Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02587/2018

THE IMMIGRATION ACTS

Decided without a hearing under Rule 34	**Decision & Reasons Promulgated**
On 27 November 2020	**On 8 December 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SANJEEV [S]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Bayati instructed by Paramount Chambers (written submissions only)
For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer (written submissions only)

DECISION AND REASONS

Introduction

1. The appellant is a citizen of India who was born on 18 July 1980. The appellant arrived in the United Kingdom on 5 September 2002 as a student. He was subsequently granted further periods of leave to remain as a student until 7 September 2013. On 2 August 2013, he applied for indefinite leave to remain which was granted on 16 August 2013.

2. On 11 December 2015, the appellant was convicted of conspiracy to steal and money laundering at the Warwickshire Crown Court and was sentenced to two years and four months imprisonment.

3. On 22 December 2015, the appellant was served with a notice of decision to deport him as a result of that conviction. In response, submissions were made on his behalf on 1 February 2016 and 6 June 2016.

4. On 25 January 2017, a deportation order was made against the appellant under s.32(5) of the UK Borders Act 2007 and his human rights claim, made in the earlier submissions, was refused under Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. In a decision sent on 25 November 2019, Judge James dismissed the appellant's appeal under Art 8 of the EHCR.

6. The appellant had married his wife in India in 2009 and she had come to the UK in 2010 as his dependant. On 31 December 2011, their first child, "D" was born in the UK and on 22 July 2014, the appellant's second child, "V" was born in the UK. On 12 January 2016, the appellant's wife was naturalised as a British citizen.

7. Judge James rejected the appellant's contention that his deportation would be "unduly harsh" on his two children and wife. She found that Exception 2 in s.117C(5) of the Nationality, Immigration and Asylum Act 2002 (as amended) (the "NIA Act 2002") did not apply. In addition, the judge found that there were not "very compelling circumstances" such as to outweigh the public interest under s.117C(6) of the.

The Appeal to the Upper Tribunal

8. The appellant appealed to the Upper Tribunal. He did so, essentially, on two grounds.

9. First, the judge had erred in law in finding that the appellant's deportation would not be "unduly harsh" on his two children and wife under s.117C(5) of the NIA Act 2002 because he had taken into account, and balanced against the impact of his deportation on his children and wife, the risk, if any, of his re-offending, his lack of remorse and the public interest in deporting criminal offenders. That was, it contended, is contrary to the decision of the Supreme Court in KO (Nigeria) and Others v SSHD [2018] UKSC 53. The assessment of whether the impact upon a qualifying child or partner is "unduly harsh" focuses solely upon the consequences for, and impact upon, those family members irrespective of the seriousness of the offence or public interest.

10. Secondly, the judge erred in law in reaching certain factual findings concerning the risk of the appellant re-offending and his remorse without taking into account all the evidence. It was further contended that it was

procedurally unfair to reach adverse findings on these matters when, at the outset of the hearing, the factual matrix was accepted and no oral evidence was called by the appellant. The hearing proceeded by way of oral submissions only. The appellant was, as a result, deprived of the opportunity of dealing with matters upon which the judge made adverse inferences.

11. Permission to appeal was initially refused by the First-tier Tribunal (Judge Landes) on 27 January 2020.

12. On renewed application, the Upper Tribunal (UTJ McWilliams) granted the appellant permission to appeal on 6 March 2020. In granting permission, the judge said this:

> "It is arguable that the judge in the 32 page decision arguably erred in the assessment of unduly harsh. It is arguable that he took into account immaterial matters."

13. In the light of the COVID-19 crisis, the UT (UTJ Clive Lane) issued directions on 22 April 2020 expressing the provisional view that it was appropriate for the issues of whether the First-tier Tribunal's decision involved an error of law and, if so, whether that decision should be set aside to be decided without a hearing. The parties were invited to make submissions both on the merits of the appeal and also on the issue of whether, to the extent indicated, the appeal should be determined without a hearing.

14. In response to those directions, the Secretary of State filed submissions dated 12 May 2020. In those submissions she contended that the judge had not applied the wrong approach to the "unduly harsh" test in s.117C(5). Further, the judge had given adequate reasons for her finding that the appellant's deportation would not have an "unduly harsh" impact upon his children and wife. The respondent invited the Tribunal to uphold the First-tier Tribunal's decision. The submissions did not raise any objection to the appeal being determined without a hearing.

