Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11736/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 November 2019	**On 25 November 2019**

Before

MR JUSTICE NICOL
UPPER TRIBUNAL JUDGE PLIMMER

Between

KM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Aitken, Counsel
For the Respondent: Ms Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has appealed against a decision of First-tier Tribunal ('FTT') Judge Welsh sent on 25 July 2019, dismissing his appeal on human rights grounds.

Background

2. The appellant is a citizen of Bangladesh, born in 1971. He entered the United Kingdom ('UK') in 1986 (when he was 14) with his family, and was granted indefinite leave to remain in 1989. The appellant has a British Citizen wife ('A') and two children aged 13 ('B') and 20 ('C').

3. Although the history relevant to the respondent's deportation proceedings against the appellant is lengthy, it suffices to state that on 13 April 2018 the respondent notified him that a deportation decision had been made. This followed sentences of imprisonment over the course of 2013 and 2014 totalling 13 months for drug dealing offences: 6 months activated suspended sentence for dealing cannabis; 6 months consecutive for another offence of dealing cannabis; one month consecutive for possession of cocaine; one month concurrent for possession of cannabis. In a decision dated 18 May 2018, the respondent refused the appellant's human rights claim to remain, based upon his family and private life in the UK.

Appeal proceedings

4. When the matter came before the FTT, it was conceded on behalf of the appellant that he was a 'foreign criminal' (in any event the judge found that his offences had caused serious harm), and it was for the FTT to decide whether the appellant met the relevant thresholds to be found in ss.117C(5) and (6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). The FTT concluded that they were not, and dismissed the appellant's claim on Article 8, ECHR grounds. The grounds of appeal against this decision have been prepared by Mr Aitken, and are twofold: (1) there was no assessment of B's best interests, and (2) excessive weight was given to the public interest and the issue of deterrence.

5. Upper Tribunal (UT) Judge McWilliam granted permission to appeal, observing that it is arguable that the FTT did not consider B's best interests when assessing whether the consequences of deportation would be unduly harsh.

Hearing

6. At the hearing before us, Mr Aitken relied upon a skeleton argument dated 7 November 2019. This sought to reargue the appeal, and did not address the important issue for us, whether there was a material error of law in the FTT's decision. When this was pointed out, Mr Aitken clarified that he only relied upon ground 1, as summarised above. He withdrew ground 2.

7. Ms Jones relied upon a succinct but helpful skeleton argument, in which she submitted that the FTT took all relevant matters connected to B's best interests, and ground 1 was therefore not made out.

8. After hearing from both representatives, we reserved our decision, which we now provide with reasons.

Legal Framework

9. Paragraphs 399 and 399A of the Immigration Rules are reflected within s. 117C of the 2002 Act. This is a case in which the FTT found that exception 2 could not be met. Exception 2 is set out in this way:

> "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".

10. The correct approach to the unduly harsh test has been considered by the Supreme Court in KO (Nigeria) v SSHD [2018] UKSC 53. It was made clear by Lord Carnwath that the unduly harsh test is self-contained, that is to say it does not require a balancing of the relative levels of severity of the parent's offence other than is inherent in the distinction drawn by s.117C itself. Lord Carnwath also made it clear that the unduly harsh test requires an elevated threshold to be met. Paragraph 23 of KO (Nigeria) says this:

> "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".

11. The approach in KO has been considered and applied in RA (s.117C "unduly harsh": offence: seriousness) Iraq [2019] UKUT 00123 (IAC). The President said this:

> 22. It is important to keep in mind that the test in section 117C(6) is extremely demanding. The fact that, at this point, a tribunal is required to engage in a wide-ranging proportionality exercise, balancing the weight that appropriately falls to be given to factors on the proposed deportee's side of the balance against the weight of the public interest, does not in any sense permit the tribunal to engage in the sort of exercise that would be appropriate in the case of someone who is not within the ambit of section 117C. Not only must regard be had to the factors set out in section 117B, such as giving little weight to a relationship

> formed with a qualifying partner that is established when the proposed deportee was in the United Kingdom unlawfully, the public interest in the deportation of a foreign criminal is high; and even higher for a person sentenced to imprisonment of at least four years.

