



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

Appeal Number: HU/10185/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 9 November 2021**

**Decision & Reasons
Promulgated
On 19 November 2021**

Before

**THE HONOURABLE MR JUSTICE C G BOURNE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE BLUM**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR QUACY LLOYD BINGHAM
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer

For the Respondent: Mr R Halim, Counsel, instructed by Stains & Campbell Solicitors

DECISION AND REASONS

Introduction

The appellant in this matter will be referred to as the Secretary of State and the respondent will be referred to as the claimant.

This is an appeal by the Secretary of State against a decision of Judge of the First-tier Tribunal Griffith (“the judge”) to allow the claimant’s appeal on human rights Article 8 grounds. Permission to appeal to this Tribunal was granted by Judge of the First-tier Tribunal Parkes by a decision dated 31 August 2021.

Background

The claimant, born on 18 October 1994, is a citizen of Jamaica. He is the father of two children who are British citizens, a daughter born on 30 April 2016 and a son born on 29 January 2019. The children’s mother is the claimant’s former partner. The claimant entered the UK in November 1999 at the age of 5. On 26 June 2009 he and his mother were granted indefinite leave to remain. He applied for British citizenship but this was refused on 11 October 2010 on grounds of character. He has six criminal convictions on dates between 10 June 2010 and 25 September 2018 for a total of ten offences. In particular, on 25 September 2018 he pleaded guilty to possession of class A drugs, heroin and crack cocaine, with intent to supply and was sentenced to 30 months’ imprisonment.

On 14 November 2018 the claimant was served with a deportation notice. He claimed that deportation would breach his Article 8 rights. The Secretary of State refused that claim. The claimant’s appeal against that decision was allowed by the First-tier Tribunal by a decision promulgated on 16 August 2021.

The Decision of the First-tier Tribunal

The judge noted that by virtue of that conviction and sentence the claimant is a foreign criminal as defined by Section 32 of the UK Borders Act 2007 and that the Section requires a deportation order to be made unless certain exceptions set out in Section 33 apply. The first of these is that removal of the foreign criminal would breach his rights under the ECHR or the Refugee Convention. The judge further directed herself that an Article 8 claim in the context of deportation must be decided by reference to Part 5A of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).

Section 117C of the 2002 Act states that the deportation of foreign criminals is in the public interest and the more serious the offence committed, the greater is the public interest in deportation. The Section further provides that in the case of a foreign criminal who has received a sentence of less than four years the public interest requires his deportation unless Exception 1 or Exception 2 applies. Exception 1, which is not material in this appeal, is where the person has been lawfully resident in the UK for most of his life, he is socially and culturally integrated in the UK and there would be very significant obstacles to his integration in the country to which he will be deported.

This appeal concerns Exception 2, which applies where the person “has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child and the effect of C’s deportation on the partner or child would be unduly harsh”.

As to the application of that test, the judge directed herself as follows:

“79. There is no definition as such of unduly harsh but guidance as to its meaning is found in **MK (section 55 - Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC)** as follows:

‘ By way of self-direction, we are mindful that ‘*unduly harsh*’ does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. ‘Harsh’ in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb ‘*unduly*’ raises an already elevated standard still higher.’

Further assistance is found in **HA (Iraq) [2020] EWCA Civ 1176**. At paragraph 51 the court said, ‘the essential point is that the criterion of undue harshness sets a bar which is ‘elevated’ and carries a ‘much stronger emphasis’ than mere undesirability.’ The court went on to say that it was not as high as the test of ‘very compelling circumstances’. At paragraph 53 the court said, ‘it is inherent in the nature of an exercise of the kind required by Section 117C(5) that Parliament intended that Tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on a child or partner would be ‘unduly harsh’.

