



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15993/2017

THE IMMIGRATION ACTS

Heard at The Royal Court of Justice
On 29 October 2018

Decision & Reasons Promulgated
On 01 April 2019

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

UMESH [P]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Layne, Counsel, instructed by Everest Law Solicitors

For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a national of Nepal, who was born on 4 September 1971. He claims to have entered the United Kingdom in February 2002, illegally, with the assistance of an agent.
2. The appellant was certainly present in this country in 2005, because in November of that year he was arrested on suspicion of rape and actual bodily harm, when he gave a false name. He was released on temporary admission, and reported monthly. He

was acquitted of these charges in May 2006 following a trial at Guildford Crown Court.

3. In August 2012 he married a Ms [R], then a Nepalese citizen, who had entered the UK lawfully in December 2006 and had been granted ILR in February 2012. It is the appellant's case (which was not contested on behalf of the respondent) that the appellant and his wife had met and started a relationship in 2008 and had started to cohabit in January 2012, some seven months before they married.
4. The appellant applied for leave to remain on the basis of his marriage to Ms [R], and this was eventually granted in September 2014, that leave being valid until 17 March 2017.
5. Prior to the grant of leave to remain to the appellant, Ms [R] had applied for naturalisation as a British citizen, which was granted. On 27 April 2014 the appellant and his wife had a daughter, [CP], who is a British citizen by descent.
6. On 9 February 2017 the appellant was convicted (following a trial at which he had pleaded not guilty, despite what the judge regarded, as set out within the sentencing remarks, as "the clearest possible evidence") of fraud by way of false representation. The appellant had persuaded a victim, a Mr Shrestha, to pay him £15,000 in cash for which he had said he would procure valid visas for himself and his wife. He had never intended, as is clear from the sentencing remarks, to procure these visas but, as the judge states "this whole episode was a scam on your part from start to finish". What the appellant did was he obtained documents which were forgeries and these were the documents which were handed over to the victim.
7. The appellant was sentenced to 30 months' imprisonment, the Sentencing Judge stating that "in my judgement the only mitigating factors of any weight in your case are your previous good character, which you have now of course lost, and the unfortunate effect on your wife and child". However, as the judge goes on to remark "You should have thought about that unfortunate effect on your wife and child before you started on this fraud".
8. Prior to the expiry of his leave to remain, the appellant applied for further leave to remain on the basis of his relationship with his wife and child, both British citizens, but rather than give consideration to this application, on 18 May 2017 the respondent notified the appellant of her (as the respondent then was) intention to deport him, pursuant to Section 32(5) of the UK Borders Act 2007. Following representations made on behalf of the appellant, on 10 November 2017 the respondent made a deportation order.
9. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Oxlade, sitting at Hatton Cross on 24 July 2018. In a decision and reasons prepared two days later, on 26 July 2018 and promulgated the following day, Judge Oxlade dismissed the appellant's appeal.

10. The appellant now appeals to this Tribunal, permission having been granted by First-tier Tribunal Keane on 6 September 2018.

Judge Oxlade's Decision

11. In an extremely thorough and detailed decision, Judge Oxlade set out the applicant's case, analysed the tasks she had to perform, considered the evidence which had been given, both orally and what was contained within the file, and then gave reasons for her decision.
12. The appellant's case can be summarised briefly. It had been submitted on behalf of the appellant that although Section 117C of the new Part 5A of the Nationality, Immigration and Asylum Act 2002 applied, this simply reflected the Immigration Rules and added nothing to them. The substantive submission relied upon by the appellant at the hearing before Judge Oxlade, as recorded when she set out the closing submissions from paragraph 38 to 47 of her decision was that having regard to paragraph 399(a) of the Immigration Rules, the deportation of this appellant would not be proportionate because it would be unduly harsh for his 4 year old daughter either to go with him to live in Nepal or alternatively to remain in the UK without him. It was accepted that 399(b) would not apply because the relationship between the appellant and his wife had not been formed at a time when the appellant had been in the UK lawfully and his immigration status was not precarious (as required under paragraph 399(b)(i)). The appellant's Counsel did not before Judge Oxlade seek to argue either that the appellant would be entitled to remain under Article 8 outside the Rules. His case was put solely on the basis that the effect on his daughter would be "unduly harsh", it being accepted that the respondent's obligation to consider the best interests of that child pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009 was reflected within paragraph 399(a) of the Rules.
13. Having considered all the evidence very carefully, Judge Oxlade concluded first that it would not be unduly harsh for the appellant's daughter to live with the appellant (and her mother) in Nepal if that is what the family chose to do but, in any event, should the family decide that the appellant's wife and daughter would remain in the UK without the appellant, the effect of the appellant's daughter continuing to live in the UK without her father would not be unduly harsh either (that alternative finding is at paragraph 62).
14. As there was no other basis upon which the deportation order could be arguably challenged, Judge Oxlade dismissed the appeal.

