95]. That error demonstrably played a material part in the judge's conclusion that the scales of proportionality tipped in the appellant's favour.

33. Thirdly, and most importantly, I accept Mr Avery's submission that the judge failed, in the relevant section of his decision, to identify any factors 'over and above' those which he had identified in concluding that the appellant's deportation would bring about unduly harsh consequences for his children. Paragraphs [95]-[97] of the decision show that the only factors which the judge considered to tip the balance in favour of the appellant were the very factors which had led him to conclude that the appellant's deportation would have unduly harsh consequences for the children. Despite his extensive reference to authority and his finding at [98] that there were factors 'over and above those described in exception 2' the judge failed to demonstrate by his reasoning why he considered the appellant to have what has variously been described as a 'very strong claim indeed' (Hesham *Ali*, at [38]) or a case of 'extra unduly harsh' or 'especially compelling' circumstances: *SSHD v JG (Jamaica)* [2019] EWCA Civ 982 and *NA (Pakistan)* refer. The circumstances of the appellant's children and his partner were not ring-fenced matters which could not feature in the assessment under s117C(6) but what the judge was required to do, having found undue harshness in respect of the children but not the appellant's partner was

> "to look to see whether any of the factors falling within the Exceptions 1 and 2 are *of such force*, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6). (*NA (Pakistan)*, at [37], per Jackson LJ)."

34. Even reading the decision in the manner required by the authorities cited at the start of my analysis, and even considering the decision as a whole, I am unable to conclude that the judge undertook the evaluative exercise required by s117C(6), or that he provided reasons which were sufficient for the respondent to

understand the basis of his decision. The decision shows clearly why the judge considered that the appellant's deportation would be unduly harsh on his children but not why the consequences were of such force that they outweighed the strong public interest in deportation.

35. In the circumstances, I find that the decision of the FtT is erroneous in law and that it must be set aside. The question which must then be considered is whether the decision should be set aside in full or only as regards the assessment under s117C(6). The answer is to be found in what I have said at [30]-[32]. The judge's speculation about the family financial circumstances in the event of the appellant remaining in the UK was an error which featured in his assessment of the questions posed by s117C(5) and s117C(6). His conclusion that the appellant's deportation would bring about unduly harsh consequences for the children is necessarily unsafe for that reason and I will set aside the decision as a whole.

36. I add a further observation about the structure of the judge's reasoning and the content of his undue harshness analysis, although I emphasise that it has played no part in my decision to find that the decision is erroneous in law and should be set aside. As I explored with Ms Butler at the hearing, the judge introduced immaterial considerations into his analysis under s117C(5). The judge evaluated the undue harshness submissions made by Ms Butler from [68] onwards, and he expressed his conclusion on the subsection at [91]-[92]. Just before he reached those conclusions, the judge stated at [90] that he was going to 'consider the remaining factors raised by section 117B'. But section 117B had no part to play in the assessment under s117C(5); the focus under that subsection is on the position of the child (*KO (Nigeria)*, at [32]), and it was an error for the judge to introduce consideration of s117B in his analysis of this exception.

37. Having taken that wrong turn, however, the judge also erred in his application of s117B. He concluded, amongst other things, that the appellant's partner was 'already in receipt of public funds' and that the appellant spoke excellent English. In the circumstances, he considered that s117B 'adds little to my assessment'. Insofar as the latter conclusion concerned the appellant's English language ability, it cannot be faulted. Insofar as it concerned the requirement in s117B(3) (financial independence), the judge misdirected himself in law in his approach to the fact that the appellant's partner is already in receipt of public funds. The question was not – as Ms Butler sought to suggest before me – whether the appellant's presence would lead to an additional burden on the public purse; it was whether he was financially independent of the state: *Rhuppiah*,

at [55]. That cannot be said of the appellant and his family, who are entirely reliant on public funds. The judge therefore erred in his consideration of s117B.

38. Given my conclusion that the judge's decision falls to be set aside as a whole, the proper course is for the appeal to be remitted to the FtT so that it may be considered afresh by a different judge.

Notice of Decision

The decision of the First-tier Tribunal contained errors of law and it is set aside in full. The appeal is remitted to the First-tier Tribunal to be considered de novo by a judge other than Judge Cox.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 May 2021