80. At paragraph 56 the court gave some examples of factors that might affect the harshness of the impact of separation, such as the child’s age, whether the parent lives with them, the degree of the child’s emotional dependence on the parent, the financial consequences of the deportation, the availability of emotional and financial support from a remaining parent or other family members, the practicability of maintaining a relationship with the deported parent and by all the individual characteristics of the child. The point was also made in that paragraph that the test requires an appellant to establish a degree of harshness going beyond a threshold ‘acceptable level’ but there is no reason in principle why cases of ‘undue’ harshness may not occur quite commonly.”

The judge considered the evidence of witnesses including the claimant, his former partner and an independent social worker and decided the following.

Following his release from prison in January 2020 the claimant had unlimited and unsupervised contact with the children.

Between October 2020 and April 2021 he had supervised contact facilitated by the local authority.

The claimant has thereby focused on rebuilding his relationship with the children. A resettlement support worker stated that he “has made fantastic progress”.

The local authority no longer has any concerns about his access to the children.

The progress made in his relationship with the children, especially his daughter, who is now aged 5, would be lost if he were deported. This would mean a further episode of loss and disruption in her life. The social worker considered that the separation from the children “would impact on their sense of stability and identity and would affect their emotional and psychological wellbeing, leading to poor educational and life outcomes”. Electronic communication would be a poor substitute.

The claimant is the only person providing financial support to the children and their mother. There was considerable uncertainty about whether he could provide this from Jamaica in view of his lack of ties there.

The effect of deportation on the children, especially the daughter, would go beyond mere undesirability, discomfort or inconvenience in view of the previous history of separation followed by a period of strengthening the relationship and the children being too young to understand the reasons for a further separation. The effect would be unduly harsh.

It would also be unduly harsh for the children and their mother to follow the claimant to Jamaica. Their mother has never been to Jamaica, the claimant has not lived there since the age of 5 and has only visited twice since then.

Exception 2 therefore applies and the public interest does not require the claimant’s deportation.

The Appeal before the Upper Tribunal

The Secretary of State contends that the claimant’s case did not meet the high threshold of showing that the effect of his deportation on the children would be unduly harsh. The Secretary of State relies in particular on the decision of the Court of Appeal in **HA (Iraq)** where Lord Justice Underhill said at paragraph 42: “One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent.” The Secretary of State therefore contends that the judge erred in law by setting the threshold for undue harshness too low.

In argument, Mr Tufan for the Secretary of State realistically accepted that this is a perversity challenge. In answer to a question from the bench, he said that whilst there are cases which could validly be decided in favour of either party, this was a case which could only be decided in the Secretary of State’s favour.

The claimant, by his Counsel Mr Raza Halim, responds that the appeal identifies nothing more than disagreement with the decision of the judge and does not identify any error of law. To overturn the judge’s assessment of the facts would require the Secretary of State to overcome the high hurdle of showing

perversity. Mr Halim points out by reference to **KB (Jamaica) [2020] EWCA Civ 1385**, paragraphs 21 to 22, that it would not be enough to show that the evidence was only arguably insufficient to satisfy the test of undue harshness. Nor will the Upper Tribunal allow an appeal merely because it considers that it might have reached a different conclusion on the facts short of a finding of perversity, and the finding of an “arguably generous conclusion” by the First-tier Tribunal will not mean that the First-tier Tribunal erred in law: see **AA (Nigeria) [2020] EWCA Civ 1296** at [31] to [37].

Mr Halim took us through the reasons given by the judge and submitted that they are valid reasons properly expressed and based on a correct statement of the law.

Discussion

The only question in this case is whether the First-tier Tribunal erred in law when applying Section 117C of the 2002 Act and when deciding that the exception provided for by that Section was applicable because the effect on the children of their father’s deportation would be unduly harsh.

