Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10450/2017

THE IMMIGRATION ACTS

Heard at Field House
On 10 April 2019

Decision & Reasons Promulgated
On 15 April 2019

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

TS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Ahmad, Ahmad & Williams
For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan born in 1989. He is 29 years old. He has three British citizen children born in 2012, 2013 and 2016 respectively.

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2. I have maintained an anonymity direction because this decision refers to the circumstances of the appellant's three children.

3. The appellant has appealed against a decision of the First-tier Tribunal ('FtT'), sent on 15 November 2018, in which his appeal was dismissed.

Background

4. The appellant arrived in the United Kingdom ('UK') in 2011 as a student. He entered into an Islamic marriage with K, the mother of his three children, on 11 July 2012. Following this, he was granted leave on the basis of his family life until 21 February 2016.

5. On 13 April 2016 the appellant was convicted of one count of putting K in fear of violence and two counts of breaching a non-molestation order. On 11 May 2016 he was sentenced to 17 months imprisonment and a restraining order was put in place. The sentencing judge drew attention to the aggravating features of the offending: they were committed toward his wife and in the presence of their children; the offending was not out of character because there was evidence to indicate that the appellant's violence toward his wife began in 2012; the threats and acts of past violence were sustained and serious.; the breaches of the non-molestation order were flagrant.

6. The appellant was released from prison in January 2017 but immediately placed in immigration detention until his release on 25 July 2017. The restraining order was varied on 5 September 2017 to permit the appellant to see his children.

7. The appellant was made the subject of a deportation order on 9 March 2017 and on 9 October 2017 the respondent refused his application for leave to remain and his protection claim.

FtT

8. The matter came before FtT Judge James at a hearing on 23 October 2018. He heard evidence from the appellant, K and his mother-in-law, M, and made the following findings of fact, before dismissing the appeal on all grounds:

   (i) The appellant sought to minimise the seriousness of his criminal offending. There was evidence to show a sustained period of violence against K as early as 2012 and some of this violence was perpetrated in front of the children.

   (ii) After the appellant's conviction he had no contact with his children until the restraining order was varied in September 2017. After this he had supervised contact for 3 hours twice a week. This was supervised by M and K's sister. In July 2018 the restraining order was discharged and the appellant's contact with his children increased. The appellant has a genuine and subsisting relationship with his children.

(iii) The appellant and K did not live together but there was "hope" by both that they would get back together, albeit K was less optimistic that this would be in a matter of months.

(iv) It would be unduly harsh for the children to live with the appellant in Pakistan.

(v) Although the children would prefer to have the appellant remain in the UK they spent a long period apart and are not integrated as a family. The children are healthy and do not have special needs. Balancing these circumstances and noting the seriousness of the appellant's offending it would not be unduly harsh for the children to remain in the UK without the appellant.

(vi) The appellant is not in a genuine and subsisting relationship with K and the effect of his deportation on K would not be unduly harsh.

(vii) The appellant has not provided a credible account of his fear of serious harm in Pakistan and in any event there is a sufficiency of protection.

Appeal against FtT decision

9. The appellant applied for permission to appeal against the FtT's decision in grounds of appeal drafted by his solicitors. These mount a series of disagreements with the FtT's factual findings. FtT Judge Froom granted permission to appeal but focussed on a single issue, that was not raised in the grounds of appeal. He considered it arguable that the FtT failed to treat the unduly harsh test as self-contained and arguably unlawfully factored in the seriousness of the appellant's offending. Judge Froom also observed that it was arguable that had the FtT not done so, the conclusion might have been different notwithstanding the high threshold to be met.

10. In a Rule 24 response dated 17 January 2019 the respondent opposed the appeal, submitting that the FtT had directed itself appropriately. The respondent submitted that the FtT did not weigh in the appellant's criminal conduct when applying the unduly harsh test but in any event on no legitimate view of the evidence could the high threshold be met, even when the offending is left out of account.

11. At the beginning of the hearing before me and after some discussion the representatives agreed that in determining the question whether it would be unduly harsh for the children to remain in the UK, the FtT took into account the seriousness of the appellant's offending and this constitutes an error of law. However there continued to be a dispute as to whether that error is material. Both representatives accepted that this is the only issue to be determined and that I must consider whether but for the error, the decision regarding s. 117C(5)

of the 2002 Act would inevitably have been the same. Mrs Ahmad conceded that at the date of the FtT hearing the relationship between the appellant and K could not be described as subsisting. As such, she acknowledged that the appellant only continued to rely upon Exception 2 in s.117C, and only in relation to his children.

12. Mrs Ahmad invited me to find that that the level of contact and closeness between the appellant and his children are such that it remained possible for the unduly harsh threshold to be met. Ms Isherwood submitted that the evidence available did no more than demonstrate that the children would be adversely affected but on no legitimate view could it be said that the effect would be unduly harsh.

