Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17812/2018

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 14 January 2019	**On 31 May 2019**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR HAMZA BRINI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: The appellant appeared in person
For the Respondent: Mr S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I heard this appeal on 14 January 2019, following which I considered the representations which had been made and reached a provisional decision. Regrettably, the file was mislaid before my decision was perfected, but the decision I provisionally reached has not altered. The file having now been located, I have perfected the decision for promulgation. The Tribunal apologises to the parties for the delay.

2. The appellant, who was born in May 1988, is a national of Tunisia. He entered the UK with a spousal visa in August 2013, which visa expired on 22 November 2015. Prior to the expiry of his leave, on 19 November 2015

he applied for further leave to remain on the basis of his family/private life but this was refused on 16 December 2015. The appellant remained in the UK without leave and was served with removal directions as an overstayer in August 2016. A subsequent application for a derivative residence card as a non-EEA family member was refused in May 2017; the appellant was without leave while this application was being considered.

3. On 27 July 2017 the appellant was convicted of assault occasioning actual bodily harm and for having an offensive weapon for which he was sentenced to a total of sixteen months' imprisonment.

4. Because of the length of his prison sentence, the appellant was liable to automatic deportation pursuant to Section 32(5) of the UK Borders Act 2007 (subject of course to such deportation not being subject to any of the exceptions set out within Section 33) and accordingly on 26 September 2017 the respondent wrote to the appellant notifying him of the obligation on the respondent to make a deportation order under Section 32(5) of the 2007 Act unless the appellant could demonstrate that one or more of the specified exceptions set out within Section 33 of that Act applied.

5. In response to that letter, the appellant submitted representations on 24 October 2017, in which it was submitted that because of his Article 8 rights his deportation would be in breach of the ECHR. These submissions were considered by the respondent, but in a decision made on 3 May 2018 the respondent rejected the submissions and made a decision refusing the appellant's human rights claim and issuing a deportation order against him.

6. The appellant appealed against this decision but following a hearing before First-tier Tribunal Judge M A Khan sitting at Harmondsworth on 4 October 2018, in a decision promulgated on 22 October 2018 the appellant's appeal was dismissed.

7. The appellant now appeals against this decision, permission having been granted by First-tier Tribunal Judge Swaney on 28 November 2018. As Judge Swaney states at paragraph 6 of the reasons for decision, the grant of permission is limited to issues relating to the appellant's Article 8 rights.

8. Prior to the appellant's conviction for the offence of assault occasioning actual bodily harm, he had (about a month earlier) also been convicted of possession of class A drugs (cocaine), driving without a licence and uninsured and failing to surrender for custody. The basis of his human rights claim was that he had established a family life in the UK because he was in a subsisting relationship with his wife and one son. The respondent noted in the decision letter, however, that the appellant had failed to submit any evidence in support of this claim, beyond stating the names of his family members, which included his son, a British national, born in September 2011. The respondent, within the decision refusing his human rights claim and affirming the decision to deport the appellant, had regard to the respondent's duty to safeguard the welfare of children set out in

Section 55 of the Borders, Citizenship and Immigration Act 2009 and to the relevant Immigration Rules. However, the respondent did not accept that the appellant had a "genuine and subsisting parental relationship" with his son because "you have provided no evidence to show that you have been in recent contact with him or in a relationship with him prior to or since your imprisonment". The respondent in this regard noted that:-

> "A genuine and subsisting relationship means more than a biological relationship and more than presence in a child's life. It requires a significant and meaningful positive involvement in a child's life with a significant degree of responsibility for the child's welfare".

In this regard the respondent noted that the appellant had "provided no documentation showing joint custody of [his son] with his mother".

9. The respondent also noted that the appellant was estranged from his son and that there was no evidence to show that he had had any contact with him since his imprisonment. Furthermore, even should he be reconciled with his estranged wife "it is nevertheless not accepted that it would be unduly harsh for [his son] to join you".

10. In the alternative, the respondent did not accept that it would be unduly harsh for the appellant's son to remain in the UK even if the appellant was deported. The reason given for this conclusion was that the appellant had:-

> "provided no evidence to show that he [that is the appellant's son] would face any hardship if he were to remain in the UK with his mother when you are deported. He will be able to access all the privileges and benefits granted to him as a British national. He will have his mother as his main carer. He is part of a family unit which includes other extended family members who would support and guide him. In addition he will attend school and continue to build up a network of friends and the support of teachers who would guide him ensuring that he has support with his education."

The respondent also noted that the appellant's son could, if he wished to maintain contact with the appellant, do so "by using modern means of communication".