Grounds of Appeal

15. Both limbs of the judge's decision were challenged. With regard to the finding that it would not be unduly harsh for the appellant's daughter to return with him to Nepal, it was submitted that the judge had failed to have sufficient regard to the Nepal Citizenship Act 2006, which, it was asserted, would require the appellant's daughter

to renounce her British citizenship in order to acquire Nepalese citizenship. At paragraph 6 of the grounds it was stated as follows:

“It is submitted that under section 11, the appellant’s daughter would have to relinquish her British citizenship if she had to live in Nepal”.

16. At paragraph 52 of her decision, Judge Oxlade had found that the appellant’s daughter was a Nepalese citizen by descent by operation of Section 3 of the 2006 Nepal Act, but had stated that it was unclear whether or not this would require her to renounce her British citizenship. It was submitted that in order properly to consider the child’s best interests, as the judge was required to do pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009, the judge needed to make a finding as to whether or not the child would be able to keep her British citizenship. British citizenship was an important factor as stated by the Supreme Court in *ZH (Tanzania)* [2011] UKSC 4. At paragraph 9 of the grounds, with regard to whether it was in the child’s best interests to move to Nepal, it was said that:

“the judge’s failure to attach significant weight to the following factors:- the appellant’s daughter’s British citizenship, the fact that the appellant’s daughter had an unqualified right of abode in the UK, that she has spent all her life in the UK, that she has never been to Nepal, that she is settled in school and doing well (as evidenced by the school reports in the appellant’s bundle which were before the judge) amounts to an error of law”.

17. With regard to the judge’s alternative finding that it would not be unduly harsh for the appellant’s daughter to live in the UK without him if he was deported to Nepal, the submission is made as follows:

“It is submitted that the judge failed to take into account that the appellant’s daughter is 4 years old; that she is an only child; that she has [a] deep emotional bond with her father; from the age of 4 to 14 years she will be deprived of her father’s presence and influence in her formative years for at least ten years. It is further submitted that the judge failed to consider in relation to this, Christine Fortune’s expert report in which she had stated at page 4: *‘I also have concerns about the wellbeing of her daughter if [the appellant’s wife] is not to be reunited with her husband in the UK. It was clear from my observations that [the appellant’s daughter] is well-cared for and loved by her mother but the negative effect on a child living with a depressed and stressed parent have been well-documented for some time (Downey G, Coyne J C 1990, A Billings and R Moos 1983). Young children are adaptable and resilient in the short-term but if the situation [the appellant’s wife and daughter] are in continues I consider that there will be a detrimental effect on [the appellant’s daughter’s] mental health and wellbeing as well as on [the appellant’s wife’s]’*”.

Judge Keane’s Reasons for Granting Permission

18. Judge Keane only dealt in his reasons with the challenge to the judge’s decision that it would not be unduly harsh for the appellant’s daughter to go with him to live in Nepal. He considered it was arguable (on the basis of the grounds advanced) that

the appellant's daughter would have to renounce her British citizenship upon settling in Nepal and that the judge arguably had not accorded adequate weight to that arguably material consideration when considering where the best interests of the child lay. In particular Judge Keane noted that Judge Oxlade had not anywhere within her decision accorded weight to the child's British citizenship.

19. Judge Keane does not appear to have considered at all whether the alternative reason given by Judge Oxlade for dismissing the appeal (that the effect on the appellant's daughter were she to remain in the country while her father was deported would not be unduly harsh) was sustainable.

The Hearing

20. I heard submissions on behalf of both parties, following which I reserved my decision. Immediately following the hearing I read the file and my notes of the hearing, and reached a provisional view as to what my decision would be. Regrettably, however, the file was then mislaid and my Decision was not then finalised and communicated to the parties. However, the file has now been located and I now give the decision I had originally intended to give, but much sooner. The Tribunal apologises to the parties for the delay.
21. I shall not set out below everything which was said to me during the course of the hearing, which is contained within my Record of Proceedings, but shall refer only to such of the submissions as are material. However, I have had regard to everything which was said during the course of the hearing as well as to all the documents contained within the file, whether or not specific reference is made to any particular document or submission below.

