



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09771/2017

THE IMMIGRATION ACTS

Heard at Field House
On 30 January 2018

Decision & Reasons Promulgated
On 08 February 2018

Before

RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE LINDSLEY

Between

FK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Iengar, Counsel
For the Respondent: Mr Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a decision of First-tier Tribunal Judge CAS O'Garro promulgated on 22 November 2017 refusing his appeal against a deportation order made on 27 June 2017.
2. The appellant is citizen of Kosovo. His date of birth is 3 February 1987. He came to the United Kingdom as an unaccompanied minor on 9 July 2001 and claimed asylum.

This was refused but he was granted discretionary leave to remain. On 6 August 2010 he was granted indefinite leave to remain.

3. The appellant has a number of criminal convictions which are narrated in paragraphs 3 to 7 of the decision letter. Only one resulted in a custodial sentence; on 22 December 2016 the appellant pleaded guilty at Kingston upon Thames Crown Court of two counts of entering an arrangement to facilitate acquisition, retention, use or control of criminal property. On 24 April 2017 he was sentenced to two concurrent terms of 21 months imprisonment.
4. The respondent made a deportation order which was served on the appellant on 27 June 2017. He has appealed against the decision based on his family and private life.
5. Judge O'Garro found that the appellant had established a subsisting and genuine relationship with MS, by whom he had two minor daughters, LK and IK, age 7 and 4 respectively. MS had clearly stated that she had no intention of going with the children to live in Kosovo. Accordingly the issue for the judge was whether it would be unduly harsh for the children to remain in the United Kingdom without the appellant. He found that it would not be unduly harsh and dismissed the appeal.

Submissions for the appellant

6. Ms Iengar presented three grounds of appeal which may be headed, first, the best interests of the children; second, article 8 – proportionality assessment; and third a flawed approach to s117C(4) Nationality, Immigration and Asylum Act 2002.
7. In assessing the best interests of the child the Judge had accepted that their best interests would “in some measure be impaired”. This was wrong as the best interests of the child was a fixed and final assessment, not a sliding scale. Moreover, the Judge had failed to properly consider all of the relevant material before her. She had made only a passing reference to the independent social work report. There was a duty to explain in clear and concise terms what weight she placed on the report; **MK (Pakistan) 92013 UKUT 00641 (IAC)**. Although the term ‘unduly harsh’ appeared it was not clear that the Judge had looked at it in terms of **MM (Uganda) [2016] EWCA Civ 450**.
8. The Judge had incorrectly relied on the case of **Lee [2011] EWCA Civ 348** to justify the appellant’s removal from the UK. However, this was determined before the 2012 change in the Immigration Rules. The correct approach was set out in **Hesham Ali [2016] UKSC 60** at paragraph 169. Moreover no weight appeared to have been placed on the appellant’s private life.
9. The Judge had erred in concluding that the appellant did not fall within the exception at s117C(4) of the 2002 Act on the basis that he had not been lawfully resident in this country for most of his life. That was incorrect. He had come to this country at the age of 14 and was now 30 years old. He had therefore lived in the UK for over half his life.

Submissions for respondent

10. The respondent submitted a rule 24 response. Mr Clarke reminded us that **Hesham Ali** had not considered the recent amendments to legislation including those effected by the Immigration Act 2014. The correct approach to section 117C of the 2002 Act, as amended by the Immigration Act 2014 was set out by the Court of Appeal in **NE-A (Nigeria) v SSHD [2017] EWCA Civ 239**. That required a structured approach which, if followed, would produce a result that was compliant with article 8 ECHR. Here the relevant provision was section 117C(5). The tribunal would have to be satisfied that the appellant's deportation would be unduly harsh. The complaint here was that the Judge had paid scant attention to the social work report and had inaccurately asserted that there was no medical evidence that the children were not fit and well. However the judge had dealt with the evidence appropriately. The case of **Lee** acknowledged that there was balancing exercise but that there was a strong public interest in deportation. The seriousness of the offending was clear from the judge's sentencing remarks. The immigration judge had taken account of these but conducted a full proportionality exercise in paragraphs 58 and 59.
11. Mr Clarke accepted that the Court of Appeal in **MM (Uganda)** had said that in assessing whether the effect of deportation on a child of the deportee was unduly harsh the court had to consider all the circumstances including the criminal's immigration and criminal history; paragraph 20. However a positive immigration history, in the sense of a person who had resided in the UK lawfully throughout, was at best a neutral consideration and not a factor in his favour.

Decision and reasons

12. The statutory framework is to be found in section 117C of the 2002 Act. So far as relevant it is in the following terms.