15. It appears that the directions as originally sent may not have reached the appellant's legal representatives. As a result, they were re-sent on 7 September 2020. In response to the re-sent directions, the appellant's legal representative made written submissions relying on the two grounds – namely that the judge had misdirected herself on the test to be applied in determining whether the impact of the appellant's deportation would be "unduly harsh" on his family contrary to KO (Nigeria); and that the judge had failed properly to consider the evidence in making adverse inferences in relation to the appellant's future risk of re-offending and whether he had shown remorse. It is repeated that it was procedurally unfair for the judge to make adverse inferences, in the absence of oral evidence, when the factual matrix had been accepted at the outset of the appeal. No objection is raised to the appeal, at least at the error of law stage, being determined without a hearing.

16. In the light of the parties' submissions, and having regard to the fact that neither party raised any objection (despite being invited to do so), and having regard to the overriding objective of determining the appeal justly and fairly and the nature of the legal issues raised, I am satisfied that it is in the interests of justice to determine this appeal without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) and para 4 of the *Amended General Pilot Practice Directions: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal* (14 September 2020) issued by (then) Vice Senior President and (now) Senior President of Tribunals, the Rt. Hon. Sir Keith Lindblom. In reaching my conclusion under rule 34 I have taken into account the judgment of Fordham J in R(JCWI) v The President of UTIAC [2020] EWHC 3103 (Admin).

Discussion

17. The appellant's first ground of appeal is that the judge erred in law in taking into account matters such as the risk, if any, of the appellant re-offending, his remorse and the public interest raised by his offending in assessing whether under s.117C(5) the appellant has established that his deportation would have an "unduly harsh" effect upon his wife and two children.

18. Section 117C(3) of the NIA Act 2002 states that:

> "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."

19. The appellant is a "foreign criminal" to which s.117C(3) applies because he was sentenced to a term of 2 years and 4 months imprisonment.

20. If neither Exception 1 nor Exception 2 applies, then s.117C(6) states (and is relevant despite its terms to a "foreign criminal" sentenced to less than 4 years imprisonment: see NA (Pakistan) v SSHD [2016] EWCA Civ 662) that:

> "the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 ad 2."

21. The appellant relied upon Exception 2. Section 117C(5) of the NIA Act 2002 provides that:

> "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 the child would be unduly harsh."

22. It is not in dispute in this appeal that the appellant's wife is his partner with whom he has a "genuine and subsisting relationship" and that both his children are "qualifying children" for the purposes of s.117C(5). It is also not in dispute that if the appellant satisfies the test in s.117C(5) then

his deportation is *not* in the public interest. The issue in this appeal, as was accepted before the judge, is whether the appellant had established the "undue harsh" consequences for his wife and children if he were deported and, if not, whether he met the "very compelling circumstances" test in s.117C(6).

23. The logical approach, therefore, in considering whether the appellant's deportation would be a breach of Art 8 was: (i) to determine whether Exception 1 applied because a deportation would be "unduly harsh" on his wife and/or his children; and (ii) if not, to consider whether there were "very compelling circumstances over and above" Exception 2, applying s.117C(6).

24. In KO (Nigeria), the Supreme Court, Lord Carnwath (with whom the other Justices agreed) rejected the Secretary of State's submission that, in determining whether the impact would be "unduly harsh" under s.117C(5), the Tribunal should carry out a balancing exercise taking into account the general public interest in deporting a foreign criminal including the relative severity of the offence. The Supreme Court held that the focus was exclusively upon the impact of deportation upon the individual's partner or child (see [32]).

25. In this appeal, the appellant contends that the judge fell into error in taking into account, contrary to KO (Nigeria), factors relevant to the public interest and the seriousness of the appellant's offending in reaching her finding that Exception 2 in s.117C(5) did not apply.

26. The judge's determination is a detailed and lengthy one running to over 100 paragraphs. The judge referred to KO (Nigeria) at para 19 of her determination where, correctly, she stated that:

> "The assessment of unduly harsh requires evaluation of the consequences and impact of deportation solely on the family members concerned, and not to have regard to the seriousness of the offence committed in this context."

