OUTER HOUSE, COURT OF SESSION

[2021] CSOH 43

P827/20

OPINION OF LORD ARTHURSON

In the petition

RSS (AP)

Petitioner

for

Judicial Review of a decision by the Upper Tribunal (Immigration and Asylum Chamber) to refuse to grant permission to appeal

Petitioner: Caskie, Advocate; Drummond Miller LLP
Respondent: McKinlay, Advocate; Office of the Advocate General for Scotland

27 April 2021

Introduction

[1] In this petition the petitioner seeks reduction of a decision of the Upper Tribunal (Immigration and Asylum Chamber) dated 20 July 2020 in terms of which the Upper Tribunal declined to grant the petitioner permission to appeal to itself. The sole issue for determination by the court in these proceedings is whether the Upper Tribunal erred in law in so refusing permission, having found in terms that there was no identifiable arguable error in law made by the immigration judge of the First-tier Tribunal in his decision dated 30 March 2020 dismissing the petitioner's appeal to that tribunal.

[2] The petitioner is a citizen of India who has lived in the United Kingdom for approximately 20 years. He is the unmarried partner of a British citizen and has two children, aged 9 and 13, with his partner. In 2015 the petitioner was convicted of the crime of rape and in July 2015 was sentenced at Glasgow High Court to a period of 7 years imprisonment. In November 2018 a deportation order was issued in respect of the petitioner. The petitioner's appeal to the First-tier Tribunal was rejected on 30 March 2020. His application for permission to appeal against that determination was rejected by the First-tier Tribunal on 6 May 2020 and, in the decision challenged in these proceedings, by the Upper Tribunal on 20 July 2020.

The relevant statutory framework

[3] Counsel were in full agreement in respect of the relevant miscellaneous statutory provisions applying in the circumstances of the present case, which I do not propose to rehearse in full, other than to note at this stage that the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provides how Article 8 of the ECHR should be considered in the context of statutory decisions made concerning the deportation of foreign criminals. In focussing the issues arising between them, counsel referred to a deportation algorithm. In terms, this can be summarised as follows. There are three categories expressed in the relevant legislation in respect of foreign criminals, namely those sentenced to a period of imprisonment of up to 1 year; those sentenced to a period in excess of 1 year and under 4 years imprisonment; and, finally, those sentenced to a period of imprisonment of 4 years or more. For the purposes of discussion of the issues arising in the petition, counsel focussed upon the latter two categories. A person sentenced to a period of under 4 years imprisonment but in excess of 1 year, if he or she wishes to challenge deportation, must

establish that any removal would breach their Convention rights and, where the person had a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, that the effect of that person's deportation on the partner or child would be unduly harsh. In the case of a foreign criminal who has been sentenced to a period of imprisonment of 4 years or more, the statutory material provides that the public interest requires deportation unless, over and above undue harshness, there are very compelling circumstances: section 117C of the 2002 Act. In seeking to establish undue harshness, the person resisting deportation requires to establish that it would be unduly harsh for that person to be deported and that it would be unduly harsh for their partner and/or children to remain in the UK. This is accordingly a cumulative test.

Submissions for the petitioner

[4] Counsel for the petitioner referred to what he described as the shifting sands of legal development in this area, referring to the decision of the ECHR at Strasbourg in *Unuane* v *UK* (80343/17) at paragraphs 88 and 89. Counsel submitted that these paragraphs made clear that while a lawful conclusion in domestic law could be arrived at by the application of the domestic deportation algorithm, the court in Strasbourg had held that, notwithstanding that, the decision-maker requires in effect to take a step back and look at the overall circumstances of the case in order to determine whether such a conclusion was in any event proportionate or disproportionate to the legitimate aim pursued. In adopting this position, the Strasbourg court had concluded that while it was not inevitable that applying the domestic deportation algorithm would result in a breach of article 8, it could nevertheless do so by being productive of a disproportionate outcome. Counsel, under reference to paragraph 87 of *Unuane*, submitted that an exercise of weighing a variety of matters in the

balance was required. The fact that a person seeking to challenge deportation had committed an offence at the more serious end of the criminal spectrum was, rather than being determinative of the case, just one factor requiring to be so weighed, together with the other criteria emerging from the decisions in *Boultif* v *Switzerland* (2001) 33 EHRR 50 and *Uner* v *the Netherlands* (2007) 45 EHRR 14. The ten criteria or factors were helpfully set out in *Uner* at paragraphs 57 and 58. Counsel submitted that there was a dissonance between what the immigration judge had done in the petitioner's case and these factors, and that this constituted an obvious error in law. In advancing this submission counsel accepted that the decision in *Unuane* had been promulgated on 24 November 2020, after the determination challenged in, and indeed the framing of, the present petition. Counsel's submission was, however, that the landscape had changed following the decision in *Unuane*, in which the court in Strasbourg had set out what it declared to be the existing law. The effect of that decision was to establish a material change in the law in terms of how a decision-maker will reach a decision upon a proportionality assessment. What was now required was for a decision-maker to go through the domestic law algorithm and reach a conclusion on whether the relevant tests of undue harshness and very compelling circumstances had been established and then to carry out a determination on whether the resultant decision was in any event a proportionate one.

