



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00390/2016

THE IMMIGRATION ACTS

Heard at Birmingham
On 1 April 2019

Decision & Reasons Promulgated
On 16 May 2019

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

GL
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Jafferji (Counsel)
For the Respondent: Mr D Mills (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant is a citizen of Jamaica born in 1982. On 21 October 2015 the respondent made a decision to refuse a human rights claim in the context of a decision to make a deportation order against the appellant in the light of his criminal

offending. Supplementary reasons for the decision were given in writing on 2 February 2018.

2. The appellant arrived in the UK on 15 March 2002 as a visitor with leave to enter for six months. Further leave applications were made which eventually resulted in the appellant being granted further leave to remain until 30 March 2007. However, on 4 April 2007 he was served with notice of his being an overstayer. There then followed various further applications for leave, the setting of removal directions, judicial review proceedings and further representations until he was granted discretionary leave to remain until 9 September 2012. He was granted further discretionary leave on 10 October 2013 until 10 October 2016. Notice of intention to make a deportation order against him was served on 8 June 2015.
3. The appellant's criminal offending can be summarised as follows. Between 15 October 2003 and 6 May 2015 he was convicted on 13 occasions in relation to various offences. In particular, on 6 May 2015 in the Crown Court at Nottingham he was convicted of possession of an imitation firearm with intent to cause fear of violence for which he received a sentence of 21 months' imprisonment.
4. The appellant's appeal against the refusal of his human rights claim (the deportation decision) was heard by First-tier Tribunal Judge P J M Hollingworth ("the FtJ") on 7 January 2018 following which the appeal was dismissed.
5. The grounds of appeal in relation to the FtJ's decision and upon which permission to appeal was granted contend, in summary, that the FtJ erred in his assessment of undue harshness in terms of separation of his children from him and in his failure to consider the Article 8 claim outside the Immigration Rules.
6. Before summarising the FtJ's decision and the grounds and submissions before me, it is useful to refer briefly to the appellant's family circumstances in terms of relationships and children. He has seven biological children in the UK roughly between the ages of 3 and 15, and one stepchild. It seems that he also has three children in Germany. His children in the UK are from six different partners. To varying extents he has some degree of contact with most of them.

The FtJ's decision

7. It must be said, with all due respect to the FtJ, that summarising his decision is not altogether straightforward because some of the paragraphs are very lengthy and contain a very many number of findings in one paragraph. For example, [14] is a page and a half long.
8. The FtJ summarised the evidence that he had before him in terms of the appellant's relationships with his eight children and one stepchild in the UK from six different mothers. He identified the documentary evidence including the witness statements of the appellant and CW, who is the mother of three children, two of whom are the appellant's biological children. He also summarised the submissions made on behalf of the parties. In that summary there is reference to the report of Charles Musendo,

an independent social worker. He noted that all the appellant's children were British citizens except for the three that lived in Germany.

9. At [11] the FtJ said that the essence of the appellant's case was his relationship with his children. He set out the contact that the appellant has with the children and who their mothers are. For clarity I give the first names of the children notwithstanding the anonymity order. Doing so does not undermine the anonymity order which will still be effective in relation to the children if only their first names are given and if neither the appellant nor their mothers are identified. Thus, according to the FtJ's decision, Lemar is aged 15. His mother is LR. He sees Lemar after school about every other day for half an hour to 45 minutes. The three children who live in Germany are aged between 11 and 14. There is no contact between them and the appellant, phone contact having ended about a year ago.
10. Thomas is aged 12 and Alisha is aged 9. Their mother is TL and they live about five miles from the appellant. Every Tuesday the appellant picks up Alisha from gymnastics and takes her home. Every Friday he sees both children for three hours. Those arrangements had been in place at the date of hearing for some two months. Sometimes the appellant picks up the children if TL has work commitments.
11. Logan is aged 7 and his mother is JF. The appellant last saw Logan in 2014. Family court proceedings have been stayed until after a decision has been made by the immigration courts. There is indirect contact by card.
12. Sade is aged 5 and her mother is JS. The appellant last saw Sade in October 2013. Family court proceedings are taking place.
13. Jayden is aged 3 and his mother is CB. They live about four miles from the appellant. He takes Jayden to nursery three times a week but does not see Jayden's mother. There is also contact on a Sunday for one hour.
14. Giovanni is aged 3½ and Shania is aged 5. Their mother is CW (who provided a witness statement and gave evidence). The appellant visits their home every day and spends most of the day at that address. Those arrangements also relate to Tianna who is the appellant's stepdaughter, the daughter of CW.
15. The FtJ said that he had taken the evidence of the appellant at its highest in respect of his relationships with all the children. In relation to the expert report from Charles Musendo, the FtJ accepted his expertise and noted that the report explained why its author considered that the respondent's 'section 55' consideration had been totally inadequate.
16. The FtJ then went on to state that he accepted that the appellant had a genuine and subsisting relationship with all the children in the UK and he proceeded on the basis that he would be successful in the proceedings in the Family court and that either he has or will have contact with all the children in the UK. He said that the factors relevant to the best interests of the children had been identified.

