



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: HU/08279/2017 (V)

THE IMMIGRATION ACTS

**Heard at Field House via Skype for
Business
On Tuesday 15 September 2020**

**Decision & Reasons
Promulgated
On Tuesday, 22 September
2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR O'NEILL [F]

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr C Yacoobali, Legal Representative, North Kensington
Law Centre

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of the First-tier Tribunal Judge Davey

promulgated on 2 January 2020 (“the Decision”). By the Decision, the Judge allowed the Appellant’s appeal against the Respondent’s decision dated 24 April 2017 refusing his human rights claims, made in the context of the Respondent’s decision to deport the Appellant to Jamaica. The Appellant’s claim is based on his relationship with his partner and children/stepchild as well as his private life formed in the UK.

2. The Respondent accepted that the Appellant’s stepchild, [JOS] could not be expected to go with the Appellant to Jamaica, presumably on the basis that he remains in a relationship with his biological parent or at least may wish to have contact with that parent. The Respondent also accepted that it would be unduly harsh for the Appellant’s partner [F] to go to live in Jamaica as [F] had lived her entire life in the UK. The Respondent did not accept that the Appellant’s children (currently aged five and six years) could not go to Jamaica given their young age and ability to adapt. The Respondent did not accept either that it would be unduly harsh for the Appellant’s partner and children/stepchild to remain without him in the UK. The Respondent also did not accept that the Appellant meets the Immigration Rules (“the Rules”) in relation to his private life. The Respondent did not accept that there are very compelling circumstances over and above the exceptions within the Rules and Section 117C Nationality, Immigration and Asylum Act 2002 (“Section 117C”) which would render deportation unjustifiably harsh.
3. The Judge concluded that it would be unduly harsh for the Appellant’s partner and children/stepchild to go with the Appellant to Jamaica or remain without him in the UK. He also concluded that the decision to deport was disproportionate when looked at outside the Rules. He allowed the appeal on that basis.
4. The Respondent appeals the Judge’s conclusions essentially on the basis that the Judge has failed to identify what it is in this case that satisfies the threshold of being “unduly harsh”. It is said that the Judge fails to point to evidence showing that the effect of deportation on the partner and children would be beyond the norm which is to be expected in a deportation case.
5. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 11 February 2020 on the basis that “[i]t is arguable that the judge has erred in making a finding that the criteria in paragraphs 399(a) and (b) are met without giving sufficient evidence and reasoning”. Permission is granted on all grounds although, in truth, the grounds are simply an expansion of one ground namely a failure to give reasons or explain by reference to the evidence why the Appellant should succeed.
6. On 23 April 2020, the President gave directions inviting the parties to consider whether the error of law issue could be determined on the papers and to make written submissions on that course and expanding upon the substance of the grounds and the Appellant’s response to them.

Those directions were given in light of the Covid-19 pandemic and the effect on the Tribunal's ability to convene oral hearings as normal.

7. On 16 June 2020, the Appellant's representatives filed a response to the appeal in reply to the directions but which I have also treated as the Appellant's Rule 24 response. The Appellant identifies as the crucial issue whether the separation of the children and mother from their father would be unduly harsh or otherwise disproportionate in the context of the public interest. The Appellant said that the Judge had placed particular weight on the reports of two independent social workers and the role which the Appellant plays in the family as well as the fact that the family had preserved the family relationship via contact whilst the Appellant was in prison.
8. The Respondent filed a skeleton argument on 24 June 2020 to stand as her case. That had been previously filed in May 2020 with a wrong reference. The Respondent relied in particular on a decision of the Tribunal in Imran (Section 117C(5); children, unduly harsh) [2020] UKUT 83 (IAC) and KF (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 2051. It is said that the Judge failed to have regard to the guidance given in those cases and in other case law and the Respondent repeats that the Judge has failed to provide adequate reasons for his conclusions that deportation would have an unduly harsh effect.
9. A response to the Respondent's skeleton argument was filed in relation to the case-law cited therein. The Appellant drew attention to the cases cited by the Judge, in particular PG (Jamaica) v Secretary of State for the Home Department [2019] EWCA Civ 1213 and KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 ("KO (Nigeria)") (see [12] of the Decision).
10. By a Note and Directions sent on 6 July 2020, the parties were informed that the hearing would take place by remote means absent any objection. Neither party objected to that course. The parties were therefore given notice that the hearing would be conducted via Skype for Business. The hearing proceeded without any technical problems and both parties confirmed that they were able to follow the hearing throughout. I had before me the written submissions as aforesaid, the Appellant's bundle and skeleton argument which were before Judge Davey and other sundry documents.
11. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