[5] Counsel for the petitioner submitted that the immigration judge in the petitioner's case had erred in law in failing to carry out a proper proportionality assessment on the basis that the assessment purportedly carried out by him could be said to be infected by elements of the domestic algorithm. It was clear from the terms of paragraph 26 of the decision of the immigration judge, being the paragraph commencing his assessment of the article 8 claims, that his proportionality assessment had included from the outset a reference to the taking

into account by him of the "very compelling circumstances" threshold. The immigration judge had accordingly sought to carry out a proportionality assessment having had express regard to the terms of the domestic legislation. At paragraph 26.4 the immigration judge stated that he had already had to assess public interest considerations as balanced against the petitioner's and his partner's and children's private and family lives. Counsel submitted that the immigration judge had not recognised and provided reasons to explain why the outcomes in terms of the domestic law exercise and proportionality assessment were the same, standing that, as was clear from *Unuane*, they would not inevitably be the same. Such a repeated reliance on the domestic law tests demonstrated what counsel sought to characterise as an error in law.

[6] Turning to the decision of the Court of Appeal in *HA (Iraq)* v *Secretary of State for the Home Department* [2021] 1 WLR 1327, a decision issued in September 2020 and therefore predating *Unuane*, in which the Court had dealt with an offender in the intermediate or medium category, the Court had considered the effect of the word "unduly" in the concept of undue harshness, concluding that the underlying concept was one of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of a foreign criminal: Underhill LJ at paragraph 44. At paragraph 57 it was further observed that a tribunal will require carefully to evaluate the likely effect of a parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh. Counsel described this as a child-centred approach to the assessment of proportionality. In the petitioner's case the questions to be considered were whether it was unduly harsh to allow the children to go to India and, regardless of that, whether it was unduly harsh for the children to remain in the UK if the petitioner was to be deported to India. It was critical to remember that both of these questions required to be answered in terms favourable to the

petitioner and that in addition due to the custodial tariff imposed in the petitioner's criminal case, very compelling circumstances would require to be demonstrated. Counsel also referred to the observations of Peter Jackson LJ at paragraphs 158 to 159, submitting that a decision-maker requires to consider the effect of the deportation on the particular child and in so doing to give primary consideration to the reality of that child's situation.

[7] Counsel finally referred to *Saleemi* v *Secretary of State for the Home Department* 2020 SLT 1101 for the proposition that a failure to engage with or effectively respond to grounds of appeal submitted to it would mean, as applied in the petitioner's case, that the decision of the Upper Tribunal challenged in the present petition was defective in law.

[8] The immigration judge had at paragraph 19.10 reached an overall conclusion in terms of the welfare of each child to the effect that it would be in his and her best interests if the petitioner remained in the UK, but at paragraph 20.8 had concluded that there was no evidence that the children could not adapt within a reasonable time period to life in India without their grandparents and friends. In considering the evidence as a whole, at paragraph 20.13 the immigration judge had indicated that he had not been persuaded that it would be unduly harsh for either child to remain in the UK without the petitioner.

[9] The grounds of appeal submitted to the Upper Tribunal had adopted those submitted to the FtT. Grounds 2 and 4 of the latter advanced the contention that the immigration judge had failed to address what the positon was, as he required to do, as at the date of his determination. He had instead relied on his predictive powers about the prospective future adaptation of the children and had not adequately explained how he had reached the conclusion that the children would be able to adapt. In ground 3 reference had been made to the immigration judge at paragraph 19.6 noting the absence of medical evidence but failing to assess other available evidence pertaining to medical matters.

Ground 6 focussed on the provision of assistance in the UK to the children by their grandparents and certain related matters, in terms of which the immigration judge had again been speculating as to the future. The grounds advanced to the Upper Tribunal had contended that the immigration judge's failure to assess the produced medical evidence had been an error in law and emphasised the speculative nature of the approach taken by the immigration judge.

