Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01038/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 29 March 2019	**On 29 April 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

I P T
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Mr H Dieu instructed by NLS Solicitors

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent (IPT). This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. This appeal comes before the Upper Tribunal having been remitted by the Supreme Court as one of a number of cases considered by it in KO (Nigeria) and Others v SSHD [2018] UKSC 53.

3. It was common ground that the appeal is by way of a re-hearing of the respondent's appeal (whom I shall hereafter refer to as the "claimant") challenging the decision of the Secretary of State taken on 9 May 2014 refusing to revoke a deportation order made against the claimant on 29 October 2009 pursuant to the automatic deportation provisions in s.32 of the UK Borders Acts 2007.

Background

4. The claimant is a citizen of Jamaica who was born on 28 February 1966. He is, therefore, 53 years old.

5. The claimant arrived in the UK on 23 September 1988 as a family visitor. His leave was extended on a number of occasions until 28 March 2002.

6. On 2 December 2000, the appellant married a British citizen whom I shall refer to as "MT" and who was born on 2 August 1965. She already had three children as a result of a previous relationship.

7. On 30 September 2002, the claimant and MT had a son ("R"). He is now aged 16 years old. He is in year 11 and is taking his GCSEs this summer.

8. On 23 January 2009, at the Bristol Crown Court the claimant was convicted of four offences of supplying class A controlled drugs, namely cocaine. On 11 February 2009, he was sentenced to 42 months' imprisonment.

9. On 29 October 2009, the Secretary of State made a deportation order against him under the UK Borders Act 2007.

10. The appellant appealed and, on 14 January 2010, an Immigration Judge dismissed his appeal. The claimant was deported to Jamaica on 21 July 2010.

11. On 23 September 2013, the claimant sought revocation of that deportation order. That application was refused on 9 May 2014.

12. The appellant appealed to the First-tier Tribunal and in a decision given on 5 September 2014, the First-tier Tribunal allowed the claimant's appeal. The Tribunal concluded that the consequence of maintaining the deportation order were "unduly harsh" on R who has special education needs and medical problems associated with a condition with which he was born, namely microcephaly. On that basis, the First-tier Tribunal allowed the claimant's appeal.

13. The Secretary of State unsuccessfully appealed to the Upper Tribunal which dismissed his appeal on 12 January 2015.

14. The Secretary of State further appealed to the Court of Appeal which allowed the Secretary of State's appeal and remitted the appeal to the Upper Tribunal.

15. However, the claimant further appealed to the Supreme Court was dismissed (at [39] – [45]) but the Supreme Court confirmed the order of the Court of Appeal remitting the claimant's appeal to the Upper Tribunal.

The Hearing

16. Thus, the appeal came before me on 29 March 2019. The claimant was represented by Mr Dieu and the respondent by Mr Howells.

17. It was common ground between the parties that the sole issue that I had to decide was whether the maintenance of the deportation order against the claimant was "unduly harsh" on his wife, MT or upon his son, R.

18. In support of the claimant's appeal, Mr Dieu relied upon an appellant's bundle of 79 pages. He indicated to me that there were no other relevant documents upon which the claimant relied.

The Law

19. As I have already indicated, it was common ground before me that the only relevant issue in determining whether the claimant's appeal should succeed under Art 8 was whether the maintenance of the deportation order was "unduly harsh" upon MT or R.

20. That position, undoubtedly flows, from the relevant Immigration Rules dealing with the revocation of a deportation order in paras 390 – 392 (read with paras 398 and 399) of the Immigration Rules (HC 395 as amended). As the claimant had been convicted of an offence for which he was sentenced to 42 months' imprisonment, namely a period of imprisonment of at least twelve months but less than four years, his deportation would not be in the public interest if the impact upon his partner, with whom he has a genuine and subsisting relationship, or upon his child (who is a British citizen) with whom he has a genuine and subsisting parental relationship would be "unduly harsh". That is the effect of reading across, by virtue of para 390A, the provisions in para 398(b) and 399(b) and 399(a).

21. It was not in dispute, any more than it was before the Supreme Court, that although this appeal concerned the revocation of a deportation order, rather than the making of a deportation order, the "public interest question" under Art 8 had to be determined in accordance with Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002"), in particular s.117C(3) and (5) that provide respectively:

> "(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.

...

(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."

22. The appeal had proceeded since the First-tier Tribunal's decision on the basis that the claimant has a "genuine and subsisting relationship" with his partner and child. Mr Howells, before me, did not suggest otherwise.

