



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

Appeal Number: PA/10517/2018

THE IMMIGRATION ACTS

**Heard at Manchester Civil Justice Centre
On 19 July 2019**

Decision & Reasons Promulgated

On 13 August 2019

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR J

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Holmes, Counsel

For the Respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND REASONS

(given ex tempore)

Introduction

Mr J is a citizen of Iraq who has made a claim for international protection.
For that reason, I make an anonymity order.

Background

Mr J appealed against a decision of the Secretary of State for the Home Department ('SSHD') dated 8 August 2018 in which he refused his asylum and human rights claim. The SSHD did not accept that Mr J had a genuine and subsisting relationship with his two children in the United Kingdom ('UK'). Those children are both British citizens and were born in 2011 and 2013 respectively.

First-tier Tribunal (FtT) decision

Mr J appealed against that decision to the FtT. His appellant was heard by FtT Judge Davies and in a decision sent on 12 April 2019 he allowed the appeal on Article 8 grounds but dismissed the appeal on international protection grounds.

Appeal to the Upper Tribunal (UT)

The SSHD appealed against the FtT's decision, arguing that it had failed to provide adequate reasons for its finding that the effect of Mr J's deportation would be unduly harsh and failed to direct itself to the appropriate principles and the high threshold required by the unduly harsh test - see KO (Nigeria) [2018] UKSC 53. The SSHD was granted permission by FtT Judge Grant-Hutchison in a decision dated 3 May 2019.

Mr J cross-appealed against the FtT's decision, submitting that the FtT had failed to deal with the international protection claim and also argued that the Article 8 findings were not infected by an error of law.

In a Rule 24 notice dated 16 May 2019 the SSHD conceded that the international protection claim had not been considered but continued to rely upon the appeal against the human rights aspect of the decision.

The matter now comes before me to determine whether or not the FtT's decision contains an error of law in relation to the findings relating to the unduly harsh test, the matter having been conceded regarding international protection.

Hearing

At the hearing before me Mr Bates relied upon the grounds of appeal and invited me to find that the FtT provided inadequate reasons for the ultimate conclusion that Mr J's deportation would be unduly harsh upon his two children. Mr Holmes relied upon his written response and emphasised two particular points. Firstly, he invited me to note that the FtT reminded itself at [43] that the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal and submitted that when the decision is

read as a whole the FtT had done just enough in terms of directing itself to the unduly harsh high threshold.

Mr Holmes also reminded me that the factual background in this case is rather unusual because, as the FtT noted, the children reside with their grandfather as a special guardian because of reasons relating to a difficult history with their mother and her addiction to drugs. Nonetheless, Mr J saw the children according to the FtT three to four times a week. Mr Holmes therefore invited me to conclude that because there were these unusual facts, the FtT was entitled to find that the high threshold required was met.

After hearing from Mr Holmes, I indicated that I did not need to hear from Mr Bates because I was satisfied that there is an error of law in the FtT's findings regarding Article 8.

Legal framework

Paragraphs 399 and 399A of the Immigration Rules are reflected within section 117C of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). This is a case in which the FtT found Exception 2 in Section 117C(5) applies. The correct approach to Exception 2 has recently been considered by the Supreme Court in KO (Nigeria) (supra). In the only judgment Lord Carnwath said this at [23]:

"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."

Lord Carnwath also approved of the guidance given regarding the term unduly harsh in MK (Sierra Leone) v SSHD [2015] UKUT 223 (IAC). In that case the then President of the Upper Tribunal said this:

"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."

Discussion

The FtT summarised Mr J's relationship with his children at [34 to 35]. These paragraphs refer to Mr J having contact three to four times a week including taking them to the park unsupervised and occasionally picking them up from school. The FtT was satisfied that the relationship was and is genuine and subsisting and entirely beneficial

to the children, notwithstanding the stormy relationship Mr J clearly had in the past with the children's mother.

The FtT went on to find that given that the children have regular contact with Mr J there is clearly family life and if he were to be deported to Iraq that would effectively mean an end to that family life. The FtT then went on to refer to a number of general matters relating to Article 8 and concluded that because the relationship between Mr J and his children would be terminated it would clearly not be in the children's best interest for him to be deported. The final paragraph relevant to Article 8 reads as follows:

"I take into account that the evidence clearly indicates in this case that the appellant has a genuine and subsisting relationship with two British citizen children. The effect of the appellant's deportation upon the children would be unduly harsh and indeed not in the children's best interests."

During the course of submissions, I invited Mr Holmes to take me to the part of the FtT's decision in which there was a direction to the high threshold required by the unduly harsh test. Mr Holmes was only able to take me to paragraph 43, which deals with the seriousness of the offence. Of course, as made clear by KO (Nigeria), the seriousness of the offence has nothing to do with the unduly harsh test itself. The seriousness of the offence is simply a signpost by which a foreign criminal ends up having to meet the unduly harsh test by virtue of having a sentence of at least twelve months, which Mr J has.

Having read the decision as a whole, there is nothing to indicate that the FtT was aware of the elevated threshold required by the unduly harsh test. There is nothing to indicate that the FtT directed itself to the straightforward position on the unduly harsh test as enunciated by the Supreme Court. In addition, the FtT has failed to give adequate reasons for why the high test was met. Indeed, the FtT has done no more than describe what would ordinarily be faced by children who are involved in a case in which a parent is to be deported. The FtT was of course entitled to find that the children's best interest required their father's continued presence in their lives but that in itself is not sufficient to meet the unduly harsh test.

For those reasons, I am satisfied that the FtT's findings regarding Article 8 are inadequately reasoned and fail to apply the factual findings to the elevated threshold required by the unduly harsh test as set out in section 117C(5).

Disposal

This is a case in which there will need to be fresh findings regarding Mr J's protection claim. It is unclear at this stage the extent to which those findings will need to go into particular detail as to background, family, place of origin. The reason for that is that we are awaiting a country

guidance case on Iraq. It may be following that case that there may be limited fact-finding but there may also be considerable fact-finding. Although the matter is finely balanced I have come to the view that it is appropriate in this case, bearing in mind that Mr J has not had the opportunity to have his international protection claim considered in the first instance by the FtT fairly or properly, that that should be done again in the FtT.

I acknowledge that there will be limited findings to be made on the Article 8 aspect of the case but, drawing everything together and applying the relevant Practice Direction, I am satisfied that in this case it is appropriate for the matter to be remitted to another FtT Judge other than FtT Judge Davies.

Decision

The decision of the FtT contains an error of law both in relation to Article 8 and international protection and is set aside.

The decision shall be remade in the FtT and I remit it for those purposes to be heard by another FtT Judge other than Judge Davies.

Direction regarding anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his 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

UTJ Plimmer
Upper Tribunal Judge Plimmer

6 August 2019