



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12196/2017

THE IMMIGRATION ACTS

Heard at Field House
On 20 June 2019

Decision & Reasons Promulgated
On 26 June 2019

Before

RT HON LORD BOYD OF DUNCANSBY
Sitting as a Judge of the Upper Tribunal
UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GT

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Melvin; Home Office Presenting Officer

For the Respondent: Dr Chevlan, Counsel instructed by Duncan Lewis & Co, Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State. We shall however refer to the parties as they appeared before the FTT.
2. The appellant is a citizen of Jamaica. His date of birth is 3 June 1983. He came to this country as a boy in or before 1996. He has had indefinite leave to remain since 1996.

3. The respondent made a deportation order on 13 June 2017 following the appellant's conviction on 19 December 2016 at Basildon Crown Court for possession of crack cocaine, a class A drug, with intent to supply. He was sentenced to 38 months imprisonment. In October 2016 he had been convicted of possession of cannabis and was fined £80. Before that he committed a number of offences in 2000 and 2001 for which he received non-custodial disposals.
4. The appellant appealed the deportation order on human rights grounds. In a decision promulgated on 7 March 2019 FTTJ Cary allowed the appeal.
5. The appellant has nine children under the age of 18 years. He lives with a partner by whom he has two children. The other children do not stay with him but the evidence was that he had a close relationship with them.
6. Before the FTT the appellant relied on paragraph 399(a) and section 117D(2) of the Nationality Immigration and Asylum Act 2002. It was not in dispute that the appellant had a genuine and subsisting parental relationship with his children who were resident in the UK and British citizens. The first issue for the FTT was whether or not the appellant's deportation would have unduly harsh consequences for any of the children. It was accepted that it would be unduly harsh to expect any of them to live in Jamaica with the appellant. Accordingly the issue was whether it would be unduly harsh for them to remain in the UK without the appellant.
7. At paragraphs 30 and 31 the FTTJ considers the relevant authorities on the test to be applied and in particular to the meaning of "unduly harsh" as analysed by the UT in **MK (Sierra Leone) [2015] UKUT 223 (IAC)** and by the Supreme Court in **KO(Nigeria) 2018 UKSC 53**. There was no criticism of the FTTJ's approach.
8. Before the FTTJ was a report from an independent social worker Dymphna Pearce dated 20 September 2018. This dealt with the likely impact on the appellant's children of his removal to Jamaica. The FTTJ described the report as "a thoughtful well-reasoned analysis of the appellant's relationship with his children and the likely impact on them of his enforced departure". She described the significant contribution that the appellant made to his children's sense of "emotional and psychological well-being" and that there was no doubt that most of the children enjoyed a close and fulfilling relationship with their father. They all felt extremely positively towards their father.
9. The FTTJ highlights the particular impact on two of the children. [S¹], who is now 17 had started self-harming when the appellant was in prison. The report records that she has expressed deep distress, despair and associated feelings of powerlessness and helplessness through anger. She has a diagnosis of Oppositional Deficit Disorder and Conduct Disorder. These emotions became too much for her when her father was imprisoned. She was unable to cope and took an overdose. Ms Pearce was of the opinion that that if the appellant was deported there was a very serious risk that [S¹] might turn to self-harming again. She highlights that at least when her father was in prison there was a release date. If he was deported there would be no grounds for

reassurance that she would be with him any time soon. [S¹] would have no one to turn whom she trusts.

10. The FTTJ also made reference to [S¹]'s younger sister [S²] who had experienced problems during her father's incarceration and had been offered counselling. So far as the other children were concerned the report dealt at length with the interaction of each of the children with their father and in particular his imprisonment and subsequent release. The appellant's mother was recorded as saying that the children "were fretting but they are now so relieved, so happy. He gives them love and support, every one of them and their mothers are so pleased that he is out to help them out." All of the children who were interviewed apparently spoke about their father in a positive way and benefitted from ongoing contact with him. The FTTJ concluded that the evidence supported the appellant's case.
11. In paragraph 35 the FTTJ considers that even if he is wrong that the appellant is entitled to succeed under paragraph 399(a) and exception 2 of section 117C(5) of the 2002 Act decision there were exceptional circumstances or very compelling circumstances under the immigration rules that outweigh the public interest in the deportation order. Accordingly the appeal should be allowed under this head.
12. The respondent lodged two grounds of appeal. The first ground was directed to the making of a material error of law in respect of the threshold test of unduly harsh. Whatever the intention of the second ground as Mr Melvin conceded it did not appear to deal with the facts of the present case. No argument was heard on this ground.
13. Mr Melvin submitted that the findings did not support the conclusion that the high threshold of unduly harsh had been met. The children had not lived with their father since they were young children. They had not visited him in prison. The problems noted in the report and experienced by the girls appeared to stem from an abusive relationship with their mother's partner. The FTTJ appeared not to have read the report but just adopted the conclusions. There was no specific findings in respect of each child upon which the appellant relied for his claim that the effect upon them would be unduly harsh. There was no analysis of the role that the father played in their lives. While the FTTJ had quoted authority he had played lip service to it.
14. Dr Chevlan pointed out that there was no challenge to the social work report in submissions to the FTT and there was no challenge to any of the findings of fact made by the FTTJ. In his submission the key finding related to the self-harming by [S¹]. It was of great concern that she had been self-harming while her father was in prison. That stopped when he left prison but the uncontested opinion evidence was that there was a real risk of her resuming self-harming if her father was deported. That was sufficient to satisfy the test under paragraph 399(a).

Decision

15. The test of what is unduly harsh is a high one. In **KO (Nigeria)** Lord Carnwath said this

“... 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.”

16. It is clear that the FTTJ recognised and sought to apply that test. He did not do so in a manner which we consider appropriate. We agree with Mr Melvin that it will normally be expected that the FTTJ will make specific findings of fact in respect of each qualifying child that the appellant relies on in making his or her human rights claim. The question for us is whether or not in this case there are sufficient findings to support the appellant’s case.
17. The lack of specific findings in respect of each child and an assessment of whether the impact on that child would be unduly harsh is unhelpful. Looking at the individual children other than [S¹] and [S²] it is clear that there will be an impact on them. There are reasonably strong bonds with each of the children. He is regarded as a good father. The children will miss his companionship and guidance and will experience upset and distress if he is deported. That is to be expected. While harsh it cannot be said that the effect on any of them falls into the category of unduly harsh.
18. [S²] appears to have been affected rather more by her father’s imprisonment. She was offered counselling but it is not clear whether that was taken up or whether there was likely to be any lasting impact on her of her father’s deportation over and above what may normally be expected.
19. The impact on [S¹] is somewhat different. As noted above she started self-harming while her father was in prison. She took an overdose. She is someone who has mental health difficulties. There is a serious risk that she may resume self-harming if he is deported. In our opinion the FTTJ was entitled to reach the conclusion that in respect of [S¹] the impact on her would be unduly harsh. It would go beyond what would necessarily be involved with any child faced with the deportation of a parent.
20. Mr Melvin made a number of criticisms of the report of the independent social worker. For all we know there may be some merit in some of the points he made but it was for the FTTJ to evaluate all the evidence including the independent social work report and to reach a view on it. As Dr Chevlan pointed out no issue was taken with the report at the FTT and there was no attack on the findings of fact in the appeal.
21. Accordingly we are satisfied that there is no error of law and we shall dismiss the appeal.

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 24 June 2019

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