The meaning of unduly harsh was considered by Lord Carnwath in **KO (Nigeria) v Secretary of State [2018] UKSC 53** at paragraph 23:

“The expression ‘unduly harsh’ seems clearly intended to introduce a higher hurdle than that of ‘reasonableness’ under Section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word ‘unduly’ implies an element of comparison. It assumes that there is a ‘due’ level of harshness’, that is a level which may be acceptable or justifiable in the relevant context. ‘Unduly’ implies something going beyond that level. The relevant context is that set by Section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent’s offence, other than is inherent in the distinction drawn by the Section itself by reference to length of sentence. Nor ... can it be equated with a requirement to show ‘very compelling reasons’. That would be in effect to replicate the additional test applied by Section 117C(6) with reference to sentences of four years or more.”

The nature of the test was further considered by Lord Justice Underhill in **HA (Iraq)**:

“51. ... The underlying question for the Tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest in the deportation of foreign criminals.

...

53. ... It is inherent in the nature of an exercise of the kind required by Section 117C (5) that Parliament intended that Tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be 'unduly harsh' in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value."

Lord Justice Underhill went on at [56] and [57] as referred to above to say that the test does indeed require an appellant to establish a degree of harshness going beyond a threshold "acceptable" level. However, the effect on a child will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Decision-makers must carry out a fact-sensitive assessment evaluating the impact of an appellant's deportation on his children and then deciding whether the effect is not merely harsh but unduly harsh.

In this appeal the Secretary of State has not seriously suggested that the judge did not correctly direct herself in law. We perceive no misdirection. The judge referred carefully to the relevant legislation and the principles which can be identified from case law as summarised above. We therefore consider that the appeal depends on the Secretary of State showing perversity, i.e. that in applying the law to the facts the judge reached a conclusion which no reasonable judge could have reached or on showing that the judge failed to give proper reasons for her decision.

In our judgment, the decision of the judge cannot be said to be perverse. She identified the factual and evidential basis for her conclusion, namely the evidence from the family and the independent social worker about the evolution of the claimant's relationship with the children and the likely impact of a further separation, having regard to the past history and to the children's ages.

To give a little more detail, the judge at [76] noted that the claimant's ex-partner supported his appeal despite the breakdown in their relationship and gave evidence that she did so because the children would be heartbroken if their father were deported. At [77] the judge noted that the local authority thought it was in the children's best interests to rebuild the relationship with their father upon his release and this process was said to have gone well. At [78] the judge noted that the independent social worker's report provided a second independent source of evidence of where the children's best interests lie.

Then the judge ran through the examples of relevant factors given by the Court of Appeal in **HA**. By reference to that list at [81] the judge focused on the effect of the claimant's detention on his daughter, who is now 5, on the work done to rebuild their relationship and the "fantastic progress" made. At [81] he

said that he attached considerable weight to the fact that, as a result of that progress, the local authority no longer had any concerns about the claimant in respect of the children. Deportation would mean that that progress would be lost. In the opinion of the social worker, this would pile another episode of loss and disruption on those which had previously occurred in the life of the children.

It was those detailed facts which meant that the impact would, to use the language of **AA (Iraq)**, go beyond “what would necessarily be involved for any child faced with the deportation of a parent”. There was no failure to give clear reasons for this decision.

The Secretary of State contended that this was an over-generous conclusion but, as the Court of Appeal said in **AA (Nigeria)**, we cannot allow the appeal only because we might have decided it differently if hearing the case at first instance. The Secretary of State must show that no reasonable judge could have decided it as the judge did. In this appeal, where the judge correctly directed herself on the law and identified relevant factual conclusions supported by evidence, she falls some way short of that. Whether or not we would have been convinced that the facts of this case satisfied the unduly harsh threshold, we cannot say that these facts are incapable of doing so. There has therefore been no misdirection, no perversity and no lack of reasoning by the judge and therefore no error of law.

So, our decision will be that the appeal is dismissed.

Notice of Decision

The Secretary of State’s appeal is dismissed

No anonymity direction is made.

C.G. Bourne

11 November 2021

Signed

Date

Mr Justice C G Bourne
Sitting as a Judge of the Upper Tribunal