



Neutral Citation Number: [2023] EWCA Civ 1350

Case No: CA-2022-001723

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Upper Tribunal Judge Hanson and Deputy Upper Tribunal Judge Hall
PA/12934/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2023

Before:

LORD JUSTICE NEWEY
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

Between:

FN (BURUNDI)
- and -
SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Appellant

Respondent

The Appellant appeared in person

Jack Anderson (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 8 November 2023

Approved Judgment

This judgment was handed down remotely at 2pm on 16 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. In a decision dated 22 March 2022 (“the Decision”), the Upper Tribunal (Immigration and Asylum Chamber) (“the UT”) dismissed an appeal by the appellant against a deportation order made by the respondent, the Home Secretary. The appellant now challenges the Decision in this Court. The question raised by the appeal is whether the UT was wrong to conclude that the effect of the appellant’s deportation on her daughter J would not be “unduly harsh” within the meaning of section 117C(5) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).

Basic facts

2. The appellant is a citizen of Burundi born on 9 December 1972. She arrived in the United Kingdom on 10 September 2003 and claimed asylum, but that was refused and an appeal against that decision was dismissed on 25 February 2004.
3. In 2004, the appellant entered into a relationship with R, a citizen of South Sudan. J is their daughter. She was born on 4 December 2007 and has British nationality.
4. On 5 February 2009, the appellant was sentenced to 15 months’ imprisonment for five offences, involving obtaining pecuniary advantage by deception and fraudulently claiming benefits. R cared for J during the 7½-month period the appellant was in prison.
5. On 21 April 2010, a deportation order was made against the appellant. An appeal against the decision to make a deportation order was dismissed on 20 September 2010, but the appellant subsequently made representations on human rights and protection grounds. Representations made on 26 September 2017 were accepted to amount to a fresh claim, but the claim was refused on 21 November 2017.
6. The appellant appealed against that refusal. Eventually, after various procedural complications which it is not necessary to detail, the appeal came before the UT on 18 January 2022. It was dismissed by the Decision.
7. In the meantime, in January 2020, the appellant and R had separated. The UT explained in paragraph 15 of the Decision that the appellant had said that her relationship with R had remained cordial until June 2021, when a domestic incident had occurred.
8. J lives with her mother. The UT noted in paragraph 15 of the Decision:

“The appellant states that since [her] relationship [with R] ended J has only seen her father face-to-face once although she speaks to him on the telephone approximately three times a week, sometimes more, sometimes less, although it is also stated in evidence that there had also been other occasions when J’s father has tried to see J outside the home.”

Legal framework

9. Section 32 of the UK Borders Act 2007 (“the 2007 Act”) requires the Home Secretary to make a deportation order in respect of a “foreign criminal” unless section 33

applies. “Foreign criminal” is defined to include a person who is not a British or Irish citizen and who has been convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least 12 months. The appellant is, accordingly, a “foreign criminal” within the meaning of the legislation.

10. Section 33 of the 2007 Act provides for an exception where “removal of the foreign criminal in pursuance of the deportation order would breach ... a person’s Convention rights”: see section 33(1) and (2)(a). “Convention rights” include the right to respect for private and family life under article 8 of the European Convention on Human Rights (“the ECHR”).
11. By section 117A of the 2002 Act, Part 5A of that Act, which comprises sections 117A-117D, applies where a Court or Tribunal is required to determine whether a decision made under the “Immigration Acts”, which include the 2007 and 2002 Acts, breaches a person’s right to respect for private and family life under article 8 of the ECHR. Section 117A(2) stipulates that, when considering the question of whether an interference with a person’s right to respect for private and family life is justified under article 8(2), the Court or Tribunal must have regard to the considerations listed in section 117C in cases concerning the deportation of “foreign criminals”.
12. So far as relevant, section 117C of the 2002 Act provides:
 - “(1) The deportation of foreign criminals is in the public interest.
 - ...
 - (3) In the case of a foreign criminal (‘C’) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C’s deportation unless Exception 1 or Exception 2 applies.
 - ...
 - (5) Exception 2 applies where C 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”
13. By section 117D, a “qualifying child” includes a British citizen who is under the age of 18.
14. In *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563 (“*MK*”), at paragraph 46, the UT (McCloskey President and Upper Tribunal Judge Perkins) gave itself the following self-direction as to the meaning of “unduly harsh” in section 117C(5) of the 2002 Act:

“‘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.”

