Neutral Citation Number: [2016] EWCA Civ 488

Case No: C5/2014/3722

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
ASYLUM & IMMGIRATION CHAMBER
Judge Macleman
DA/02568/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2016

Before:

LORD JUSTICE TOMLINSON
LADY JUSTICE RAFFERTY DBE

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Between:

The Secretary of State for the Home Department	**Appellant**
- and -	
CT(Vietnam)	**Respondent**

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Kerry Bretherton QC (instructed by **Treasury Solicitors**) for the **Appellant**
Abdurahman Akhtar Jafar for the **Respondent**

Hearing date: 5th May 2016

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Approved Judgment

Lady Justice Rafferty:

1. This is an appeal from the decision of the UT, whose outcome protected from deportation the Respondent CT a Vietnamese national.

2. The Respondent (49) arrived in the UK in 1991 and was granted refugee status, since revoked, and indefinite leave to remain. In breach of conditions attaching to his travel documents he more than once returned to Vietnam for significant periods.

3. In September 1997 at the Central Criminal Court he was convicted of attempted murder and of possession of a firearm with intent to endanger life. He was sentenced to 7 years and 4 years imprisonment concurrently.

4. Post-release he began a relationship with KLN by whom he has a son born on 4.2.2003 and a daughter born on 8.8.2005. KLN has two children, born in 1994 and 1998, by another man. They, the Respondent's stepchildren and treated as children of the family, are now 22 and 18. KLN and all four of her children are British citizens.

5. In June 2009 at the Crown Court sitting at Snaresbrook ("SBCC") he was convicted of a 2006 conspiracy to cultivate cannabis, conspiracy to supply cannabis, possession of a firearm when prohibited and possession of ammunition without a certificate. He was sentenced to 4 years for the cannabis offences and 7 years 6 months imprisonment concurrently for the firearms offences.

6. It has never been in issue that he was guilty of serious crime.

7. On 1 September 2010 a deportation order was made. On 31 January 2011 his appeal against it was dismissed by the FTT on grounds that deportation was proportionate.

8. On 29th September 2011 the UT allowed an appeal to a limited extent. On 5tth July 2012 the Appellant SSHD refused to revoke the deportation order. By a procedural route which need not trouble us, the FTT heard the matter in March 2014 and found in favour of the Respondent, and the UT in a decision promulgated on 24 May 2014 dismissed an appeal by the SSHD, finding the FTT's decision was one open to it.

9. Permission to appeal to this court was granted by Elias LJ on 6 March 2015.

The Legal Framework

10. S32 of the UK Borders Act 2007 provides that, unless an exception under s33 applies, in this case that removal would breach the individual's rights under the European Convention of Human Rights ("the Article 8 point"), and providing the individual was sentenced to at least 12 months imprisonment, the deportation of a foreign criminal is conductive to the public good for the purpose of s 3(5)(a) Immigration Act 1971 and the Secretary of State must make a deportation order.

11. By s55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") where they arise the best interests of the child are a primary consideration.

12. Since Paragraph 398(a) of the Immigration Rules applies, the Respondent having been sentenced to a term of at least four years, his deportation is conducive to the public

good in the public interest. The public interest in deportation will be outweighed by factors other than and over and above those in Paragraphs 399 and 399A only where they give rise to very compelling circumstances. Paragraphs 399 and 399A address (1) a genuine and subsisting relationship with a partner both in the UK and a British citizen and (2) a genuine and subsisting parental relationship with a child under 18 both in the UK and a British citizen, together with the length of his or her residence in the UK.

13. In *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192; [2014] 1 W.L.R. 544 the Court held:

> "38 …paragraph 398 expressly contemplates a weighing of "other factors" against the public interest in the deportation of foreign criminals. …
>
> 40 …[We accept that] ….in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paragraphs 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under article 8.1 trump the public interest in their deportation."

The scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal: *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).

14. In LC (China) [2014] EWCA Civ 1310 Moore-Bick L.J. held:

> "17 …SS (Nigeria) and MF (Nigeria)…both emphasise the great weight to be attached to the public interest in the deportation of foreign criminals and the importance of the policy in that regard …
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> 24. …The starting point for any such assessment is the recognition that the public interest in deporting foreign criminals is so great that only in exceptional circumstances will it be outweighed by other factors, including the effect of deportation on any children. ….where the person to be deported has been sentenced to a term of 4 years' imprisonment or more, …the weight to be attached to the public interest in deportation remains very great despite the factors to which [paragraph 399] refers. It follows that neither the fact that the appellant's children enjoy British nationality nor the fact that they may be separated from their father for a long time will be sufficient to constitute exceptional circumstances of a kind which outweigh the public interest in his deportation…."