Submissions

22. On behalf of the appellant, Mr Layne relied on the grounds. When finding that it was not unduly harsh to expect the appellant's daughter to return with him to Nepal, Judge Oxlade had failed to consider whether under the Nepal Citizenship Act 2006 the child would need to renounce her British citizenship. Although it was accepted that that point was not argued, nonetheless the judge should not have assumed that she would not. It was accepted that there would be no bar to the child accompanying her parents on their return to Nepal, and the judge was correct when stating at paragraph 52 that there was not a legal impediment to her living there; nonetheless it would be unduly harsh to require a British citizen child to live in Nepal or to require her to give up her British citizenship.
23. While relying on his grounds, Mr Layne did not make further oral submissions with regard to the alternative basis upon which the judge had dismissed the appeal, namely that the effect on the appellant's daughter of her father's deportation would not be unduly harsh were she to remain in the UK with her mother.
24. In answer to a question from the Tribunal, Mr Layne accepted that the Tribunal was bound by the recent decision of the Supreme Court in *KO & Ors* [2018] UKSC 53

which had been handed down on 24 October 2018, after Judge Oxlade’s decision, and also after the grounds had been settled and permission had been given in this case to appeal that decision. It was accepted that the test of what was “unduly harsh” was now a tough test.

25. On behalf of the respondent, Mr Duffy referred first of all to Section 10(3) of the 2006 Nepal Act, whereby it was provided that in the case of a child, a decision had to be taken with regard to nationality (that is whether or not to retain Nepalese citizenship and renounce foreign nationality or retain foreign nationality) within two years of the child being 16; in other words the child would have until she was 18 to make up her mind whether or not she wished to retain her British citizenship.
26. As to whether or not the effect on the child would be “unduly harsh”, the appellant needed to establish not just that it would be unduly harsh to expect the child to accompany him to Nepal, but also that the effect on her would be unduly harsh were she to remain in the UK while her father was deported. Following the decision of the Supreme Court in *KO*, this was now a difficult hurdle to overcome, and there is nothing identified within the grounds which amounts to more than a disagreement with the judge’s decision that the effect on the appellant’s daughter of the appellant’s removal were she to remain in the UK would not be unduly harsh. The judge had taken full account of the arguments which had been put before her and the facts were all considered. At paragraph 59 for example the judge had considered the long-term effect on the child of an absent parent and also the possibility of a deterioration in the mother’s mental health. At paragraph 61 the judge considered the arguments which had been advanced with regard to the mother not coping well, but gave her reasons for rejecting these arguments. In light of the reasons given the finding at paragraph 62 that the effect on the appellant’s daughter of remaining in the UK without her father would not be unduly harsh are entirely rational and sustainable.
27. Finally, the appellant had not adduced any expert evidence with regard to the law in Nepal and the judge had perfectly properly not engaged with the Nepalese legislation, because there was an absence of material before her upon which she could do so. However, in any event, as the child would have until she was 18 to make a decision as to whether to retain British citizenship, it would not be unduly harsh were she to accompany her parents to Nepal (if that is what they chose) and make her decision then.

Discussion

28. It is useful to set out the relevant Rules, as follows:

“Deportation and Article 8

A398. These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom’s obligations under Article 8 of the Human Rights Convention;

- (b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
- (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (c) ...

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) ... applies if –

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported ...".

29. This appellant falls within the provisions of paragraph 398(b) because he had been sentenced to a period of imprisonment of less than four years but at least twelve months. Accordingly, as it is common ground that there are not "very compelling circumstances over and above those described in paragraphs 399 and 399A" the public interest in deportation will be sufficiently strong as to make that deportation proportionate unless, on the facts of this case, the appellant is able to establish both that it will be unduly harsh for his daughter to live in Nepal and that it would be unduly harsh for her to remain in the UK without him.

30. For present purposes, as is common ground between the parties, the provisions set out within section 3C of the 2002 Act mirror the relevant rules.

31. I consider Judge Oxlade's decision to be thorough, detailed and well-reasoned. It is also compatible with the guidance subsequently given (but with retrospective effect) by the Supreme Court in *KO*, in which (at paragraph 27) the "authoritative guidance as to the meaning of 'unduly harsh' in this context" given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v SSHD* [2015] UKUT 223, referring to the "evaluative assessment" required of the Tribunal, was set out with approval:

"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 advert 'unduly' raises an already elevated standard still higher".

Later, when referring to the approach taken recently by the Upper Tribunal in *KO* itself, at paragraph 35, the Supreme Court stated as follows:

"35. Miss Giovanetti for the Secretary of State takes issue with that alternative reasoning, which she criticises as applying too low a standard. I agree. The alternative seems to me to treat 'unduly harsh' as meaning no more than undesirable. Contrary to the stated intention it does not in fact give effect to the much stronger emphasis of the words 'unduly harsh' as approved and applied in both *MK* and *MAB*."