12. Although I did not follow at first reading the Judge's reasoning at [7] of the Decision as to why it would be unduly harsh for the Appellant's children to go to Jamaica, I accept Mr Yacoobali's submission that this was a conclusion open to the Judge based on [5] of the Decision where the Judge points out that the Respondent considered it unduly harsh for [JOS] to leave. Although the same reasoning does not necessarily translate directly to the Appellant's biological children, in circumstances where the Respondent also accepted that [F] could not go to Jamaica, it is difficult to see how the young children could be expected to leave as to do so would involve separation not only from their half-sibling but also from their mother. Mr Melvin did not challenge this part of the Decision in his submissions. The focus is therefore on the Judge's reasoning and conclusions whether it would be unduly harsh for the Appellant's family to remain without him in the UK.
13. In order to consider the grounds and submissions in context, it is necessary to set out the Judge's reasoning and conclusion in relation to paragraph 399 of the Rules. The Judge's conclusion that the appeal should be allowed focusses only on the Appellant's family life and I do not therefore need to deal with paragraph 399A of the Rules. I did not understand it to be disputed that the Appellant cannot meet that paragraph or the exception in Section 117C based on his private life. The Judge found that paragraph 399A was not met and that conclusion has not been challenged. The Judge did not place reliance on the Appellant's private life when concluding that deportation would also be disproportionate outside the Rules.
14. The Judge's reasoning appears at [15] and [20] to [25] of the Decision as follows:

"15. The issue therefore remains to what extent the impact of removing the Appellant or the children would be unduly harsh upon them; Similarly raised under the rules as in Paragraph 7 herein.

...

20. Whilst health issue of the Appellant's partner and of one of the children were raised, it did not seem to me, other than as a fact that they have occurred, they added much to the factors I took into account in particular that the child BNFF has asthma and certain health problems that may be aged related and the Appellant's partner has undoubtedly been feeling the effects of depression and anxiety over the uncertain status of the Appellant. I concluded that those health issues are not immaterial but of no particular weight.

21. In respect of the social workers' reports, whose qualifications and experience are set out in their reports, I take them into account in the context of the best interests assessment with reference to Section 55 BCIA 2007. It seemed to me material factors were that, first, the Appellant had been living in the family home since his release from prison in January 2018. Secondly, that the Appellant's partner and the children had visited the Appellant every week/fortnight when he was in custody (AB96). Thirdly, separating the children from the Appellant would not be in their best interests, in the reports paragraphs 20.8, 23.3,

23.4, 25.2, 26.3, 24.6 and 26.6 (AB99, 101-103, 105 and 106). Fourthly, that communication by modern technology which the Secretary of State advanced as a way of maintaining family relations did not I find replace or replicate the emotional and direct physical contact benefits (AB104). Fifthly, that the eldest son JOS's wishes and feelings need to be taken into account, bearing in mind his age (AB108). There was no doubt that the social workers observing the Appellant's family have seen them at various times and on various occasions and been able to observe both their behaviour at home and in one case attending at a prison visit with the impact of seeing the Appellant and the effects of separation at the end of the prison visit.

22. I found the social workers' evidence compelling as to the bond between the Appellant with his family and the positive role he plays in their lives and in the family home generally (AB109-122).

23. Ms Mwape considered the implications of removing the Appellant from the children's lives and she also reported the strong bond and positive relationship between the Appellant and the children and the significant part he plays in the family home (AB96-107). The report therefore descends into particulars as to the nature of the relationships with the Appellant and the children and I simply cite the conclusion she found to be read at AB86-91, in terms of the positive contribution the Appellant makes to the children's lives and the benefits to them of his presence continuing. Further, it is the view of Ms Mwape that the Appellant is the cornerstone of his family and that the effects of his removal would be very significant in terms of both the Appellant's partner and the two children JOS and BNFF. The issue of the child DIVF is not be ignored but those reports particularly refer to particular impacts on those older children.

24. Ms Mwape also interviewed the Appellant's brother and her report provided a clear picture of the family bond and the consistency of opinion as to the positive part the Appellant plays in their lives. I remind myself that the Secretary of State did not have the advantage of seeing the independent social workers' reports and Mr Main did not identify any particular flaws in the assessments that those persons had made or that there were matters which appeared to be ignored which might have affected the conclusions reached. I also had the letter of Mr D Mills supporting the Appellant and that of Ms Rojow. The school at which the child JOS attends also had the report from the assistant head teacher, Ms Goodyear, dated 5 June 2019 for JOS which spoke to her assessment of the impact of deportation and as she put it 'the forced removal of a key care giver would have detrimental effect for any child'.

