Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05173/2019

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
On: 22nd October 2019

Decision and Reasons Promulgated
On: 24th October 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

J S H
(anonymity direction made)

Respondent

For the Appellant: **Mr Brown, Parkview Solicitors**
For the Respondent: **Mr McVeety, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Respondent is a national of Iraq born in 1991. On the 9th July 2019 the First-tier Tribunal (Judge Malik) allowed, on human rights grounds, his appeal against a decision to deport him. The Secretary of State now has permission to appeal against that decision.

2. The key finding reached by the First-tier Tribunal was that the Respondent's deportation would have an unduly harsh impact upon four of his five British

children/stepchildren. The Secretary of State disputes that finding on the grounds that it was not one open to the Tribunal on the evidence before it.

3. The Secretary of State's grounds make reference to the decisions of the Court of Appeal in Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213 and BL (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 357. Although the former was not available at the date that Judge Malik made her decision both judgments are relied upon for their emphasis on the high threshold to be crossed when making a finding that deportation of a foreign criminal is 'unduly harsh', the Court underlining that the 'commonplace' distress that will be caused to children if a parent is removed is not sufficient. See to similar effect the decisions in Secretary of State for the Home Department v AJ (Zimbabwe) and VH (Vietnam) [2016] EWCA Civ 1012, NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, and indeed the decision of the Supreme Court in KO (Nigeria)(FC) [2018] UKSC 53.

4. What none of these decisions do is render the second 'exception' set out at section 117C(5) of the Nationality, Immigration and Asylum Act 2002 meaningless. They are not to be read as imposing an unrealistically high burden on appellants. It can be inferred from the fact that the exception exists that parliament recognises that for *some* children separation from a parent will have such profound consequences that deportation will not be a proportionate response. Decision makers applying the statutory scheme must be mindful that the threshold is a high one, but be cautious not to elevate it to the even more stringent test applied in the case of family members of criminals who are sentenced to four years' or more in prison:

> "On the other hand 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. 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. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2017] 1 WLR 240, paras 55 and 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."
>
> [per Lord Carnwath in KO]

5. In the present case the First-tier Tribunal was tasked with examining the position of five children.

6. The first, AL, is a little girl brain damaged at birth who now lives with her maternal grandparents. She is cared for by them full time and the Respondent visits her every two weeks. Judge Malik was not satisfied that AL would suffer unduly harsh consequences if her father were deported and there is no challenge to that finding.

7. The remaining four children are the Respondent's daughter R (born in 2013), his son M (2018) their half-brothers D (2004) and K (2005). These four are all the children of the Respondent's current partner NG. All four live with the Respondent and NG. The salient – and unchallenged – findings about this family unit are:

    i) One year-old M was born prematurely and has significantly impaired vision. The Respondent plays a day to day role in his care, for instance taking him swimming;

    ii) Five year-old R is under the care of paediatricians and is said to have 'challenging behaviour'. R's Assistant Headteacher provided written evidence to the effect that the Respondent plays a significant role in her care, bringing her to and from school and attending child protection/child in need meetings. The letter speaks of a "dramatic improvement in R's emotional well-being and behaviour" since the Respondent returned to the family home.

    iii) Fourteen year-old D has a diagnosis of ADHD, Social Communication Disorder and Autism. He stays at his special school twice per week but otherwise lives at home. He has a close relationship with the Respondent. D's Headteacher gave written evidence that he had fully engaged with his education since the Respondent was released from prison, and that D derives "a great deal of consistency and security from his presence in the household". This in turn has a positive effect on D's self-esteem and confidence, enabling him to make academic progress. The Head believed that the Respondent's removal would be "significantly damaging" to D, and that if the deportation were to proceed D would "undoubtedly regress and it is highly probable that we would see a return of the wholly inappropriate behaviours" that led D to being placed with the school initially.

    iv) Thirteen year-old K has no medical conditions of note, but his behaviour has been classed as giving 'cause for concern' with the relevant professionals noting a decline whilst the Respondent was in prison. A letter from K's school speaks of an improvement in his "attitude, punctuality and focus" since the Respondent's release, attributed by the writer to "a direct result of the extremely positive influence that [the Respondent] has over K". The school considered that it would be "extremely detrimental" if the Respondent were to be removed from K's life. K himself wrote to the Tribunal saying that he wanted to "hurt himself" whilst his [step] Dad was away.

    v) NG has a diagnosis of depression. Concerns have been raised by those caring for her regarding her vulnerability, depressed mood and intrusive

suicidal thoughts. A Health Visitor who has worked with the family attributes NGs conditions and anxiety to abuse that she suffered from a previous partner. Judge Malik notes that NG has in the past been hospitalised because of her mental health needs.

vi) The Respondent and NG enjoy a close and supportive relationship. In the months that the Respondent was in prison during 2018 NG found it physically and emotionally difficult to cope. She received help from her mother, her aunt and social services but her health took a turn for the worse. Social services describe the Respondent as a "hands on Dad" who takes a leading role in caring for the children, all of whom face particular challenges as outlined above.

8. It was against this background that the First-tier Tribunal found that this is not an ordinary family. Neither the difficulties these children face, nor their consequent dependence upon their father, can be described as "commonplace". All of the evidence before the Tribunal – from family members, from the GP, paediatricians, the health visitor, social workers and teachers - all pointed the same way. It would be strongly contrary to the best interests of these children – and unduly harsh - should the Respondent be removed from the family home.

9. The grounds of appeal plead that the First-tier Tribunal erred in failing to consider whether the children could be taken into care, or that social services might otherwise fill the gap that would be left by the Respondent. In light of the decision in KO (Nigeria) – in particular the passage from Lord Carnwath's judgment that I have set out above – that is a startling submission to make. If children need to find themselves in care before the threshold can even be contemplated it is difficult to see what traumas would need to befall a child of a parent convicted of in excess of four years before an appeal could ever be allowed. This submission, not pursued with any vigour by Mr McVeety, entirely fails to engage with the *ratio* of the First-tier Tribunal's judgment: that it is the nature of *his* relationship with his children that is regarded as important by the professionals concerned, and their collective opinion that these children will suffer profound consequences should that relationship face interference. This also dispenses with the other submission in the grounds, that the Tribunal failed to consider whether the needs of the children could be met by professional support or other family members, such as the grandmother and aunt who helped NG out when the Respondent was in prison. I note that in fact the Tribunal had express regard to that possibility [at its §44-45] but for the reasons I have summarised, found that it would not prevent the consequences for these four children being unduly harsh. It was their emotional dependence upon their father, heightened by particular medical and social needs, that counted.

Anonymity Order

10. The Respondent is a criminal and as such would not ordinarily be given the protection of an order for anonymity. As I have set out, however, his case turns on the presence in the United Kingdom of his British children. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential

Guidance Note No 1 of 2013: Anonymity Orders I am concerned that the identification of the Respondent could lead to identification of the children. I therefore consider it appropriate to make an order in the following terms:

> "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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

11. The determination of the First-tier Tribunal contains no error of law and it is upheld.

12. There is an order for anonymity.

Upper Tribunal Judge Bruce
22nd October 2019