13. After hearing from both representatives I reserved my decision which I now provide with my reasons.

Legal framework

14. Paragraphs 399 and 399A of the Immigration Rules are reflected within section 117C(5) of the 2002 Act, which provides as follows:-

> "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."

15. It is to be noted that the question in s. 117C(5) as to whether "the effect" of C's deportation would be "unduly harsh" is broken down into two parts in paragraph 399, so that it applies where:

> "(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."

16. The correct approach to paragraph 399 and s. 117C(5) of the 2002 Act has recently been considered by the Supreme Court in KO (Nigeria) v SSHD [2018] UKSC 53. It is now clear that the assessment of unduly harsh does not require a balancing of the relative level of severity of the parent's offence. The assessment solely requires a careful consideration of whether the elevated threshold is reached from the point of view of either the child or partner. If that high threshold is met, then deportation would be a breach of Article 8 of the ECHR and no further analysis is required.

Error of law discussion

17. When [38 and 39] of the FtT decision are read together, the FtT clearly factored in the appellant's criminal offending when determining whether it would be unduly harsh for the children to remain in the UK without the appellant. The

parties agreed that I must determine whether this error is material or such that the FtT decision should be set aside. I must consider whether or not the conclusion reached was inevitable on the evidence available to the FtT.

18. I note that when granting permission Judge Froom indicated it might be possible for the FtT to have concluded differently. That observation must be viewed in context – at that stage Judge Froom was only determining the arguability of any error of law and the arguability of the materiality of that error. I do not agree with Judge Froom's observation. The elevated threshold (as explained in KO (Nigeria)) and the factual findings are such that the FtT could only reach one conclusion in this case: it would not be unduly harsh for the children to remain in the UK without the appellant. The required elevated threshold cannot be met on any legitimate view given the main features of the evidence and irrespective of the children's best interests militating in favour of their father remaining in the UK.

19. Firstly, although the appellant substantially increased contact (said to be daily) with the children in July 2018 when the restraining order was lifted on an application from K (see [33] of the FtT decision), by the time of the FtT hearing in October 2018, those arrangements were only in place for a short period i.e. about three months. Prior to this the appellant had limited supervised contact and prior to that he was in prison or detention. It follows, as the FtT found, that the appellant spent a long time away from his children, and his resumption of daily contact with his children underpinning their close relationship, was very recent. The suggestion in the grounds of appeal that it was significant that K supported the lifting of the restraining order does not obviate the short period of time the appellant had been enjoying increased contact.

20. Second, although (as K said) the children may have been adversely affected by not having their father with them and they preferred to be with him, they are still very young and are all healthy. They have had and will have the love and support of their mother and her family members to assist them to transition through the changes consequent on the appellant's offending. Although it was difficult for the children, there was no cogent evidence that they were unable to cope or function on a day to day basis without the appellant when he was imprisoned. Similarly, there was no cogent evidence beyond the assertions of the appellant and K, that with time and support, the children would not be able to adapt and cope without their father. Mrs Ahmad highlighted that M gave evidence that she would not be able to assist K any longer and as such the FtT's made a mistake in finding at [40] that K would continue to have the support of M. The grounds of appeal make no meaningful effort to properly plead that the FtT made a mistake of fact that caused unfairness in this or any other regard. The passing reference to this matter at (8) of the grounds makes no effort to explain why the asserted fact can be considered to be incontrovertible or why, having assisted in caring for her grandchildren for an extended period, M was minded to end this.

21. Third, the family dynamics remained fragile at the time of the FtT hearing. Although the restraining order had been lifted, the appellant had not returned to the family home and K remained (entirely understandably) cautious about this. The asserted "extremely strong bond" between the appellant and the children would have to be viewed in context: there was only a recent resumption in regular and unsupervised contact and the appellant did not live with his children.

22. In KO (Nigeria), Lord Carnwath emphasised at [23] that: "*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*". Mrs Ahmad was unable to point me to any evidence available to the FtT to support her submission that the children would face a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent, in relation to whom there is a genuinely close and subsisting relationship with the child. In addition, at [35] of KO (Nigeria), Lord Carnwath made it clear that when making his alternative assessment regarding the impact of KO's deportation, the judge applied "*too low a standard*" and treated unduly harsh as no more than "*undesirable*". The impact on the children in KO's case on any view is more serious than in the present case. KO lived with his children. This appellant does not. KO's relationship with his children had not very recently developed more significantly having previously been the subject of supervision. The main household income would be not be lost by the appellant's deportation.

23. Having considered all the evidence available to the FtT in the round, I am satisfied that the conclusion that the appellant's deportation would not have an unduly harsh effect upon the children was an inevitable one, when the appellant's offending is left out of account. It follows that in taking into account the appellant's offending when determining the relevant unduly harsh test, the FtT has not committed a material error of law.

Conclusion

24. I dismiss the appellant's appeal and do not set aside the decision of the FtT.

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 their 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 Date
UTJ Plimmer

Upper Tribunal Judge Plimmer 11 April 2019