25. In the light of the social workers' report and the evidence as a whole, I concluded that the children's best interests lie, as British nationals, to enjoy the benefits of being British nationals in the UK with their British national mother and that it was not in their best interests to be separated from their father, the Appellant I concluded that the impact of removing the Appellant on both [F] and the children would be unduly harsh and could not be satisfactorily replaced or replicated by modern means of communication. The removal of the Appellant would be unduly harsh upon [F] who it was accepted to be in an ongoing and loving relationship, and would not be in the best interests of the emotional development of the children. I therefore take the conclusions and those set out in Paragraph 7 above as relevant to consideration of the public interest question and the proportionality of the Respondent's decision."

15. In light of [15] of the Decision and what is said in the final sentence of [25], in order to consider the reasoning as a whole, it is necessary to import what is said at [7] of the Decision as follows:

“Whether the Appellant arrived in the UK in 2009 or 2011, ultimately it does not seem to me the Appellant would have met sub-paragraph (a) of paragraph 399A, nor are there obviously any very significant obstacles to his integration into Jamaica. Life might be hard there but that did not indicate that he could not reintegrate. In view of what the Respondent did accept I find the Paragraph 399(a)(i), (b)(i) were met and that it would be unduly harsh for the children to live in Jamaica or remain in the UK without the Appellant Paragraph 399 sub paragraphs (a)(ii), (a) and (b). It is accepted that sub paragraphs (b) and (b)(i) apply. In the light of the acceptance that it would be unduly harsh for [F] or [JOS] to relocate to Jamaica I conclude the same factors would engage sub-paragraph (b)(ii). I therefore will consider if sub-paragraph (a)(ii)(b) and (b)(iii) are met i.e. it would be unduly harsh for the children BNFF and DIVF or [F] to remain in the UK without the Appellant: the Secretary of State did not accept that it would be so”.

16. Although it might not be helpful to set out what is and is not accepted by reference to the paragraphs of the Rules which have become quite complicated in their numbering (and which has led to some potential ambiguity in relation to the position of the children midway through the passage), it is clear from the final sentence that the Judge understood that what he needed to consider namely whether it would be unduly harsh for the Appellant’s partner and children to remain in the UK without him. I have already noted that there is no challenge to the Judge’s findings as to the Appellant’s private life nor as to the conclusion that it would be unduly harsh for the Appellant’s partner and children to go to Jamaica with him. What is said at [7] of the Decision read with [15] of the Decision does identify the issue which the Judge needed to decide.
17. Nor do I accept the Respondent’s grounds in relation to the consideration of the evidence. The Judge has set out in the passage which I have cited at [14] above and the paragraphs between [15] and [20] of the Decision the evidence to which he had regard and what he made of that evidence.
18. That leaves only the question whether the Judge has adequately explained why it would be unduly harsh for the Appellant to be deported leaving his family in the UK. It is on this point that I consider the Respondent’s grounds to have some potential merit for reasons which I now explain.
19. I begin by noting the Appellant’s reliance on the recent Court of Appeal judgment in HA (Iraq) and RA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176. I did not need to hear any detailed submissions on the content of that judgment. Mr Melvin informed me that consideration was being given by the Respondent to an appeal of that decision to the Supreme Court on limited aspects but that the

Respondent did not consider the judgment to be contrary in the main to the previous case-law. Mr Yacoobali accepted that the judgment still makes clear that “unduly harsh” involves a high threshold for an appellant to surmount because of the context of deportation of foreign criminals and the importance of that to the public interest. In particular, at [44] of the judgment, the Court pointed out that “[t]he underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category” (see also [51] of the judgment).

20. The difference if difference there be relates to what is also said at paragraph [44] that the question of the need for the degree of harshness to “go beyond what would necessarily be involved for any child faced with the deportation of a parent” cannot be read literally. The point to be taken from KO (Nigeria) (which is there being analysed) is that “some level of harshness is to be regarded as ‘acceptable or justifiable’ in the context of the public interest in the deportation of foreign criminals and what ‘unduly’ does is to provide that Exception 2 will only apply where the harshness goes beyond that level.” The change in emphasis in the Court of Appeal’s judgment does however undermine the point made in the Respondent’s grounds in this case which relies on a necessity to show something beyond the normal consequences of deportation. That this is not the test is now confirmed expressly by the Court of Appeal in HA (Iraq). The impact of deportation on the child or children in question (or the partner) is to be considered individually based on the evidence in each case to identify whether the high threshold which must be shown has been surpassed.
21. Turning back therefore to the Decision, the issue for me to consider is whether the Judge has recognised that the threshold to be met is a high one and has explained how it is met based on his analysis of the evidence.
22. I asked Mr Yacoobali to identify to me any part of the Decision where the Judge had set out what is meant by the test of “unduly harsh”. He was unable to do so. Although those words are used on a number of occasions including at [25] where the Judge’s conclusion on that issue is found, there is no indication that this involves a high threshold. Indeed, taking [25] of the Decision alone, one might think that this was not a deportation case at all if the only reasons for finding that the Appellant’s deportation was disproportionate were that the children’s best interests were better served by their father’s presence and that they and their mother were British. I leave out of account the reference to the “public interest question” in the final sentence which seems designed to move on to the next section dealing with Article 8 outside the Rules but even that sentence does not identify the strong public interest at play. One finds that public interest articulated only at [26] of the Decision and even there not in the context of the high level of that interest.