23. Mr Dieu did not seek to rely upon s.117C(6) which, even in the case of a foreign criminal who has been sentenced to less than four years' imprisonment but more than twelve months, that, even where Exception 2 does not apply an individual may resist deportation (and by extrapolation to revoke a deportation order) where there are "very compelling circumstances, over and above those described" in Exception 2 (see NA(Pakistan) and another v SSHD [2016] EWCA Civ 662 and RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC))

24. The position taken before me in respect of s.117C(6) no doubt reflects the fact that the totality of the circumstances relied upon by Mr Dieu related either to the impact upon MT or on R if the deportation order were maintained. In other words, all the relevant circumstances fall to be considered under the "unduly harsh" test in s.117C(5) such that the claimant either succeeded on that basis and that there was no conceivable prospect of identifying circumstances "over and above" those circumstances and which could amount to "very compelling circumstances".

25. In relation to the "undue harsh" test, the Supreme Court in KO (Nigeria) clearly identified that the public interest was not a factor to be taken into account in applying that test. In that regard, therefore, the Supreme Court overruled the earlier Court of Appeal's decision in MM (Uganda) v SSHD [2016] EWCA Civ 617. In other words, the "undue harsh" test does not entail a balancing exercise balancing the public interest in deportation against the circumstances or impact upon individual partner or child.

26. Giving the judgment of the Supreme Court in KO (Nigeria), Lord Carnwath approved earlier statements of the Upper Tribunal in MK (Sierra Leone) [2015] UKUT 223 (IAC) at [46] that:

> "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 more severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raised an already elevated standard still higher."

27. Lord Carnwath at [23] noted that the expression "unduly harsh":

> "seems clearly intended to introduce a higher hurdle than that of 'reasonable' under section 117B(6)."

28. He continued that:

> "Further, the words '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."

29. Lord Carnwath added that the test could not be equated with the requirement to show "very compelling circumstances" (at [23]).

The Submissions

30. On behalf of the claimant, Mr Dieu relied on the fact that there had now been some 8-9 years since the claimant was deported and, he submitted, it was now clear what effects that had had upon his wife and R. He relied upon the bundle of documents. He drew my attention to two letters from R's GP dated 7 November 2018 (at pages 9 – 10) and 13 February 2019 (at page 7).

31. Mr Dieu relied upon these documents as identifying R's circumstances, including that he had a congenital condition, microcephaly which resulted in him having learning disabilities or difficulties. He has been 'statemented' and has a special needs co-ordinator providing 1:1 support at school. He struggles and requires extra support for examinations and the outcome of his GCSEs this summer is "likely to be below average".

32. Mr Dieu also relied upon the impact upon R at home where he "struggles with his fine motor skills" and is unable to use a knife and fork together and struggles with other daily living activities.

33. Mr Dieu particularly relied upon the final paragraph in the GP's letter dated 7 November 2018 which states:

> "[R's] continued separation from his father is having a significant impact on his current wellbeing. This is due to a lack of father figure present in the family home and additional support he is missing out on from not having his father around to assist him with his learning needs at school, and at home. His father's absence also means that there is less support to his mother surrounding his behavioural problems. Most significantly he is missing the love of a father to support his general wellbeing as he grows up. I therefore feel that the continued separation from his father is having a profound negative impact on [R]."

34. Mr Dieu also relied upon a brief letter from R himself (at page 6 of the bundle) in which R says he has not seen his father for nearly nine years and that he wants him to come back home.

35. In addition, in relation to MT, Mr Dieu relied upon a letter (again) from the GP dated 11 March 2019 (at page 5) which refers to MT struggling in raising R due to his learning difficulties. The GP notes that she suffers

from depression and that the court proceedings have had "quite a detrimental impact on her mental health". Her mental health is also affected by "concerns over her finances" due to her being unable to work at times due to her depression and lost income. The letter goes on to note that in November 2018, MT restarted taking an anti-depressant drug, namely sertraline on a daily basis.

36. Mr Dieu submitted that, although there was no documentary evidence to support this, MT's evidence was clear that R suffered from a fear of flying and that was why he had not accompanied MT to visit the claimant in 2010, 2013, 2015 and 2018. She had gone, she said in her evidence, with her cousin and there was no reason why R would not have travelled unless it was the case that he suffered from a fear of flying. Mr Dieu relies, in essence, upon this in support of the view that there was no realistic prospect of MT and R joining the claimant in Jamaica.

37. Mr Dieu submitted that taking all these features into account, the family were suffering in a number of ways that resulted in a profound and severe impact upon them which was not "mere difficulty or undesirability". He pointed out that, ordinarily, the deportation order, made in 2009, he could apply to re-enter in October 2010 following a period of ten years abroad.

38. Mr Dieu submitted that the impact of maintaining the deportation order would be unduly harsh.

39. On behalf of the Secretary of State, Mr Howells submitted that the effect of maintaining the deportation order was not "unduly harsh" on either MT or R. He submitted that while MT and R have had their difficulties they have coped without the claimant since 2010. Mr Howells submitted that the evidence showed that there was regular contact between R and his father, the evidence was that he spoke to him one or two times a week, sometimes by video calls. Mr Howells also relied on the fact that MT had visited Jamaica on a number of occasions in October 2010 (for two weeks), in 2013 (for two weeks), in 2015 (for two weeks) and in May 2018 (for three weeks).