17. Referring again to the report of Mr Musendo, he noted that it was said that family breakdown would have significant consequences on each family member and especially on Giovanni. He noted the report's reference to "significant research" showing that separation of fathers from children gave rise to problems in early and later development. It was also noted that the views of the local authority social worker and the appellant's ex-partner had also been referred to by Mr Musendo. The FtJ accepted his report in terms of the consequences of separation.
18. He concluded that it would not be in the children's best interests for the appellant to be removed from the UK and also found that it would be in the best interests of those children in the UK to remain here.
19. Again at [12] he noted that the appellant's case was not advanced on the basis of his being in a relationship (with a partner) in the UK. At [13] he also said that the case had not been advanced that he was the primary carer of any of the children in the UK, but on the basis of contact with those children.
20. At [13] there is reference to paragraphs 398, 399 and 399A of the Rules. The FtJ reiterated his finding that the appellant has a genuine and subsisting parental relationship with the children in the UK and that in relation to Family court proceedings decided the appeal on the footing that such relationships would be established or re-established. He noted that all the UK children are British citizens except for Lemar who had resided in the UK for at least seven years preceding the date of the decision.
21. The FtJ next referred to the question of whether it would be unduly harsh for the children to remain in the UK without the appellant or whether it would be unduly harsh for the children to live in Jamaica. He went on to say this at [13]:

"On the basis of my findings and in applying Section 55 I have reached the conclusion that it would be harsh for the children to remain in the UK without the Appellant and that it would be harsh for the children to live in Jamaica. I do not find that it has been established that it would be unduly harsh. The Respondent has set out factors relating to the distinction between harshness and undue harshness in the correspondence to the Appellant. I do not find that it has been established that there is undue harshness or would be in contradistinction to harshness."
22. The FtJ referred again to the report of Mr Musendo. Although not entirely clear from his decision, he referred to the respondent's conclusions that as regards all the children with whom the respondent found that he had a genuine relationship, it would be unduly harsh for them to live in Jamaica with the appellant.
23. At [14] he stated that he had proceeded "to consider the concept of undue harshness on the further and alternative basis of taking into account the wider public policy considerations in relation to the Appellant". In this context he set out the history of the appellant's offending from 2003 to 2015.

24. Some of his key conclusions were that the persistence and pattern of the appellant's offending were of substantial concern. He noted that Lemar is 15 and the first offences committed by the appellant took place in August 2003. He found that the appellant's children had not played any part in dissuading him from continuing with criminal offending and he had offended even after being given notice by the respondent of the intention to make a deportation order against him. He said that the reasons given by the appellant as to his continued offending were "wholly insufficient".
25. He went on to state that he did not accept the appellant's claim that he was innocent of the offence(s) which led to his imprisonment for 21 months (possession of an imitation firearm with intent). He referred to the qualifications that the appellant had obtained and his claim that he deeply regretted his offending.
26. However, he concluded that the courts had given the appellant ample time and opportunity to reflect on the consequences of his actions, given the community orders and supervision which had been imposed by the courts. He found that the appellant had "failed singularly" to take advantage of any of the measures offered by the courts which were designed to prevent his further offending. He further found that he had had ample incentive to avoid further offending given his children and his relationships with them.
27. The FtJ said that he had taken into account the assessments made in the OASys Report. He concluded that the wider public interest, taking into account all those factors in favour of the appellant, required his removal. His course of offending had been relentless and the gravity of it had deepened considerably. He had effectively spurned steps taken by the courts to help him. The FtJ said that he had taken into account all the matters advanced in the material put forward on behalf of the appellant from the probation service and the evidence put before him. He also referred to an expert report from Luke de Noronha as regards the situation in Jamaica for those deported there. He again mentioned s.55.
28. At [15], in relation to para 399A of the Rules, he concluded that the appellant had not become socially and culturally integrated in the UK and that his (criminal) record represented the antithesis of cultural integration. Furthermore, the appellant had not been lawfully resident in the UK for most of his life, having arrived in 2002 aged 20.
29. Lastly, he said at [16] that "I do not find that compelling circumstances have been established which enable me to proceed to consider whether there would be a breach of Article 8 outside the Rules".