None of this is or has ever been in issue.

Grounds of Appeal

Ground 1

15. The Tribunals erred when considering the strong public interest in favour of deportation of foreign criminals test, failing to recognise that even cases which fall within Paragraph 399(a) permit a finding that deportation is not unjustifiably harsh.

Ground 2

16. The Respondent's Article 8 claim must establish the most compelling circumstances so as to outweigh the public interest in deportation, on these facts the interests of the children. The UT did not identify them as so compelling as to be over and above the circumstances contemplated in paragraph 399(a).

Ground 3

17. The Respondent could not rebut the presumption in s72(2) Nationality, Immigration and Asylum Act 2002 that he was a danger to the community. His refugee status had been revoked. He had attempted to murder and had on two occasions been in possession of a firearm. The public interest in deportation, balanced against other factors, should have led to the finding that he was a danger to the community.

These three were, sensibly, somewhat refined then advanced as one submission, that successfully to resist this appeal the Respondent, who should have been identified as a danger to the community, must establish the interests of the children as so compelling as to outweigh the strong public interest in deporting him. The issue before us is thus stark and simply expressed and I gratefully adopt that approach by the SSHD.

Discussion and conclusion

18. The starting point in considering exceptional circumstances is not neutral: *SS (Nigeria) and MF (Nigeria)*. Rather, the scales are heavily weighted in favour of deportation and something very compelling is required to swing the outcome in favour of a foreign criminal whom Parliament has said should be deported.

19. The best interests of the child, always a primary consideration, are not sole or paramount but to be balanced against other factors, in this case that only the strongest Article 8 claims will outweigh the public interest in deporting someone sentenced to at least four years' imprisonment. It will almost always be proportionate to deport, even taking into account as a primary consideration the best interests of a child.

20. The Respondent's deportation would not oblige his children to live abroad. Their mother could remain in the UK and they with her. The issue was not whether he were a good or very good father, as the First Tier Tribunal appears to me to have suggested. The issue was whether the very strong public interest in favour of deportation was trumped by the best interests of the children.

21. The 2009 **s**entencing remarks of the judge at SBCC require close attention. The court said:

> "You have been convicted by the jury of conspiracy to cultivate cannabis…and a conspiracy to supply cannabis. You have also been convicted of two firearm offences….Much more seriously (sic) is the firearms matter. That is more serious particularly in view of your conviction ten years ago for attempted murder by shooing someone and also your conviction arising out of the same thing of possessing a firearm with intent to endanger life. For that you received four years and for the attempted murder seven and a half years concurrent. It seems that hasn't put you off being in possession of dangerous weapons. In this case it is a prohibited weapon. It was loaded. It was clearly useable. I am quite satisfied that you had it to protect yourself and possibly threaten others in relation to your drug dealing business and I am quite satisfied that you would have had an intention to use it. …There is a minimum sentence of five years which Parliament has imposed …because these firearms offences are taken so seriously and rightly so."

22. I notice the Respondent was convicted by a jury, certainly at SBCC though I can find no information as to the Central Criminal Court, so he must have entered pleas of not guilty. Whether he gave evidence is not clear so I do not go so far as to suggest he was disbelieved on his oath or affirmation, I merely point out that however his case was advanced a jury rejected it.

23. The Respondent told the FTT as to the 1997 offences that after a few beers in a pub an oral exchange deteriorated into fighting. He took a loaded gun from one of his drinking associates and began shooting. He shot one person in the stomach. At trial he was the sole individual in the dock and none other was arrested. Released from prison in 2001 by 2006 he was arrested for the second set of offences. As to these he claimed that by 2006 he was gambling and in a lot of debt. By then additionally he had a family, was older and more responsible and had learned his lessons by going to prison.

24. This account is informative for two reasons. First, it is at odds with the sentencing remarks of the judge at SBCC. Second, the degree of internal inconsistency is striking. Whilst presenting himself to the FTT as older and wiser as a consequence of imprisonment, he was obliged to concede that he had nevertheless committed further serious offences one of which involved a loaded firearm, the other, as the judge accurately described it, his drug dealing business.

25. To decide whether the Tribunal correctly established why the children's best interests were so compelling as to trump the public interest in deportation requires consideration of its language.