27. She then went on to cite the "elevated threshold" identified by the Upper Tribunal in MK (Sierra Leone) [2015] UKUT 223 and MAB (USA) [2015] UKUT 435. At para 20, the judge then went on and set out the test under s.117C(6).

28. Given those were correct self-directions, it might be supposed that the appellant's first ground of appeal has no realistic prospect of success. However, it is important to look at the judge's reasoning for reaching her finding on Exception 2 in paras 99-101.

29. The judge, in some detail, considered the appellant's conviction and his risk of re-offending (paras 38 – 60). She considered then the implications for his family and his private life (paras 61 – 97).

30. Then, at para 99, the judge referred to the Supreme Court's decision in Hesham Ali v SSHD [2016] UKSC 60 and the Court of Appeal's decision in OH (Serbia) v SSHD [2008] EWCA Civ 694. She continued:

> "I take all matters before me into account, including the issue of the seriousness of the offences, and the public interest in deporting foreign criminals, regarding deterrence, prevention of re-offending and expression of societal revulsion.... Despite not being a persistent offender, and being of low risk of re-offending, the seriousness of the offence per se due to its protracted ongoing nature and the appellant's senior role particularly in recruitment of others to this criminal gang enterprise, and the strong public interest in the appellant's deportation, I find there are no very compelling circumstances or exceptional in this particular case, such that to render his expulsion a disproportionate interference with his private and family life under Article 8 ECHR. This also applies to the family and private life rights (including bodily integrity) of the children and the wife ..."

31. In itself, that passage does not reflect any misdirection providing it is only taken into account and reflecting the judge's decision under s.117C(6), namely whether there are "very compelling circumstances" over and above Exception 2 to outweigh the public interest. However, logically that issue only arises if the appellant cannot succeed under Exception 2. It would not be profitable to set out the judge's detailed assessment and conclusions leading up to para 97 of her decision. Suffice it to say, at no point leading up to para 99 does the judge make any finding in relation to Exception 2. Her findings in that regard are found in paras 100 and 101 of her determination immediately following the passage I have set out above referring to Hesham Ali and OH (Serbia). In those paras the judge said this:

> "100. In all the circumstances of this particular case, including the very weighty public interest in deporting foreign criminals, the appellant's deportation does not amount to a disproportionate interference with his private life and family life under Article 8 ECHR, and does not render his removal unduly harsh on his wife and children, should they remain in the UK without the husband/father. I also do not find that there would be very significant obstacles or insurmountable obstacles to the appellant's return and reintegration to his home country in India.
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> 101. I therefore dismiss the appeal finding that it would not be unduly harsh for the children to live in India (although as British children they would not be liable to be removed by the Home Office) and it would not be unduly harsh for the children to remain in the UK without their father, taking into account and balancing the s.55 primary consideration 'best interests' of the children, balancing and taking into account other relevant factors, including the public interest in deporting criminals. These considerations do not outweigh the public interest of deportation, which is proportionate. I also find that it would be unduly harsh for the wife to live in India (although as a British citizen she would not be liable to be removed by the Home Office) and it would not be unduly harsh for the wife to remain in

> the UK without her husband. In summary the exceptions in Paragraph 399(a) of the Immigration Rules [the equivalent of Exception 2 in s.117C(5)] is not made out based on all the evidence before me, and Section 3 of the UK Borders Act 2007. I confirm that removal will not breach the ECHR as it applies in regard to Article 8 ECHR private and family life in this family unit, and the family life Exception under Immigration Rule 398(b) and Section 117C(3), and 399 and Section 117C(5) is not made out. Even in the alternative, I do not find that there are exceptional or very compelling circumstances under Section 117C(6) of the 2002 Act such as to displace the public interest in the appellant's deportation (as per the findings in Paragraph 111 of NA (Pakistan) v SSHD [2016] EWCA Civ 662. It is not accepted that the Appellant falls within any of the exceptions of Section 33 of the UK Borders Act 2007."