Submissions

30. In his submissions Mr Jafferji relied on the grounds in respect of which permission to appeal was granted. He agreed that this is a case in which *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 applied in terms of the unduly harsh test.

31. It was submitted that there was no reference by the FtJ to s.117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") or any consideration of the case outside the Article 8 Rules. The case on behalf of the appellant was very different outside the Rules from that within the Rules. It might be that with reference to each child the threshold for undue harshness was not surpassed but the impact on CW in terms of the significant reliance that she has on the appellant needed to be taken into account. The FtJ had accepted what was said in the report of Mr Musendo. However, there was no engagement by the FtJ with the concerns expressed in that report on the impact of separation of the children.
32. Those matters, as well as the lack of reference to s.117C or consideration of the case outside the Article 8 Rules, established a clear error of law which was material.
33. In his submissions Mr Mills accepted that there were quite a number of "issues" with the FtJ's decision, for example that it was not set out as clearly as it could be and there was a lack of reference to s.117 of the 2002 Act. Nevertheless, it was submitted that the outcome of the appeal was inevitable in any event.
34. The FtJ had come to a very generous conclusion in terms of the parental relationships that the appellant has with the children. He had concluded that it was not in the best interests of the children for the appellant to be removed, which was in effect what Mr Musendo's report was directed to.
35. The FtJ had considered the issue of undue harshness at [13] and that is what a consideration of s.117C(5) requires.
36. It was true that it had been accepted by the respondent that in relation to a number of the children they could not go to Jamaica with him. What the FtJ said at [13] was 'KO-compliant' in terms of the issue of undue harshness. What was said at [14] was in the alternative, applying a public interest approach to the issue of undue harshness, and the law as it was at the time of the hearing before him. In any event, in [13] he had already done the exercise of examining the issue of undue harshness without the public interest factor. Furthermore, according to *KO (Nigeria)* the threshold for undue harshness is very high.
37. The only added factor on this issue was in respect of the children of CW who has had mental health problems, including anxiety and depression. However, there was no evidence that she would be unable to parent on her own.
38. At [15] the FtJ had referred to the private life requirements of the Rules. The appellant did not have any subsisting relationship with a partner.
39. It was accepted on behalf of the respondent that the FtJ had erred in his approach at [16] where he said that there were no compelling circumstances outside the Rules that needed consideration. However, the appellant had failed to establish before the FtJ that his deportation would be unduly harsh in relation to the children and there were no compelling circumstances which otherwise made the decision

disproportionate. Although at [16] there was a lack of reasons, all that could be said on the issue was considered by the FtJ at [14].

40. In his reply, Mr Jafferji submitted that neither [13] nor [14] of the FtJ's decision could save it. No reasons were given in [13] as to why the appellant's deportation would be harsh but not unduly harsh. Other aspects of [13] were simply the narrative in relation to the respondent's position in terms of the children relocating to Jamaica.
41. So far as the ability of CW to parent, Mr Musendo's report said that he was concerned about her ability to care for the children on her own without the appellant because of concerns about her mental health. At [43] he had mentioned her referral to mental health services and an assessment in March 2017 indicating her need for long-term therapy. There was also the issue of the children's cultural background.
42. At [14] the FtJ had (improperly) taken into account the public interest issues in the assessment of undue harshness. It was submitted that there was in fact no conclusion at the end of that paragraph.

Error of law – Assessment

43. Although there are some deficiencies in the FtJ's decision, the actual challenge is only on the basis that he did not consider s.117C of the 2002 Act and that there was no consideration of Article 8 outside the Rules. That 'outside the Rules' consideration is argued for on behalf of the appellant in terms of a cumulative assessment. Thus, it was accepted on the appellant's behalf in submissions that it may be that with reference to each child individually the unduly harsh threshold was not met but cumulatively, and taking into account CW's circumstances, including her ability to parent without the appellant, a different outcome was possible.
44. Aside from the matters to which I have already referred, it seems to me that there is a lack of clarity at [13] in terms of whether the FtJ concluded that it would be unduly harsh both for the children to leave the UK for Jamaica and for them to remain in the UK without the appellant. I have quoted the particular passage in this context at [21]. In addition, it is not entirely clear to me what the FtJ meant at [16] by the following:

“The Respondent has referred to consideration of the application to revoke the deportation order. If these paragraphs apply to which the Respondent has referred I do not find that the analysis set forward by the Respondent has been rebutted.”
45. It is true that the FtJ did not refer to s.117C and the various factors there set out. However, I do not see in the submissions on behalf of the appellant, or indeed otherwise in terms of the evidence, how express consideration of s.117C could have affected the FtJ's analysis such as potentially to have led to a different outcome in favour of the appellant. In relation to the matters that the FtJ had to consider, most particularly the question of undue harshness, those are matters that are contained in what are, in effect so far as they apply to this appeal, the mirror provisions of the Rules.

46. As regards the issue of undue harshness itself, I do not accept that the FtJ's decision betrays a lack of consideration of the independent social worker's report from Mr Musendo. He did refer to it and accepted its conclusions. He found that it would not be in the best interests of any of the children to be separated from the appellant. Whilst it is true that he did not expressly refer to what was said in the report about CW in particular and her ability to parent on her own, it is nevertheless the case that at [13] the FtJ noted that it had not been suggested that the appellant was the primary carer for any of the children in the UK. Elsewhere in his decision he referred more than once to having taken into account the written and oral evidence of CW. Furthermore, the FtJ had said at [11] that the case on behalf of the appellant was, in essence, his relationship with his children. At [3] he referred to evidence that the appellant was due at Nottingham Magistrates' Court on 16 March 2018 in relation to an allegation of assault on CW, albeit that she gave evidence in support of the appeal before the FtJ. At [13] he said that he accepted CW's evidence in relation to the best interests of the children. It is reasonable to conclude that that acceptance included what she had to say about her ability to parent without the appellant.
47. Although there is criticism of the FtJ's analysis of the issue of undue harshness, notwithstanding some lack of clarity in his decision in this respect to which I have referred, I am satisfied that there was a legally sustainable analysis of the issue of undue harshness in terms of separation from the appellant. The FtJ did not suggest, and indeed nor did the respondent, that any of the children could go to Jamaica with the appellant. As to separation, as was said in *KO (Nigeria)*, undue harshness represents a high threshold and means something beyond mere harshness, which is also in fact what the FtJ said at [13].
48. Furthermore, it has long been held that the mere fact of separation is not a sufficient basis from which to conclude that a person's deportation would be disproportionate in terms of its impact on family life.
49. I do accept that at [14], impermissibly as it now turns out in the light of *KO (Nigeria)*, the FtJ went on to consider undue harshness in the context of the appellant's criminal offending. The introductory sentence states that the FtJ considered that issue "on the further and alternative basis" taking into account the wider public policy considerations. However, I am not satisfied that what is undoubtedly an error of law in this respect is material. The FtJ had already decided that it was not unduly harsh for the appellant's children, or his stepchild, to remain in the UK without him. I cannot see on the evidence anything from which the FtJ could have concluded that separation would be unduly harsh. So, even accepting that his analysis in that respect could have been more specific, there was in fact nothing significant before him on that issue beyond the mere fact of separation and even taking into account CW's difficulties.
50. So far as a consideration of Article 8 outside the Rules is concerned, the FtJ said at [16] that there were no "compelling circumstances" sufficient for a consideration outside the Rules. The phrase used in para 398(c) is very compelling circumstances over and above paragraphs 399 and 399A. Whilst therefore, the FtJ did not express

himself correctly, having found that there were no “compelling” circumstances, he could hardly have concluded that there were “very compelling circumstances”.

51. Albeit in a way that could have been improved in terms of its structure and coherence, the FtJ’s decision does involve a cumulative assessment of all the relevant issues. I cannot see that there was anything before the FtJ which could have led him to conclude that an outside the Rules consideration of Article 8 would have made any difference to his decision. Indeed, at the point of such consideration, public interest issues undoubtedly do have a part to play as suggested by Mr Mills in his submissions. Thus, the appellant’s lack of integration, the persistence of his offending, the seriousness of the most recent offence, and the FtJ’s rejection of the appellant’s excuses for his offending would no doubt have militated in favour of a dismissal of the appeal in that context also.
52. Accordingly, although I am satisfied that the FtJ did err in law in the respect to which I have referred, that error of law is not such as to require the decision to be set aside.

Decision

53. The decision of the First-tier Tribunal involved the making of an error on a point of law. However, its decision is not set aside and the decision to dismiss the appeal therefore stands.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek

16/05/19