



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/04528/2019

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre

**Decision & Reasons
Promulgated**

On 2 January 2020

On 13 January 2020

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**WA
(ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellants: Mr J Fraczyk, Counsel instructed by D & A Solicitors
For the Respondent: Mr C Howells, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of Judge Boylan-Kemp in which she allowed the appeal of WA, a citizen of Jamaica, against the decision of the Secretary of State to make a deportation order on human rights grounds. For the avoidance of confusion, I will refer to the parties as the Appellant and the Respondent as they were before the First-tier Tribunal.
2. The Secretary of State's decision was made on 26 February 2019. The Appellant exercised his right of appeal to the First-tier Tribunal. The appeal came before Judge Boylan-Kemp on 10 June 2019 and was allowed.

The Secretary of State applied for permission to appeal to the Upper Tribunal. His application was refused by First-tier Tribunal Judge Adio on 8 October 2019 but on renewal to the Upper Tribunal was granted by Upper Tribunal Judge Smith in the following terms

The respondent's grounds, in effect, challenge the insufficiency of reasons given for the finding that the effect of the appellant's deportation on his wife, ex-wife and children would be unduly harsh (it being assumed for these purposes that they would remain in the UK whilst he goes to Jamaica). I would not have granted permission on this basis alone, particularly in light of the recitation of the evidence at [15] to [21] of the decision. Much of what is argued in the grounds is merely a disagreement with the judge's findings on that evidence.

However, it is arguable that the judge has failed to recognise that whether the impact is "unduly harsh" is a high threshold. I say that, in particular, in the light of the judge's failure to mention section 117C when purporting to allow the appeal outside the immigration rules and having regard to the public interest only in the maintenance of effective immigration control and not also the prevention of crime and disorder (with the recognition that the deportation of foreign criminals is in the public interest – section 117C(1)). The appellant's offending included offences involving class A drugs for which offences he was sentenced to 2 years and four months in prison. The decision barely mentions those offences let alone the public interest involved in deportation.

It may be that, ultimately, any such error will be found to be immaterial given the judge's finding within the rules that the effect is unduly harsh. However, since the judge has taken the approach that the assessment of Article 8 is outside the rules ([5] of the decision), it is arguable that the error is material. As I have already observed, it is also arguable that the materiality of the error outside the rules impacts on the judge's finding under the rules.

Background

3. The history of this appeal is detailed above. The Appellant is a citizen of Jamaica born on 7 June 1978. He arrived in the United Kingdom in 2001 and was granted indefinite leave to remain in 2005. He is married to a British citizen and they have two British citizen children and the Appellant also has two British citizen children from another relationship. On 7 October 2015 the Appellant was convicted of two offences of possession of class A drugs with intent to supply and sentenced to 28 months imprisonment. As a result of this conviction the Secretary of State decided to make a deportation order against the Appellant. The Appellant exercised his right of appeal on human rights grounds.
4. At the appeal hearing it was agreed that the sole issue to be determined was whether it was unduly harsh for the Appellant to remain in Jamaica leaving his wife and children behind in the United Kingdom (paragraph 11). In allowing the appeal, the Judge found that it would not be in the best interests of the Appellant's children from either relationship for him to be required to leave the country and that in balancing the Appellant's family

life against the public interest it would be disproportionate to refuse the Appellant leave to remain in the United Kingdom.

5. The grounds of appeal to the Upper Tribunal assert that the Judge failed to give clear reasons as to how the high threshold of unduly harsh consequences had been made out noting that the Appellant's wife's cancer is in remission and that the mother of the Appellant's other children could look after the children on the weekends when the Appellant would have assisted.