15. That self-direction was described as giving “authoritative guidance” by Lord Carnwath in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, [2018] 1 WLR 5273, at paragraph 27. More recently, Lord Hamblen (with whom Lords Reed, Leggatt, Stephens and Lloyd-Jones agreed) concluded in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, [2022] 1 WLR 3784, at paragraphs 41-43, that it was appropriate for the *MK* self-direction to be adopted and applied.
16. With regard to how this Court should approach appeals from decisions of the UT:
 - i) While “the reader of any judicial decision must be reassured from its content that the court or tribunal has applied the correct legal test to any question it is deciding”, the reasons given “should be read on the assumption that, unless he has demonstrated to the contrary, the judge knew how he should perform his functions and which matters he should take into account” and “[a]n appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself”: see *Assad v Secretary of State for the Home Department* [2017] EWCA Civ 10, at paragraph 27, per Burnett LJ, and *Piglowska v Piglowski* [1999] 1 WLR 1360, at 1372, per Lord Hoffmann;
 - ii) In the case of an expert tribunal such as the UT, it is relevant to remember that it is “an expert tribunal charged with administering a complex area of law in challenging circumstances” and “the ordinary courts should approach appeals from them with an appropriate degree of caution”: see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678, at paragraph 30, per Baroness Hale;
 - iii) On a challenge to an evaluative decision, “the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge’s treatment of the question to be decided, ‘such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion’”: see *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031, at paragraph 76, per McCombe, Leggatt and Rose LJJ.

The Decision

17. The UT noted in paragraph 42 of the Decision that it was not in dispute that J’s interests would be best served by both her parents remaining in the United Kingdom, with her mother continuing to provide for her needs. The UT further accepted that the bond between the appellant and J is “very strong” and that the appellant’s removal from the United Kingdom would be “harsh”: see paragraphs 47 and 53. The UT nonetheless concluded in paragraph 65:

“although the degree of harshness in this case if [the appellant] is deported will be greater than some the Tribunal has to deal with, we do not find that it has been shown to be ‘unduly harsh’ upon J, on the facts”.

18. In the course of the Decision:

- i) The UT observed that there was “clear evidence ... of an appropriate father daughter relationship within the confines of the physical separation of J’s parents and its related history” (paragraph 63);
- ii) The UT found that the evidence did not establish that, if the appellant were deported, J would “suffer physical harm as a result of either the inability of R to meet or provide for the child’s needs or as a result of self-harm” (paragraph 57);
- iii) The UT said that it was “not made out that R would deliberately upset or cause emotional harm to J by preventing any contact with [the appellant] in reality” (paragraph 50); and
- iv) The UT said that it believed that, if J went to live with R, he would be able to secure at least two-bedroomed accommodation (paragraph 43) and that it “was not made out that the income from all sources will be insufficient to support a household composed of R and J” (paragraph 44).

19. The UT also, however, noted that R had been “rightly criticised for using [the appellant’s] HIV status as a ‘weapon’ to get back at her as a result of their recent falling out” (paragraph 58). In the context of events in May and June of 2021, the UT said this in paragraph 48:

“It is clear that, for whatever reason, R was very angry with [the appellant] and acted in a wholly inappropriate manner in seeking to gain revenge for whatever had upset him. The fact that no criminal charges had been laid does not mean that the conduct of R is irrelevant, and even if not an issue examined by the criminal courts it may still amount to domestic abuse. The fact that R clearly has as part of his make-up and personality the ability to lose his temper and act in such a way is noted by us.”

The appeal

20. The appellant has been granted permission to appeal on one ground: in essence, whether the UT erred in concluding that the effect of the appellant’s deportation on J would not be “unduly harsh”.

21. The appellant represented herself at the hearing before us. She has in the past, however, been represented by Mr Bazini of counsel. I have derived very considerable assistance both from a skeleton argument which Mr Bazini prepared on the appellant’s behalf and from the careful and measured response to it from Mr Jack Anderson, who appeared on behalf of the Home Secretary.

22. Mr Bazini identified the specific matters on which he relied in support of the appellant's appeal on the "unduly harsh" issue under four headings:
- i) Failure to take account of social services involvement and concerns
 - ii) Police involvement
 - iii) Emotional harm
 - iv) Child's own views
23. I shall use the same headings.