And then immediately supported this by referring to the reasoning of Jackson LJ in NA (Pakistan) & Another v SSHD [2016] EWCA Civ 662:

> "23. Jackson LJ put it as follows:-
>
> > "33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.
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> > 34. The best interests of children certainly carry great weight, as identified by Lord Kerr in HH v Deputy Prosecutor of the Italian Republic [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in Secretary of State for the Home Department v CT (Vietnam) [2016] EWCA Civ 488 at [38]:
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> > > "Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation.""

Error of Law Discussion

12. Apart from erroneously referring to Pakistan instead of Bangladesh at [39] the FTT's decision is carefully drafted and contains very detailed reasoning over the course of 92 paragraphs. The FTT noted that it was accepted that the appellant is a foreign criminal for the purposes of s. 117C of the 2002 Act (see s. 117D(2)) and as such the issues in dispute could be narrowed to three:

    (i) whether the effect of the appellant's deportation would be unduly harsh on A and B (Exception 2 in s. 117C(5));

    (ii) whether the appellant's length of residence, particular circumstances and mental health met the requirements for Exception 2 in s.117C(5) to be satisfied;

    (iii) assuming that exceptions 1 and 2 cannot be met whether there are very compelling circumstances over and above those Exceptions in order to meet the requirements in s. 117C(6).

13. There was no appeal against the FTT's findings regarding issue (ii). Ground 1 only challenges the unduly harsh assessment regarding B in issue (i). Ground 2 only challenges the approach to the public interest, a relevant ingredient to be considered for the purposes of issue (iii), but this has been withdrawn by Mr Aitken. It follows that we need only deal with ground 1 and the submission that the FTT failed to address B's best interests.

14. The FTT correctly directed itself to KO (Nigeria) and was fully aware of the relevant best interests principle, having directed itself to ZH (Tanzania) v SSHD [2011] UKSC 11 at [21]. Although the FTT did not expressly refer to B's best interests after this, when the decision is read as a whole we are satisfied that the FTT had B's best interests fully in mind when making its carefully considered findings regarding B's circumstances in Bangladesh with her father and in the UK without her father. The FTT addressed all relevant factors including, in relation to life in Bangladesh with both parents: linguistic skills, knowledge of Bangladeshi customs, age, adaptability, support available in Bangladesh and mental health considerations; and in relation to remaining in the UK with her mother: her wish to have both parents living with her but her mother is her primary carer and they will have the support of the extended family in the UK, without the stress that the appellant has caused the family.

15. Mr Aitken did not take us to any factors or evidence said to be left out of the FTT's assessment of B's circumstances in either Bangladesh with both parents or in the UK without her mother. At [36] the FTT expressly accepted that the effect of relocation to Bangladesh would be harsh upon B. We accept that it is implicit from this that the FTT considered that relocation would not be in B's best interests i.e. it would be harsh, but was entitled to find for the reasons provided, that notwithstanding B's best interests, the effect of deportation upon her would not be unduly harsh.

16. Even if the FTT expressly found that B's best interests supported the appellant not being deported, the ultimate decision would have been the same for the detailed reasoning provided by the FTT, as summarised above. As Jackson LJ put it in NA (Pakistan), whilst the best interests of children certainly carry great weight, it is nevertheless, a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. Similarly, in this case, an express consideration of B's best interests would have made no material difference to the outcome, given the FTT's careful and comprehensive assessment of the relevant circumstances appertaining to B.

Notice of decision

17. The FtT's decision does not contain a material error of law and we do not set it aside.

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

Unless and until a Tribunal or court directs otherwise, the appellant 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: *UTJ Plimmer* Date: 20 November 2019

Upper Tribunal Judge Plimmer