32. The Supreme Court in *KO* at paragraph 43, also referred approvingly to "the guidance given in *MK* and later cases as to the high hurdle set by the "unduly harsh" test. The Supreme Court was also keen to emphasise that it was important to have regard to the real world in which parents regularly made decisions to relocate with their children to another part of the world.
33. It is clear in the light of the decision in *KO* that without more it will not be "unduly harsh" for a child to accompany her parents to what is the country of their birth, where, as the judge found, they would be perfectly capable of adapting and continuing their family life should that be what they chose to do. In the real world, this happens all the time, and while in a deportation case, the parties might have chosen to remain in this country, as this Tribunal stated in *MK* "'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult ... [but] poses a considerably more elevated threshold". As the Tribunal went on to state in that decision "Harsh ... denotes something severe or bleak". In order therefore to satisfy the "unduly harsh" test, the effect on an applicant's child would have to be beyond severe or bleak. Judge Oxlade's decision that the effect on this appellant's daughter of accompanying her parents to Nepal would not be unduly harsh is accordingly entirely compatible with jurisprudence culminating in the decision of the Supreme Court in *KO*.
34. Insofar as it is argued that Judge Oxlade ought to have had in mind that it would be unduly harsh to require the appellant's daughter to give up her British citizenship on moving to Nepal, which is how the case appears to be put within paragraph 6 of the

grounds (and was the main reason why permission to appeal was granted) this argument is undermined by two factors. The first is that, as accepted during the hearing before this Tribunal, there will be no impediment to the appellant's daughter accompanying her parents to Nepal without giving up her British citizenship and the second is that this is not a decision in any event which she would have to make until she approached her 18th birthday. On these facts, and having regard to the Supreme Court decision in *KO*, there is no arguable basis upon which it could legitimately be said that the consequences for the appellant's daughter of accompanying her parents to Nepal would be so far beyond bleak as to be unduly harsh.

35. Further and in any event, the judge gave full and adequate reasons for finding that it would not be unduly harsh if the appellant's daughter were to remain in the UK without her father. As Sedley LJ stated, when referring to the break-up of families caused by deportation in *A D Lee* [2011] EWCA Civ 348, "that is what deportation does". For the effect upon the remaining child to be "unduly harsh" there has to be serious hardship over and above the distress which will almost always be felt when a parent is deported. It is notable that the extract relied upon from within the expert report from Christine Fortune is to a large extent generic, referring to "the negative effects on a child living with a depressed and stressed parent [being] well-documented for some time". It is also clear that at paragraph 61 Judge Oxlade considered carefully that expert's report, noting that "the expert refers to the mother's depression, anxiety, lack of sleep, reliance on medication and concerns for how the mother would fare on a negative decision and coping in the long-term". However, as the judge also noted:

"the mother has in fact proved herself very capable, in the face of leaving Nepal, relocating to two different countries, negotiating living abroad, with different languages and different systems; she has coped with having a small child, the criminal proceedings, her husband being convicted, and then detained, losing their home, and being rehoused".

The judge also noted that the expert had given "little weight" to "this resourcefulness and resilience". In addition, the judge did not accept that the mother was alone in the UK without family support and gave her reasons for not accepting this.

36. The judge also noted as follows, still at paragraph 61:

"I had the opportunity to hear from the appellant's wife, and she struck me as a very determined person, well-able to fight her corner, and - though clearly upset - not bowed down by the challenges. The expert's report refers to her being close to her daughter, with deep affection between them. I find that she has managed exceptionally well on her own for the past fifteen months, is very proud of motherhood and despite the challenges is likely to continue to do so in the future".

37. It was only after having considered the mother's position as she did that the judge then reached her conclusion at paragraph 62 that "the daughter living in the UK without her father would [not] be unduly harsh".


38. This was a finding which the judge was entitled to make on the basis of the evidence before her and, as already noted above, it is very clearly and adequately reasoned. The challenge to the judge's decision on this aspect of the case amounts to no more than a disagreement with findings which were open to the judge without identifying any arguable error of law.
39. It follows that there being no material error of law in Judge Oxlade's Decision, this appeal must be dismissed.

Decision

There being no material error of law in the Decision of First-tier Tribunal Judge Oxlade, the appellant's appeal is dismissed.

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read "Ken Craig". The signature is written in a cursive style with a long, vertical tail on the final letter.

Upper Tribunal Judge Craig

Date: 26 March 2019