[10] Turning finally to the challenged decision dated 20 July 2020 in which the Upper Tribunal had stated its reasons for refusing permission to appeal to itself, counsel submitted that the appropriate test was whether the grounds were arguable, whereas the Upper Tribunal had stated expressly that the grounds had not been made out. The decision letter indicated that the absence of medical evidence had not been remedied by oral or written family evidence on these matters. The reference at the end of the letter to the immigration judge being entitled to put the public interest over the appellant's right to a family life disclosed no consideration of the position of the children and their article 8 rights, which issue had plainly arisen in terms of the grounds of appeal. The grounds before the Upper Tribunal had accordingly not been engaged with when it took its decision to refuse permission. In the whole circumstances decree of reduction should be granted.

Submissions for the respondent

[11] Counsel for the respondent submitted that the grounds before the Upper Tribunal had been considered, engaged with and duly rejected. The reference in the Upper Tribunal's determination to the grounds not being made out should be read in the context that the Upper Tribunal would have been well aware that this was a permission matter. The statement was a response to the specific grounds advanced before it and was not a statement

setting out a decision of the Upper Tribunal on the merits of a claim. Insofar as the Upper Tribunal had considered the issue of future adaptation, as addressed by the immigration judge, there was no material error in law disclosed here, the tribunal requiring as a matter of necessity to consider what would and could happen in the future. On the medical position, counsel submitted that the position was a nuanced one. In paragraph 19.6 the immigration judge had indicated that a medical report might have sought to inform him of any medical diagnosis made in respect of the petitioner's partner. This was insufficient to support the contention that evidence of her condition had not been considered by the immigration judge. The task of the Upper Tribunal had been to respond to the grounds presented to it; accordingly, an arguable error of law would require to be identified in the grounds before the Upper Tribunal: *SA* v *Secretary of State for the Home Department* 2014 SC 1 at paragraph 15. In this regard there had been a disconnect, counsel submitted, between the bulk of the petitioner's submissions and the grounds considered by the Upper Tribunal.

[12] Turning to the point advanced by counsel for the petitioner on the basis of *Unuane*, counsel noted the *dicta* of Underhill LJ in *HA (Iraq) supra*, at paragraphs 27 and 28, submitting that in these passages the Court of Appeal had set out that the Strasbourg *jurisprudence* formed an inherent part of an analysis of the statutory provisions under domestic law. In any event, the relevant factors set out in *Boultif* and *Uner, supra*, had been considered by the immigration judge in the present case. Counsel submitted that there had been a detailed, balanced and fair assessment by the First-tier Tribunal in respect of these factors. When read as a whole, it was plain that a relevant proportionality assessment satisfying the domestic and Strasbourg *jurisprudence* had been undertaken. Counsel referred to the concerns noted in the social worker's report as set out at paragraph 19.7 of the First-tier Tribunal decision regarding the petitioner returning to the family home given the nature

of his conviction and the lack of offence focussed work carried out by him. Counsel further noted that at paragraph 21.7 the immigration judge had observed that some of the parenting concerns directly related to the conduct of the petitioner. The best interests of the children had been considered and determined at paragraph 19.10 and what could be taken from paragraph 26 was that it was clear that a wide assessment had been undertaken.

[13] Under reference to *AA (Nigeria)* v *Secretary of State for the Home Department* [2020] 4 WLR 145, the Court of Appeal at paragraphs 34 and 35 had stated that experienced judges in a specialised tribunal should be taken to be aware of relevant authorities and to be seeking to apply them without requiring to refer specifically to them, unless it was clear from their language that there had been a failure to do that.

[14] Counsel finally submitted that even if an arguable error of law had been identified in respect of the test of undue harshness, the petitioner would also require to demonstrate that there had been an arguable error of law in respect of the supplementary test of very compelling circumstances in terms of section 117C(6) of the 2002 Act. Counsel submitted that the petitioner had not identified a reasonable basis therefor.

Discussion and decision

[15] I have concluded that there is no justification for decree of reduction of the decision of the Upper Tribunal dated 20 July 2020. No arguable error of law is disclosed on the face of that determination, nor, in my view, can it be argued that the immigration judge erred in law in determining the disposal of the petitioner's case by his decision dated 30 March 2020.