40. As regards MT's mental health, Mr Howells submitted that, although the GP letter identified that she suffered from depression and since 2018 had again been taking sertraline, her evidence was that she had stopped taking sertraline in 2015 and so there was a gap of three years. He submitted that there was no evidence that her mental health difficulties required counselling or any other therapy. In addition, Mr Howells relied upon the fact that MT, in her evidence, had said that she had family living nearby and had regular contact with them, including three brothers and one sister.

41. As regards R, Mr Howells accepted that R has learning difficulties and microcephaly. Nevertheless, Mr Howells submitted that he was receiving support and care both under the community paediatric team which, according to the GP's letter, had last reviewed his circumstances in May

2015. He was also receiving special education needs support on a 1:1 basis in school. Mr Howells pointed out that R, according to the GP's evidence, would be sitting his GCSEs this year although the outcome was likely to be below average. Other than that support, MT had said that R's health was in general good.

42. Mr Howells submitted that it would not be unduly harsh for MT and R to join the claimant in Jamaica and, if they did not, the impact of the separation had not reached the threshold of being "unduly harsh".

Discussion and Findings

43. In reaching my factual findings, I have fully taken into account all the evidence relied upon by the parties, in particular the documents to which I was referred by Mr Dieu in the claimant's bundle and the oral evidence of MT.

44. The claimant was deported to Jamaica on 21 July 2010. Since that time, I accept the evidence of MT that she has made four visits to see him in October 2010 (for two weeks), in 2013 (for two weeks), in 2015 (for two weeks) and in May 2018 (for three weeks). On each of those visits, she was accompanied by her cousin.

45. Despite the separation, I accept that she has maintained a genuine and subsisting relationship with the claimant as his partner. Indeed, Mr Howells did not suggest otherwise.

46. R is the son of the claimant and MT. He is now 16 years old. He is in year 11 and is taking his GCSE exams this summer.

47. I accept MT's evidence that he maintains contact with the claimant by telephone (and sometimes video calls) between once and twice a week.

48. MT accepted that R had not accompanied her on her visits to see the claimant in Jamaica. She explained that R had a fear of flying and will not accompany her to visit the claimant. As I will turn to shortly, R's ongoing microcephaly has significantly impacted upon his development and has resulted in ongoing learning difficulties. There is no reference to R's 'fear of flying' in the supporting documents, in particular the GP's letter at pages 5, 7 and 9. In cross-examination, Mr Howells asked MT whether there were any supporting documents in relation to R's 'fear of flying'. MT accepted there were none but that she had mentioned it to the GP. Mr Dieu submitted that I should accept MT's evidence on this issue as there was no reason why, apart from this, that R had not accompanied MT on her four visits to see the claimant. I accept that submission. MT's evidence, on this matter, was persuasive.

49. I accept on the evidence that the claimant has a genuine and subsisting parental relationship with R.

50. Turning now to the circumstances of MT and R, MT has, in my judgment, coped with the claimant's absence and caring for R. The supporting documents (in particular the GP's letter at page 5) identify that she suffers from depression and struggles to work as a consequence of being a single parent with a teenage son with learning difficulties. Her concerns over her finances have also contributed to that. The letter notes that she has been unable to work at times and in November 2018 she restarted taking the anti-depressant sertraline daily. The letter notes that the "court battle itself" has had "quite a detrimental impact on her mental health".

51. MT, in her evidence, told me that her parents and siblings (three brothers and one sister) live nearby and she has regular contact with them. Her father now has dementia and is in residential care. Her mother is 92 years of age. The support she can obtain from them, therefore, is no doubt limited. However, in addition to R, the appellant's 25 year old daughter, as a result of a previous relationship, also lives with MT. MT works part-time in a supermarket. She told me that when she visited Jamaica her sister looked after R. She told me that she could not concentrate moving to Jamaica because her parents needed her, including her father who, as I have said, is in residential care.

52. R, as I already stated, suffers from microcephaly which has impacted upon his development and resulted in him having ongoing learning difficulties. He is supported, however, in school by a special educational needs teacher who provides frequent 1:1 support. Although I accept that he needs extra support in school, on the basis of the documentation, it is clear to me that that is being provided to him and that he is able to take his GCSEs this summer albeit, in the words of the GP, "the outcome is likely to be below average". I also accept that R requires support for his daily activities due to his neurodiversity. Since 2010, and indeed since the claimant's earlier imprisonment, MT (together with her family and others, have provided the necessary support to R both in school and outside school. He is under the care of the community paediatric team but his last review took place in May 2015 and there is nothing in the documentation to suggest that his needs have not been, or will not be in the future, met by the support he presently receives. Although MT has undoubtedly had to struggle with raising R alone, with the support provided she has clearly been able to do so despite suffering from depression herself. MT accepted that between 2015 (when she was previously taking medication) and November 2018 (when she re-started treatment on sertraline) she had not needed any medication to deal with any depression or anxiety from which she suffered.