Submissions

6. For the Secretary of State Mr Howells said that the main point was that the Judge did not self-direct or apply the test in KO and others [2018] UKSC 53. There was no undue harshness resulting from the deportation. KO and others at paragraph 23 explains the undue harshness test requiring something over and above the due level of harshness, something going beyond. The context is set by section 117C(1) of the 2002 Act. Paragraph 35 of KO and others approved the test set in both MK v SSHD [2015] UKUT 223 (IAC) and MAB v SSHD [2015] UKUT 435. Unduly harsh does not equate with uncomfortable, there must be something considerably more. The recent case of RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC) held that the high threshold guidance must be followed. Mr Howells said that it is not clear from decision that the Judge recognised that the test was so stringent. Referring to the grounds of appeal Mr Howells said that the Appellant's wife was in remission from cancer and the possibility of its return was speculative. There was no evidence that the removal of contact with the twins would result in undue harshness. Their mother can look after them. The report of the social worker refers to the strong bonds that the Appellant has with the children, but this is not uncommon and there must be a degree going beyond what would normally be faced. The fact that one of the children is severely autistic and unable to communicate does not prevent the Appellant continuing communication with that child in some way using modern methods of communication.
7. For the Appellant Mr Fraczyk referred to his detailed skeleton argument which, he said, addresses the KO and others issues. It was not a perverse finding of fact to suggest that there was a possibility of the Appellant's wife's cancer returning. Indeed, her current health condition showed the ongoing effects of her cancer. This is not an ordinary case where the consequences of deportation would be what is normally expected. It involves a mother with a difference and a child with a difference. There is nothing perverse or irrational about the Judge's findings.
8. I gave an extempore decision dismissing the Secretary of State's appeal. My reasons are given below.

Decision

9. The issues involved in this appeal are straightforward. At the hearing before the First-tier Tribunal it was agreed that the only question to be decided was whether it would be unduly harsh for the Appellant to be deported to Jamaica leaving his wife and children in the United Kingdom. There was never any suggestion that it would be reasonable for the Appellant's wife and children from different relationships to relocate to Jamaica.
10. In considering the issue the Judge took into account the particular circumstances of the family. As Mr Fraczyk rightly points out both in his skeleton argument and in oral submissions the family circumstances are not what is normally to be expected involving as they do a mother with a difference and a child with a difference. In her decision the Judge refers to both of these differences.
11. So far as the mother is concerned the Judge refers to the Appellant's wife's cancer at paragraph 15. She notes that the cancer is presently in remission but also notes

"...she has had significant and invasive surgery in order to tackle the disease ... she has been left with ongoing health concerns such as tiredness and aching joints as a result of the chemotherapy she received, and ... she is at high risk of the cancer returning due to the nature of the underlying disease"

In my judgement the Respondent's assertion (ground 4) that "any possibility the disease could return is speculative" not only displays a misunderstanding of the nature of cancer and the meaning of 'remission' but also flies in the face of the Judge's findings. The assertion (ground 3) that extensive support could be obtained from the NHS and other support groups such as Macmillan whilst correct in itself does not detract from the fact that close familial support is also desirable.

12. There is in my judgement no error of law in the Judge's finding that it would not be in the children's best interests to be separated from their father when their mother's health is in such a fragile state (paragraph 16). There is no error of law in the Judge including both the state of the mother's health and the effect that this has upon her children in the positive side of the proportionality balance or in her assessment of undue harshness.
13. Turning to the other children the Judge notes (at paragraph 17) that the Appellant is "an involved carer" who "provides respite care for them and their mother on a regular basis". The Judge notes that the one child is severely autistic and that he is "unable to communicate due to the extent

of his autism and so (the) parental relationship could not be adequately maintained if the Appellant were to be removed". The Judge deals with the suggestion that the parental relationship could be maintained via social media finding

"it is clear from the evidence before me that D is unable to communicate or verbalise his feelings and so it is unlikely that he would be able to maintain his relationship with his father through the means of modern technology. I find that D's limited ability to communicate would mean that he could not continue to have any meaningful parental relationship with his father if his father was removed from the United Kingdom".

There is my judgement nothing that could be said to be perverse or irrational in the Judge's findings in this respect.

14. Having made these findings, the Judge goes on to deal with the social work report and the cross family/sibling relationships before concluding at paragraph 21 in the following terms

"Overall, when taking the evidence in the round I find that it would be unduly harsh for the Appellant's children to remain in the UK without the Appellant due to the adverse effect it would have upon the Appellant's five children both emotionally and practically and upon their respective mother's ability to adequately care for them in the Appellant's absence".

This is in my judgement a comprehensive and adequately reasoned finding and one that is made on the clear basis that there are matters "above and beyond" the normal consequences of deportation for this family. Whereas the Judge does not spell out her understanding of 'unduly harsh' and the stringency of the test and does not specifically self-direct to KO and others it is very clear that the principles involved whether taken into account or not are met by the facts as recited. There is in my judgement no error of law but if the failure to self-direct did amount to such an error then it would not be material because given the particular circumstances as found the effect of the Appellant's deportation upon his children and his wife would undoubtedly be unduly harsh.

Summary of decision

15. Appeal dismissed. The decision of the First-tier Tribunal stands.

Signed

J F W Phillips

Deputy Judge of the Upper Tribunal

Date: 3 January 2020