11. With regard to whether or not the exception set out within paragraph 399(b) of the Immigration Rules applied (that is that the foreign criminal had a genuine and subsisting relationship with a British citizen partner which was formed not only when that person's immigration status was not precarious but that it would also be unduly harsh for the foreign criminal's partner to move with the criminal to where the criminal was going to be deported to), first it was not accepted that the appellant was in a subsisting relationship with his wife because the parties were estranged, but in any event it would not be unduly harsh for his wife to live in Tunisia with him.

Judge Khan's Decision

12. The judge considered the appellant's relationship with his son under paragraph 399 of the Immigration Rules which provides as follows:

> "399. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> … and …
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported".

13. This provision mirrors what is set out now in Section 117C of the Nationality, Immigration and Asylum Act 2002 which sets out the additional considerations which apply in cases involving foreign criminals as follows:

> "**117C Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (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.
>
> …"

14. Judge Khan did not consider that Exception 2 applied with regard to the appellant's relationship with his child because he was not satisfied that the

appellant had a genuine and subsisting relationship with his son. His reasons are set out at paragraph 37 of his Decision:

> "37. In this case paragraphs [sic] 399 is not engaged, although the appellant has a qualifying, British citizen child residing in the United Kingdom, there is no corroborating evidence before the Tribunal that he has a genuine and subsisting relationship with his son. The appellant's son is 7 years old and resides with his mother. The appellant claimed that he had direct contact with his child before he was sent to prison but there is no independent evidence. He stated that he has indirect contact with his wife by telephone. I find that his claimed contact with his son is also by telephone, on *add* [sic] *hoc* basis and not direct contact as he claimed. In the circumstances, I find that paragraph 399 and 229A [again sic, presumably the judge had in mind 399A] exceptional circumstances do not apply in this case".

15. Although the judge then refers to Section 117A and 117B of the 2002 Act, he does not specifically mention 117C, although as already noted above, the statutory provisions within 117C effectively mirror what is set out in paragraph 399 of the Immigration Rules, to which the judge did have regard.

Grounds of Appeal

16. The grounds are contained in one handwritten page, settled by the appellant in person. It is as follows:

> "I have lived in the UK since 2013. I have been granted spouse visa from 2013 until 2015. I married to British citizen but we are separated. I got a 7 year's son. He means the world to me. I got a big network to family and friends. I worked and contributed tax like every British taxpayers."

17. The appellant then sets out various Articles of the ECHR on which he presumably relies, being "Article 2: Right to life and freedom. Article 3: No torture, inhuman or degrading. Article 5: Right to liberty and security. Article 6: Right to a fair trial. Article 7: No punishment without law. Article 8: Right of family and private life". It is not clear as to what relevance any of the Articles other than Article 8 might have, and as already noted permission to appeal was only granted with regard to arguments founded on the appellant's Article 8 rights. The appellant does not anywhere within his grounds identify any error of law in Judge Khan's decision relied upon.

18. Judge Swaney, when setting out the reasons for granting permission to appeal, states as follows, at paragraph 4:

> "The judge refers to having carried out a balancing exercise applying the five stage *Razgar* test. There are however no specific findings made in relation to each stage of that test. Notwithstanding the finding that the appellant had not enjoyed a genuine and subsisting

parental relationship with his son, the judge accepted some contact was taking place. The parental relationship itself was not in dispute. It is entirely unclear from the decision whether or not the judge accepted that Article 8(1) of the ECHR was engaged and if not, why not. The judge failed to mention the best interests of the appellant's child, much less identify what they are or factor them into the assessment of proportionality".

The Hearing

19. At the hearing before this Tribunal, the appellant, representing himself, expressed his view that he had "really been punished for my mistake. Sixteen months". He said he was not an habitual offender and had never been to prison before and wished to continue life as a family member. He had worked and paid tax as any other person. He was separated from his wife, but still in contact and although he had not seen his son since he went to prison, he called him three to four days a week.

20. The appellant told the Tribunal that he wanted an adjournment in order to put in further evidence about the tax that he had paid and the birth certificate of his son, but the Tribunal informed him that he had no need for this because it was accepted that he had paid tax and that his son was British.

21. When asked by the Tribunal as to whether there was anything which made his position more difficult than that of any other person facing deportation, who had a child, he replied that he was being "double punished" and that he would appreciate a chance to continue with his life.