53. Mr Howells put the Secretary of State's case on two bases. *First*, he submitted that it was not "unduly harsh" for MT and R to go to Jamaica and live with the claimant. *Secondly*, it was not unduly harsh for MT and R to remain in the UK without the claimant.

54. I bear in mind the test for "unduly harsh" set out in the Upper Tribunal's decision in MK at [46] which was approved by the Supreme Court in KO

(Nigeria). It does not equate with "uncomfortable, inconvenient, undesirable or merely difficult" but imposes a "considerably more elevated threshold". The "harsh" denotes that something is "severe, or bleak". The need to be "unduly harsh" raises "an already elevated standard still higher". I bear in mind, as the Supreme Court pointed out in KO (Nigeria) at [23] that the phrase "unduly harsh" introduces a "higher hurdle" than that of "reasonableness". Further, it introduces "a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent".

55. Given the circumstances of MT and R, I find that it would not only be unreasonable but it would also be unduly harsh for them to relocate to Jamaica. Although MT, as she accepted in her evidence, is of Jamaican heritage, she has lived all her life in the UK and is a British citizen. R is also a British citizen and has lived his entire life in the UK. MT has an elderly father, who suffers from dementia, and a mother aged 92. R has a fear of flying and cannot be expected to travel by the, only practicable way to Jamaica, by aeroplane. He also suffers from microcephaly with attendant impact upon his development and he suffers from learning difficulties which require support both in school and at home. In her evidence, MT said she had made enquiries about support for R in Jamaica but had not seen any support there and it would not be as good as here. She accepted that she had not approached any health professionals in Jamaica. Consequently, there is no evidence in this appeal as to the professional support that R would receive in Jamaica. It cannot be assumed, in the absence of evidence, that support would not be available or that, the support which was available, would be inadequate.

56. Nevertheless, to uproot MT with R – bearing in mind his 'fear of flying' – in order to relocate to Jamaica would, in my judgment, not only against R's best interests but also reaches the heightened level of being "unduly harsh" on both MT and R. If R cannot relocate then neither can MT as his parent and primary carer.

57. That, however, is not enough for the claimant to succeed. The issue remains whether the separation of MT and R from the claimant is "unduly harsh". I do not accept that for MT and R to remain in the UK is unduly harsh. R's health and wellbeing is catered for by the support of MT, the family and professional assistance provided to R. Of course, I accept what the GP says in her letter of 7 November 2018 that R's separation from his father has had a significant impact on his wellbeing and that in the absence of his father there is less support to MT dealing with his behavioural problems. It would, no doubt, be in R's best interests to have both parents in the UK. He is, however, at least able to maintain contact with the claimant in Jamaica and has done so for some time even though he cannot travel to see him. Nevertheless, the evidence simply does not demonstrate that the circumstances of MT or R in the UK (without the claimant) are "severe" or "bleak" such as to be "harsh" let alone "unduly harsh". MT (with the support of others) has coped since at least 2010 when the claimant was deported and R has been provided with the needed

support both at home and elsewhere, such as in school. His special educational needs have been catered for. MT's own mental health (depression and anxiety) has, when needed, been treated first in 2015 and more recently since November 2018. R was last reviewed by the community paediatric team in May 2015. There is no evidence of any ongoing review or need that is not being met. R, although the outcome is likely to be below average, is taking his GCSEs as a year 11 student. MT accepted that his general health was good apart from that arising from his microcephaly.

58. Looking at all the circumstances, I am not satisfied that the maintenance of the deportation order against the claimant has an "unduly harsh" impact upon MT or R.

59. For these reasons, I am not satisfied that Exception 2 in s.117C(5) of the NIA Act 2002 applies.

60. Mr Dieu did not rely upon s.117C(6), namely that, even though Exception 2 did not apply, there were nevertheless "very compelling circumstances, *over and above* those described in "Exception 2" (my emphasis). That test could not be met in this appeal since all the relevant circumstances have already been taken into account in reaching my decision that Exception 2 does not apply.

61. Consequently, as the impact of maintaining the deportation order against the claimant is not unduly harsh upon MT or R, the public interest requires the maintenance of that deportation order against the claimant.

Decision

62. As a result, the claimant's appeal based upon Art 8 of the ECHR fails and his appeal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

23, April 2019