117C Article 8: additional considerations in cases involving foreign criminals

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (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.
- (4) Exception 1 applies where –
 - (a) C has been lawfully resident in the United Kingdom for most of C's life,
 - (b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(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. The appellant was sentenced to 21 months imprisonment and accordingly subsection (3) applies. The public interest requires his deportation unless, in this case, Exception 2 applies. The Judge accepted that there was a genuine and subsisting relationship with both his partner and a parental relationship with qualifying children. His partner made it clear that she would not relocate to Kosovo with the children. Accordingly the issue in this case was whether it would be unduly harsh on either or both children for him to be deported. It was not suggested that it would be unduly harsh on his partner.
14. At paragraph 41 the Judge considers the evidence of the social worker, Miss Nikki Austin and a letter written by Dr Purewal. The reference to the best interests of the children being in some measure being impaired by the loss of the company of their father may be clumsy but is nothing more than an acknowledgement that it would be in the children's best interests for the appellant to remain in family with his children. Otherwise we are not persuaded that there is any error of law in the manner in which the Judge has dealt with the evidence of the social worker and Dr Purewal. Dr Purewal's letter notes that the younger child has found the upheaval of travelling to visit her father in prison destabilising. It notes that she has had a number of night terrors and is always looking for re-assurance. She is currently being seen by urology for frequently passing urine in the absence of infection. He goes on, "It is possible that this could be behavioural." Miss Ashton's report is to the effect that the removal of the appellant will be detrimental to the children's health and well being. Accordingly we are not persuaded that there is any error in the way the Judge approached the evidence before her.
15. In paragraph 43 the Judge refers to the Court of Appeal case of **AJ (Zimbabwe) and VH (Vietnam) [2016] EWCA Civ 1012**, and noted that it would be rare for the best interests of the child to outweigh the strong public interest in deporting foreign criminals. She goes on to analyse the case in a little detail. Ms Iengar's submission was that in combination with the reference to **Lee** it was clear that the Judge had imposed a higher test of exceptional circumstances. We consider that this submission is well founded. In **AJ (Zimbabwe) and VH (Vietnam)** the Court of Appeal was addressing IR 398. That rule requires the respondent to consider whether IR 399 or 399A applies and, if not whether there were exceptional circumstances that outweighed the public interest in deportation. (The requirement has now been strengthened to one of very compelling circumstances over and above those described in paragraphs 399 and 399A.) In other words the approach in **AJ (Zimbabwe) and VH (Vietnam)** applies after the decision maker has applied the 'unduly harsh' test in IR 399 and 399A. Even on the old wording, it was necessarily more stringent than the unduly harsh test.

16. The question for us is whether these errors are material. Ms Iengar submitted that they were. She reminded us of the definition of 'unduly harsh' in **MM (Uganda)**. Contrary to Mr Clarke's submission we were entitled to take into account that the appellant had lived in this country lawfully for over half his life. There was a strong family relationship. The children could not be expected to go and live in Kosovo. They had visited only once. The children were 'not ordinary children'. There would be a tremendous impact on them. We should look to the particular circumstances of the crime and the disposal. The appellant had pleaded guilty.
17. We are not persuaded that the errors are material. The sentencing Judge's remarks make clear that the appellant involved himself in serious organised crime. He had been caught transferring over £300,000 in cash and had a month previously been seen handing over another sum of cash. For sentencing purposes it was accepted that his personal involvement should not exceed £500,000. The Judge made clear that if he had been convicted after trial the sentence on each count would have been 3 years imprisonment.
18. We accept that the appellant has been in the UK for most of his life in terms of IR 399 and we are prepared to take that into account when considering whether it would be unduly harsh on the children for him to be deported. There is no doubt that the appellant's removal will have detrimental consequences for the children. That is the natural consequence of deportation. Ms Austin's report details the effect of deportation at paragraph 4.4. She notes the effect of the appellant's imprisonment on the younger child, also detailed in Dr Purewal's letter. She considers that the children have hitherto been provided with a safe secure and loving environment. There was a very strong bond with the father. The appellant's partner did not consider that she could take the appellant's place as a father. Studies had shown that that two parent families were still the best environment for children to be raised in. To disrupt the family further would have a lasting negative impact on both children. They could not be expected to relocate to Kosovo. Her professional opinion was that it would be detrimental to both children's emotional health and well being for the family to be disrupted by the appellant's deportation. For these reasons there is no doubt that the best interests of the children would be served by the appellant remaining in the UK. We accept that some contact may be maintained by modern forms of communication and no doubt by visits to Kosovo but they are no substitute for continuing family life as a unit.
19. These consequences can no doubt be characterised as harsh on the children. But the question is whether conducting the balancing exercise that the Judge conducted in paragraphs 58 and 59, and applying the correct test, he could have found that they were unduly harsh. Every child is of course special, particularly to their parents, but we do not consider that there is anything particularly out of the ordinary about the children. They will of course suffer the consequences of their father's deportation and these are ably set out in Ms Austin's report. They are also borne out in the other evidence before the First-tier Tribunal from the appellant and the witness statements listed at paragraph 18. However in our opinion there is nothing in any of the evidence which would justify a conclusion that the effect of the deportation on either

of the children would be unduly harsh within the meaning of section 117C of the 2002 Act.

20. The Judge was also in error in holding (at paragraph 46) that the appellant had not lived in the UK 'most of his life' on the basis that he had been here only just over half his life. In **Secretary of State for the Home Department v SC (Jamaica) [2017 EWCA Civ 2112]** the Court of Appeal held that 'most of his life' was simply more than half (paragraph 69). However this does not assist the appellant. Exception 1 not only requires the criminal to have been lawfully resident in the UK for most of his life and be socially and culturally integrated but he must also demonstrate that there would be very significant obstacles to his integration into the country to which he is to be deported. No such evidence has been produced.

Notice of Decision

The appeal is dismissed.

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 their 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.

Signed

Date 08/02/2018

Lord Boyd of Duncansby
Sitting as a Judge of the Upper Tribunal