26. It described as "reprehensible" the Respondent's behaviour. That is a remarkably restrained description of criminal offences which included possession of a loaded firearm with intent to endanger life and attempted murder. Four counts attracted concurrent terms on two indictments resulting on each occasion in a total of at least seven years imprisonment, almost double the minimum set out in paragraph 398(a) of the Immigration Rules.

27. The FTT characterized as "at the very least disappointing" offences on the second indictment, conspiracies both to cultivate and to supply cannabis, possession of a firearm when prohibited and possession of ammunition without a certificate. Once again I am surprised by the language. Though the Tribunal conceded that possession of a firearm on two separate occasions was serious and had implications for public safety, nevertheless one might have expected an epithet reflective of anxiety, if not indignation, rather than of a striking degree of tolerance.

28. The Tribunal regarded as mitigatory that the offences were committed within the context of the Vietnamese community, the wider public not immediately at risk, albeit acknowledging that when guns are brandished anyone can be hurt.

29. I do not share that view. Serious offences are not infrequently committed in the context of groups, gang-related crime and racially motivated attacks two obvious examples. I agree with the SSHD that the Vietnamese community in the UK is as entitled to protection from crime as much as is the wider public. That only one section of the community was in view as including potential victims is at its highest for the Respondent neutral.

30. The FTT described the possession of a firearm – I would add, a loaded firearm - on two occasions as extremely serious with implications for public risk such that but for other factors deportation would be hard to challenge.

31. I have searched for what other factors prompted the conclusion that it could be successfully challenged. I have identified the passage of time (three and a half years without reported reoffending) said to be good evidence of rehabilitation.

32. That too requires some unpicking. His offender manager assessed the Respondent's then current risk as low and his behaviour as changed for the better. The Tribunal thought his exceptional probation attendance testament to his dedication to comply. That he had not been arrested for any further offence since release was a verifiable indication of his exceptional progress in society.

33. I am puzzled by why compliance with the terms of supervision, for three and a half years, was deemed exceptional. These were basic terms associated with the Respondent's remaining at liberty and were no more than legitimate expectation of a resident in the UK. One could readily conjure behaviour and circumstances meriting the epithet "exceptional" – attendance despite personal difficulties, in the face of a life-threatening disease, despite family circumstance imposing extraordinary demands, despite provable pressure from ill-intentioned peers, etc etc – but none at that level was cited.

34. The FTT whilst it reminded itself of the legitimate public interest in the removal of foreign criminals as a deterrence and an expression of condemnation, and that only in exceptional circumstances will that public interest be outweighed by other factors, did not go on to direct itself as to the very great weight to be given to that public interest, the scales heavily weighted in favour of deportation and something very compelling required to swing the outcome in favour of a foreign criminal. The starting point is not neutral.

35. The FTT concluded that there was ample evidence of the deleterious effect on the children of the Respondent's removal. Coupled with a low risk of reoffending that tipped the balance in his favour.

36. The effect on the children was, on the evidence, to leave them unhappy at the prospect of their father being on another continent. I readily accept that description. Experience teaches that most children would so react. I cannot accept the conclusion that, added to a low risk of reoffending, the effect on them tips the balance. These children will not be bereft of both loving parents. Nor was there evidence of a striking condition in either (I ignore the stepchildren by virtue of their age) which his presence in the UK would dispositively resolve. He is said to have "a particular tie" with the Respondent. The son was said to have spoken less confidently when his father was in prison and to have returned to confidence upon his release. That is not exceptional.

37. Neither can I accept that the Respondent had rebutted the presumption that he posed a danger to the public. This could only have been based on three and a half years of unreported further offending. In the context of such serious offending and of lessons plainly not learned between prison sentences, I agree with the SSHD that he failed to rebut the presumption.

38. Appellate guidance is clearer now than when the FTT promulgated its decision. As paragraph 24 of LC China succinctly explains, where the person to be deported has been sentenced to 4 years' imprisonment or more, the weight attached to the public interest in deportation remains very great despite the factors to which paragraph 399 refers. Neither the British nationality of the Respondent's children nor their likely separation from their father for a long time is exceptional circumstances which outweigh the public interest in his deportation. Something more is required to weigh in the balance and nothing of substance offered. The approach of both the FtT and the UT failed to give effect to the clearly expressed Parliamentary intention.

39. I would allow the appeal.

Lord Justice Tomlinson

40. I agree