Failure to take account of social services involvement and concerns

24. The evidence before the UT included two reports prepared by Ms Sarah Edwards, an independent social worker, on the appellant and her family. In the second of these, dated 1 November 2021, Ms Edwards said that, in response for a request for information, Wolverhampton Children's Services had explained that they had received a referral from J's school as a result of matters reported to it by the appellant relating principally at least to events in May/June 2021. Ms Edwards recorded, among other things, that the local authority had:

"identified the following risk factors from the referral information;

- *[J] has witnessed domestic abusive*
- *[R] is still emotionally abusive and manipulative to [J]*
- *[R] has threatened to take [J] to Africa*
- *[R] has waited for [J] outside of school*
- *[R] has parental responsibility and legally has rights to take [J]."*

25. Mr Bazini pointed out in his skeleton argument that the UT made no reference to Wolverhampton Children's Services' comments in the Decision.

26. However:

- i) Ms Edwards said in her second report that she was "unable to draw any conclusions surrounding whether domestic violence and domestic abuse has taken place towards [the appellant] and [R]";
- ii) Wolverhampton Children's Services were dependent on what they had been told, in particular by the appellant, and do not appear to have been purporting to arrive at any conclusions as to what had happened;
- iii) The UT had both direct evidence from the appellant and material from the police relating to events in June 2021 (as to which, see below);

- iv) The UT set out in full the “Summary of Conclusions” to be found in Ms Edwards’ second report and also Ms Edwards’ response to specific questions in her first report.

Police involvement

27. The UT referred in paragraph 34 of the Decision to information which had been obtained from West Midlands Police as a result of a subject access request. On the basis of this information, the UT detailed occasions on which the police had been called on 1 June and 10 June 2021, but went on:

“It is noted [the appellant] did not wish to make a statement and that as there have been no further issues or contact the investigation was closed.”

28. In his skeleton argument, Mr Bazini took issue with this account. He argued, first, that there can be seen to have been a third incident, on 12 June 2021, and, secondly, that the police investigation was not closed at that stage. In that connection, Mr Bazini pointed out that Ms Edwards had said in her second report that she had understood from R that he was “still awaiting the outcome of the police investigation being completed ... and the police still have his telephone”. Mr Bazini also relied on an entry dated 12 June 2021 in “Incident log information” provided by the police.

29. However:

- i) The 12 June 2021 entry in the “Incident log information” records a conversation which the police had with the appellant on that date, not an incident to which they were called. The only such incidents revealed by the police information were on 1 June and 10 June;
- ii) Notes relating to the incident on 10 June state, “IP [presumably, ‘injured party’] does not wish to make a statement. There have been no further issues or contact. Investigation closed.” Whether or not, therefore, R knew this, the UT appears to have been correct that there was no ongoing investigation;
- iii) The UT addressed the significance of these events.

Emotional harm

30. Mr Bazini contended in his skeleton argument that the UT’s findings as to emotional harm were inadequate and unreasonable. I do not think there is any substance in this point, however. The UT clearly had in mind that there was a “very strong” bond between J and her mother, that it would be in J’s best interests for the appellant to stay in the United Kingdom and that the appellant’s removal would be “harsh”. The UT was not obliged to make a finding as to a “specific level of emotional harm”.

Child’s own views

31. Relying on remarks made by Baroness Hale in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, at paragraphs 34-37, Mr Bazini stressed the importance, where possible, of obtaining the child’s own views

when a “best interests” assessment is undertaken. Here, Mr Bazini suggested, the UT had had no regard to evidence from J.

32. However, the UT set out in full, in paragraph 22 of the Decision, a statement which J made on 13 January 2022. While J stated in this that she loved both her parents and needed them both in her life, she also said, among other things, “Losing my mum would make me feel that half of me had gone”, “I am worried about my mum’s health if she is deported”, and “I don’t know how I would cope without [my mum]”. There is no reason to think that the UT overlooked these (very understandable) comments. In the end, however, it nonetheless concluded that the appellant’s deportation would not have an “unduly harsh” effect on J.

Conclusion

33. The UT was justified in concluding that the effect of the appellant’s deportation on J would not be “unduly harsh” within the meaning of section 117C(5) of the 2002 Act. That assessment was neither unreasonable nor vitiated by any “identifiable flaw”. In the circumstances, I would dismiss the appeal.

Lord Justice Lewis:

34. I agree.

Lady Justice Elisabeth Laing:

35. I also agree.