32. Although the judge made some reference to relevant paragraphs in the Immigration Rules, it is plain that she is considering the application of Exception 2 in s.117C(5) and the "very compelling circumstances" test in s.117C(6) of the NIA Act 2002. The difficulty is, however, that the judge plainly took into account the public interest and carried out a "balancing" exercise including the public interest in deporting criminals in assessing whether the impact upon the appellant's children and his wife would be unduly harsh for the purposes of s.117C(5). Despite the judge's clear self-direction earlier in her determination, there is no doubt that she did not apply that correct self-direction in paras 100 and 101 of her determination. She clearly referred to the public interest and the balancing that she was undertaking in the first two-thirds of her reasons in para 101. It is only in the final third, in the passage beginning "Even in the alternative", that she turns to consider whether there were very compelling circumstances for s.117C(6) to apply.

33. In my judgment the judge plainly fell into error in her approach to the "unduly harsh" test in s.117C(5) in her reasons that I have set out above.

34. It is not directly contended in the Secretary of State's submissions that if the judge fell into error in this way, her error was not material. In my judgment, this is not a case in which it can be said with confidence that, despite the judge's findings in relation to the impact upon the appellant's wife and children, it can be said that the judge, if she had not taken into account the impermissible matters following KO (Nigeria), would inevitably have reached the same assessment in relation to "unduly harsh". I have well in mind the recent decision of the Court of Appeal in HA (Iraq) and Another v SSHD [2020] EWCA Civ 1176 especially at [50]–[58] to the meaning of the "elevated" test of "unduly harsh" in s.117C(5) including at [55] the relevance of a qualifying child's best interests.

35. Given the judge's clear misapplication of the "unduly harsh" test, and in the absence of any focused submissions that, properly directed, the judge would inevitably have reached the same conclusion, I have reached the

view that the judge's error was material to her decision that Exception 2 in s.117C(5) did not apply.

36. For those reasons, Ground 1 is established and the judge's decision cannot stand and must be set aside and remade.

37. The appellant, in addition, raises under Ground 2 a number of matters which, it is said, demonstrate that the judge did not accept the factual matrix which at the outset of the hearing was said to be accepted (see para 29 of the determination). This, it is said, led to the hearing before the judge being dealt with by way of submissions only. Yet, it is said, that in assessing the evidence, the judge made a number of factual findings but the appellant was deprived of an opportunity to deal with those matters through his oral evidence. Reference is made to the judge's finding in relation to the appellant's risk of re-offending and that he had shown a lack of remorse. In the latter regard, it is said that the judge failed to have regard to the appellant's evidence in his witness statement, in particular paras 9 – 12, setting out his regrets and by implication, his remorse. It is further contended that the judge drew a number of adverse inferences from the lack of documentary evidence in relation to the appellant and his wife's health, their finances and their support from family and friends in the UK. In addition, the judge, it is said, unfairly assumed, in the absence of passports from the children, that they had travelled to India in the past which was not the case and also relied upon a discrepancy as to whether they spoke Hindi. These matters are helpfully set out in Ms Bayati's submissions at paras 14 – 21.

38. The respondent's submissions do not directly address the unfairness issue raised in Ground 2. They contend, rather, that the reasoning is adequate.

39. For the reasons I have already given, the decision must necessarily be remade. I see merit in the appellant's submissions that the judge has made a number of adverse inferences despite it apparently being accepted that the factual matrix was not challenged by the respondent. It would undoubtedly be more sensible for a judge, on remittal, in reaching a fresh decision in this appeal, to consider the evidence and make fresh findings of fact relevant the "unduly harsh" test in s.117C(5) and, if required, when considering whether there were "very compelling circumstances" under s.117C(6). As I have said, the respondent does not directly address, and seek to counter, the unfairness argument raised in the grounds and the subsequent submissions made on behalf of the appellant. In all the circumstances, I am persuaded that Ground 2 is made out given that the premise at the outset of the hearing was that the factual matrix was not challenged by the respondent. None of the judge's findings should, therefore, in my view stand and none are preserved for the judge remaking the decision.

Decision

40. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 involved the making of a material error of law. That decision cannot stand and is set aside.

41. None of the judge's findings are preserved. In view of the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the appropriate disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge James.

Signed

Andrew Grubb

Judge of the Upper Tribunal
27 November 2020