[16] Notwithstanding the submission advanced on behalf of the petitioner in respect of the import of the decision of the ECHR in *Unuane, supra*, in which it was in terms stated that it was not impossible that a lawful decision reached in terms of the domestic deportation

structure could still not be article 8 compliant, I have reached the view that the applicable law in this case is correctly expressed by the Court of Appeal in *HA (Iraq), supra*, per Underhill LJ at paragraphs 27 and 28:

> "The starting point is that the purpose of the statutory scheme is to require decision-makers to adopt a structured approach to the article 8 issues raised by the removal of a foreign national – that is, whether it will constitute a disproportionate interference with, and thus a breach of, their article 8 rights – and one which ensures that due weight is given to the public interest. It is no part of its purpose to prevent the proper application of article 8 … Following from that, the statutory structure is a 'complete code' in the sense that the entirety of the proportionality assessment required by article 8 can and must be conducted within it … It follows that the Strasbourg case law about the application of article 8 in cases of this kind must and can be accommodated within the statutory structure."

Accordingly it is clear that the Strasbourg *jurisprudence* forms an inherent part of the analysis to be undertaken by a tribunal of the relevant statutory provisions under domestic law. The structure is, as expressed above, a "complete code" encompassing as part of its whole the entirety of the proportionality assessment desiderated in terms of article 8.

[17] Under reference to the criteria expressed in *Boultif* and *Uner, supra*, as referred to in *Unuane*, in my opinion the relevant factors in this case were substantively considered by the immigration judge in the petitioner's case. Counsel for the petitioner of course focussed his criticism in this area on the first of the factors set out in paragraph 58 of *Un*er, namely the best interests and well-being of the children, in particular the seriousness of the difficulties which the children of an applicant are likely to encounter in the country to which the applicant is to be expelled.

[18] Having considered the terms of the immigration judge's decision of 30 March 2020, my conclusion in the generality is that the immigration judge has engaged appropriately in the proportionality assessment exercise before him, all in terms of the approach to the statutory scheme set out by Underhill LJ in *HA (Iraq)* at paragraphs 27 and 28. Indeed, in his

decision letter at paragraph 26, the immigration judge acknowledges that part of the proportionality assessment requires to involve the public policy in favour of the deportation of foreign criminals which in turn in part requires the taking into account, in the particular circumstances of this case, of the very compelling circumstances threshold. The children's circumstances are addressed by the immigration judge at paragraphs 19.7 to 19.9 and a conclusion on their best interests is expressed by him at paragraph 19.10. In considering undue harshness the immigration judge at paragraphs 20.9 to 20.15 has considered the context of the children living in the UK and reached the conclusion at paragraph 20.13 that, on his consideration of the evidence as a whole, it would not be unduly harsh for either child to remain in the UK without the petitioner. The immigration judge has in my view in so doing carried out what is essentially a balanced assessment within the "complete code" of the statutory structure. The article 8 assessment undertaken by him has been duly accommodated within the statutory structure in the course of his decision letter but, having said that, what follows from paragraph 26 represents in any event an in the round overview of the article 8 position. He has considered and engaged with the material before him and, as an expressive and, more significantly, substantive exercise, in my view no error of law is detectable.

[19] In terms of the grounds of appeal cumulatively before the Upper Tribunal, it is plain that the immigration judge did take account of the medical evidence before him (paragraph 19.6). Regarding the question of adaption to future life in India it is surely inevitable that this component of the exercise involves at least some component of future assessment, and, absent a crystal ball, it is difficult to say how the immigration judge, in making his assessment at the time of the determination, could be criticised for his careful consideration of, on the evidence, what might happen regarding the petitioner's children in

due course. In respect of the matters raised about grandparents and related matters, it does not appear that the Upper Tribunal placed any material reliance on this point and accordingly this ground is on any view of no moment. Finally, insofar as counsel for the petitioner criticised the opening sentence in the Upper Tribunal's reasons which sentence stated "The grounds are not made out", this sentence must be read in the context of the whole paragraph and the paragraph following in which the final sentence states in crystal clear terms that "No arguable error of law has been identified."

[20] I conclude therefore that there has been full consideration of and meaningful engagement with, on the part of the First-tier Tribunal and the Upper Tribunal, the material before it, and in particular by the Upper Tribunal in respect of the cumulative grounds of appeal submitted on behalf of the petitioner. I accordingly determine that it cannot be said that the Upper Tribunal erred in law in refusing permission to appeal to itself.

Disposal

[21] For these reasons I decline to pronounce decree of reduction. Instead, I sustain the third plea-in-law for the respondent, repel the plea-in-law for the petitioner and dismiss the petition. All questions of expenses are meantime reserved.

Anonymity

[22] The immigration judge directed that the petitioner be granted anonymity on the basis of the involvement in the case of young children. The prior difficulties arising in this connection are referred to at paragraph 30 of the decision of the immigration judge. In these circumstances and in particular having regard to the welfare of these young children this opinion is anonymised.