23. Even when setting out the statutory provisions which apply (including Section 117C) at [14] of the Decision, the Judge's focus is on Section 117B and not Section 117C so that there is no reflection of the public interest inherent in deportation of foreign criminals.
24. I accept of course that the Judge recognised that this was a deportation case. He has set out the Appellant's offending at [2] and [3] of the Decision although even in those paragraphs, there is little reflection on the public interest in both the prevention of crime and deterrence, nor that the Appellant's offences involved the supply of Class A drugs and the societal impacts of such offences.
25. Mr Yacoobali relied on what he said was a recognition of the case-law which applies at [9] to [12] of the Decision. I accept that there is some reference there to clearly relevant cases. However, for reasons which are not apparent, the Judge refers only to those in the context of the "very compelling circumstances" test and not to the threshold level which applies to the exception before one reaches the issue whether there are very compelling circumstances over and above the exceptions. Whilst clearly the threshold is higher in relation to the very compelling circumstances over and above the exceptions than it is in relation to the exceptions themselves (which are self-contained and therefore contain no balancing exercise with the offending/ public interest), if the Judge has erred by failing to take into account the threshold when considering the exceptions, that has a potential knock-on effect on his conclusion that deportation is disproportionate when the balancing exercise is undertaken.
26. Finally, in this regard, there is some ambiguity in the Judge's terminology at [15] of the Decision. It is not a question of the "extent" to which the impact is "unduly harsh" but whether it reaches the threshold.
27. For those reasons, I am therefore concerned that the Judge may have failed properly to assess the level of impact which deportation is required to have when reaching his conclusion that there is an unduly harsh impact on both the Appellant's children and his partner.
28. Whether that is so, however, depends on a consideration of the whole of the Judge's reasoning. As I have already said, if [25] of the Decision stood alone and were the sole reasoning, I would not be satisfied that the Judge had properly understood and applied the test. However, it is not. What is there said has to be read with the whole of the section leading up to it including [20] to [24] of the Decision which I have already cited and in particular to the paragraphs of the social workers' reports to which the Judge makes reference.
29. In relation to what is said in those paragraphs, I reject Mr Melvin's submission that the Judge has failed to ask himself the right question namely what is the impact on the Appellant's partner and children of his

deportation rather than what his presence within the family adds. Whilst I would accept that some of the references in the section I have cited above do focus on the position of the Appellant within the family and the benefit he brings, that is a necessary corollary of the consideration of the impact if he departs the UK and, in any event, there is reference to the evidence about the effect of separation at [21] and [23] of the Decision.

30. I have carefully read the social workers' reports and in particular the paragraphs relied upon by the Judge. Sections 22, 23, 24 and 25 of the report of Ms Mwape in particular support what the Judge says about the adverse impacts of deportation on the Appellant's partner and children at [21] and [23] of the Decision. Her report is supported by the earlier report of Mrs Lyons. Although that report is directed at a chronologically earlier period when the Appellant was in prison, it is instructive as to the level of the bond between the Appellant and his family, as the Judge observes at [21] of the Decision.
31. Whilst it might have been preferable for the Judge to have expanded on what is contained in those reports and provided some link between what is there said and his conclusion at [25] of the Decision, setting that in the context of the high threshold which applies, the social workers' reports and the Judge's analysis of them does provide an evidential underpinning for the conclusion reached that deportation would have unduly harsh impacts on the Appellant's partner and children.
32. For that reason, although I accept that it would have been preferable if the Judge had set out somewhere in the Decision an understanding of the high threshold in the test which he was applying when reaching his conclusion as to undue harshness, I am satisfied that, read in the context of the reasoning as a whole, the conclusion was one which was open to him and adequately reasoned. As Mr Yacoobali frankly accepted, the conclusion reached may be a generous one, particularly where Class A drugs offences are concerned. However, the issue for me is whether the Decision read as a whole discloses an error of law and not whether it is the decision I would have reached on the evidence. For the reasons I have given, I have reached the conclusion that an error of law is not disclosed by the grounds.

CONCLUSION

33. For the above reasons, I am satisfied that the grounds do not disclose a material error of law in the Decision. I therefore uphold the Decision.

DECISION

The Decision of First-tier Tribunal Judge Davey promulgated on 2 January 2020 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

Signed L K Smith
2020
Upper Tribunal Judge Smith

Dated: 17 September