



16 November 2016

PRESS SUMMARY

Hesham Ali (Iraq) (Appellant) v Secretary of State for the Home Department (Respondent)
[2016] UKSC 60
On appeal from [2014] EWCA Civ 1304

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Kerr, Lord Wilson, Lord Reed, Lord Hughes, Lord Thomas

BACKGROUND TO THE APPEAL

These proceedings challenge a deportation order made in respect of the appellant, an Iraqi national who has lived unlawfully in the UK since 2000. He made an asylum claim in 2002, which was rejected, and his subsequent appeal was dismissed. In November 2005 he was convicted of Class A and C drug possession and was fined. On 4 December 2006, he was convicted of two counts of Class A drug possession with intent to supply, and sentenced to four years' imprisonment. Upon completion of his sentence in January 2011 he was considered to present a low risk of re-offending. He has been in a relationship with his fiancée, a British citizen, since 2005. The appellant has two children who probably reside in the UK, and with whom he has no contact. He has no remaining family in Iraq.

On 5 October 2010 the Secretary of State made an automatic deportation order under s.32(5) of the UK Borders Act 2007. S.32(5) requires deportation orders to be made in respect of foreign criminals unless one of the exceptions in s.33 applies, which include breach of ECHR rights. A foreign criminal is defined in s.32(1) as a person who is not a British citizen, who is convicted in the UK of an offence and is sentenced to a period of imprisonment of at least 12 months. The Secretary of State found that the appellant did not fall within any of the exceptions in s.33: she accepted that deportation might interfere with the appellant's ECHR article 8 rights to private and family life, but considered that this was proportionate to the aim of preventing disorder or crime and the maintenance of effective immigration control.

The appellant appealed the Secretary of State's decision, but the First-tier Tribunal dismissed his appeal. The appellant then appealed to the Upper Tribunal, which set aside the First-tier Tribunal's decision and re-heard the appeal, allowing it on the ground that a s.33 exception applied: the appellant's removal would be incompatible with his rights under article 8. The Court of Appeal allowed the Secretary of State's appeal on the ground that the Upper Tribunal had failed, in its assessment of proportionality, to take into account the new Immigration Rules which had come into force in July 2012, and had failed to recognise the importance of the public interest in deporting foreign criminals. The Court of Appeal remitted the appeal for re-consideration by a differently constituted Upper Tribunal. This is the appeal against the decision of the Court of Appeal to remit.

JUDGMENT

The Supreme Court dismisses Mr Ali's appeal by a majority of 6 to 1. Lord Reed gives the lead judgment (with which Lord Neuberger, Lady Hale, Lord Wilson, Lord Hughes and Lord Thomas agree). Lord Wilson and Lord Thomas each add a concurring judgment. Lord Kerr gives a dissenting judgment.

REASONS FOR THE JUDGMENT

The Immigration Rules (‘the Rules’) were a relevant and important consideration which the Upper Tribunal ought to have taken into account when assessing the proportionality of the interference with the appellant’s article 8 rights. It should also have taken into account that his relationship with his partner was formed at a time when his immigration status was such that the persistence of family life within the UK was uncertain [60].

The European Court of Human Rights has provided guidance to the factors which should be taken into account in the balancing exercise (for example in *Boultif v Switzerland* (2001) 33 EHRR 50, *Maslov v Austria* [2009] INLR 47, *Jeunesse v Netherlands* (2014) 60 EHRR 17). These factors involve wide-ranging consideration of the appellant’s circumstances including the nature of his private and family life in the UK, his links to the destination country, and the likelihood of him re-offending [26-33]. The weight to be attached to each factor in the balancing exercise falls within the margin of appreciation of the national authorities [35].

The Rules set out the Secretary of State’s assessment of the weight generally to be afforded to some of these factors. In particular, the Rules prescribe a presumption that the deportation of foreign criminals is in the public interest, except where specified factors are present which the Rules accept outweigh that interest. Outside of those specified factors (for example in every case where a custodial sentence of 4 years or more has been imposed, as here), the Rules state that exceptional circumstances – that is, compelling reasons – are required to outweigh the public interest in deportation. The Rules are not law, but do have a statutory basis and require the approval of Parliament. It is within the margin of appreciation to adopt rules reflecting the assessment of the general public interest made by the Secretary of State and endorsed by Parliament. [15-23, 36-39].

As an appellate body, the Upper Tribunal’s decision making process is not governed by the Rules, but should nevertheless involve their consideration. The Upper Tribunal must make its own assessment of the proportionality of deportation, on the basis of its own consideration of the factors relevant to the particular case, and application of the relevant law. But in doing so, it must not disregard the decision under appeal. Where the Secretary of State has adopted a policy in relation to the assessment of proportionality, set out in the Rules and endorsed by Parliament, the Upper Tribunal should give considerable weight to that policy. In this case that policy was that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender’s deportation almost always outweighs countervailing considerations of private or family life [39-50, 60-64].

Lord Wilson adds that public concern (as reflected in the Rules endorsed by Parliament) can assist a court’s objective analysis of where the public interest lies [65-81]. Lord Thomas emphasises the importance of clear reasoning at first instance through a structured ‘balance sheet’ approach [82-84].

In a dissenting judgment, Lord Kerr would have allowed the appeal and upheld the decision of the Upper Tribunal. He concluded that the application of the Rules, and their prescription of the weight to be given to the public interest in the deportation of foreign criminals, were not compatible with the balancing exercise that had to be undertaken in considering the relevant factors arising under article 8 in a particular case. It had been sufficient for the Upper Tribunal to take into account those relevant factors. Undue or unique reliance on the Rules, at the expense of a comprehensive survey of the pertinent article 8 factors was not appropriate.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>