22. On behalf of the respondent, Ms Cunha submitted first of all that in order to succeed the appellant had to establish that there were compelling factors which would render his deportation disproportionate because of his Article 8 rights. The judge had considered his son's best interests but had not gone into them in any depth because he had found there was no genuine relationship between the appellant and his British citizen son; at paragraph 19 the judge had noted that he did not have a court order for contact with his son and that he was now separated from his wife, while at paragraph 37 he had noted that there was no corroborating evidence before the Tribunal that the appellant had a genuine subsisting relationship with his son. The judge noted within paragraph 37 that the son was 7 years old and lived with his mother and there was no independent evidence that the appellant had had direct contact with his child before he had been sent to prison as he had claimed. In that paragraph the judge found that his claimed contact with his son was by telephone on an ad hoc basis "and not direct contact as he claims". Ms Cunha submitted that this was a finding open to the judge on the evidence before him.

23. So far as the judge's failure to mention Section 117C of the 2002 Act was concerned, this was not a material error because the appellant would still

have to establish that the effect of deportation on his son would be "unduly harsh". The factors advanced by the appellant clearly did not establish that his deportation would be disproportionate and the judge reached the decision he was bound to reach.

24. In reply, the appellant told the Tribunal that he had stopped his child seeing him in the last two weeks because he did not wish him to see him in the state he was in in prison.

Discussion

25. Although, as already noted above, Judge Khan did not specifically set out the provisions of Section 117C of the 2002 Act, which are applicable in all cases involving foreign criminals, this was not a material error, as he did have regard to the relevant Immigration Rules, which mirror what is set out within 117C. In particular he had regard to paragraph 399 of the Rules and the circumstances in which that paragraph will apply. By paragraph 398, it is provided that it is in circumstances where that paragraph does not apply that "the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraph 399 and 399A". The judge's reason for considering that paragraph 399 did not apply was that he was not satisfied on the evidence which had been put before him that the appellant had demonstrated that he had a genuine and subsisting relationship with his child.

26. Although another judge on this point might have arrived at a different conclusion and considered that such contact as he had might have amounted to such a genuine and subsisting relationship, there was such little evidence before him that Judge Khan was, in the judgement of this Tribunal, entitled to reach that conclusion.

27. No other relationship is relied upon, because his marriage is no longer subsisting, and there is nothing particularly compelling about this appellant's circumstances, absent such relationship as he might have with his child, as could possibly outweigh the very large public interest in deporting foreign criminals.

28. Even if it might just be arguable that the appellant's relationship with his son could be said to amount to family life, on any view it is not a particularly strong one. Any Tribunal now would have to have regard to the recent guidance given by the Supreme Court in *KO* [2018] UKSC 53, and in particular to what is said within that judgment at paragraph 27 with regard to the meaning of "unduly harsh" in the context of the exception provided both within paragraph 399 of the Immigration Rules and also within Section 117C of the 2002 Act, whereby, as noted above, it is provided that "Exception 2 applies where [the foreign criminal] 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 the "foreign criminals deportation on the partner or child would be **unduly harsh** [my emphasis]".

29. At paragraph 27 of *KO*, the Supreme Court set out with approval the guidance previously given by this Tribunal in *MK (Sierra Leone) v SSHD* [2015] UKUT 223, where at paragraph 46 a Presidential Tribunal, referring to the "evaluative assessment" required of the Tribunal had stated as follows:

> "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 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."

30. On the facts of this case, even taking the appellant's claim at its highest, there was simply no evidence upon which any fact-finding Tribunal could have concluded that the effect of the appellant's removal on his child, who currently does not even see him, could be said to be "severe" or "bleak" let alone beyond severe or bleak. Understandably, the appellant would like to have a relationship with his son, but his case is no different from that of any other foreign criminals with children who are faced with the prospect of deportation in circumstances where the consequences of their removal is that such relationships as they have with their children will be severely disrupted, or even effectively terminated. As Sedley LJ noted in his well-known dictum in *A D Lee,* "that is what deportation does".

31. Having regard to the high threshold which is imposed by the need to establish that the effect on a child will be "unduly harsh" there was simply no basis on which Judge Khan or any other judge could have found this threshold was reached on the facts of this case. It follows that his conclusion to this effect was inevitable; there was accordingly no material error of law in his making this finding and dismissing the appeal. The appellant was required to do more than establish that he had some private or family life in this country; he had to establish further either that the effect on his child would be so severe or bleak as could truly be said to be "unduly harsh" or that there were factors in his case which were so compelling as to outweigh the large public interest in his deportation. This he has manifestly failed to do. It follows that this appeal must be dismissed.

32. For the avoidance of doubt, even had I concluded that Judge Khan's decision was sufficiently poorly reasoned that it needed to be remade (which I have not) I would in any event have been obliged when remaking the decision to dismiss the appeal for the reasons I have already given.

Decision

There being no material error of law in Judge Khan's decision, this appeal is dismissed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Dated: 23 May 2019