Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09601/2019

THE IMMIGRATION ACTS

Heard at Birmingham Justice Centre	**Decision & Reasons Promulgated**
On 18th February 2020	**On 14th April 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

IA
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs H Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr S Ell, Counsel instructed by Turpin & Miller

DECISION AND REASONS

1. An anonymity direction was made by the First-tier Tribunal. 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 other member of his family. This direction applies both to the appellant and to the respondent.

2. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is IA.

However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to IA as the appellant, and the SSHD as the respondent.

3. The appellant is a national of Ghana. It is not known when and how he entered the United Kingdom. In October 2000, Britannia Legal Advice Centre made an application for indefinite leave to remain on his behalf under the 'Regularisation Scheme' for over stayers. The appellant claimed to have entered the UK in January 1987 but was unable to provide any evidence to support that claim. He failed to respond to an 'Immigration Questionnaire' and his application was refused by the respondent on 24th of March 2003. In March 2015, the applicant was convicted at Blackfriars Crown Court of theft from a person. He received a six-month term of imprisonment. In January 2019, he was convicted at Warwick Crown Court of nine offences of dishonesty that took place in 2016. He received a 30-month sentence of imprisonment for each count, to run concurrently.

4. On 25th February 2019 the appellant was informed that in light of his convictions he is liable automatic deportation in accordance with s32(5) of the UK Borders Act 2007, unless one of the exceptions apply. The appellant made representations on the same date and on 17th May 2019, a deportation order was signed. The appellant was served with a decision to refuse the human rights claim dated 17th May 2019. The appellant's appeal against that decision was heard by First-tier Tribunal Judge Hollingworth on 15th October 2019 and allowed for reasons set out in a decision promulgated on 5th November 2019.

5. The appellant has three children, all of whom are British citizens. The eldest child, [A] was born on 16th April 2007 and is now 12 years old. She lives with her mother, and FtT Judge Hollingworth found at paragraph [12] of his decision, that the appellant has not established that he has a genuine and subsisting relationship with her. As set out at paragraph [12] of the decision, the focus was upon the appellant's two sons, [JE] born on 16th March 2016 and [JA] born on 16th October 2018. They are the two children of the appellant's relationship with his partner [DN]. At paragraphs [13] to [18] of his decision, the judge refers to the evidence before the Tribunal from the appellant's partner, an independent social worker Keith Patrick and Dr Aggarwal, particularly concerning the health of [JE], who has speech and language difficulties and the appellant's partner, who had developed postnatal depression and is still suffering with depression, treated by medication. At paragraph [17], the judge found

that it is unquestionably in the best interests of [JE] and [JA] for them to grow up in a household where both parents are present. At paragraph [18], the judge found that separation of [JE] from the appellant would be harsh. However, the judge noted the question to be resolved is whether the degree of harshness goes beyond what would necessarily be involved for a child of a foreign criminal facing deportation. The judge found the appellant has established that it would be unduly harsh for the children to remain in the UK without the appellant and the immigration rules are met. The judge concluded, at paragraph [23] as follows:

> "I find that family life exists between the appellant and [JE]. I find the first four criteria in Razgar are met. The question arises as to proportionality. I recognise the importance of the maintenance of effective immigration controls. I have also considered the PNC. I find that the appellant has a very poor criminal record. It is necessary for there to be deterrence. It is necessary to express the revulsion of the public. I take into account the assessment in the OASyS Report of the risk of reoffending. The appellant can speak English. The appellant is not financially self-sufficient. I have found undue harshness. The exception in relation to [JE] pursuant to Section 117C is fulfilled. It is necessary to view proportionality and the question of whether there would be a breach of Article 8 through the lens of the immigration rules. They are specifically drafted. Having found the immigration rules to have been met for the reasons given and taking into account the conclusions reached from the application of s55 as a primary consideration I have reached the conclusion that there would be a breach of the Article 8 right to a family life on the part of [JE] and on the part of the appellant. I allow the appeal."

6. The respondent claims the judge erred by failing to consider whether there could be other possibilities for [JE]'s behaviour, which following referral to a speech therapist is said to be improving, as is the mental health of [DN] and the situation at home generally. The respondent claims the judge failed to consider whether [JE]'s behaviour is attributable simply to his age and his speech and language difficulties. The fact that the behaviour of [JE] has become apparent following the incarceration of the appellant, is more likely than not to be explained by his age because [JE] would have been too young for it to have been recognised previously. The respondent claims the evidence establishes that [DN] receives weekly support visits that would continue if the appellant is removed, and [DN] would be able to continue to utilise the professional help and support available for [JE]. The respondent claims the appellant has failed to establish that it would be unduly harsh for the children to remain in the UK without the appellant. The respondent refers to the decisions of the Court of Appeal in PG (Jamaica) -v- SSHD [2019] EWCA Civ 1213 and the Supreme Court in KO (Nigeria) -v- SSHD [2018] UKSC 53, and claim there

has to be something above and beyond the normal consequences of deportation, but judge has failed to provide valid reasons to demonstrate that it would be unduly harsh for the children to remain in the UK without the appellant.

7. Permission to appeal was granted by First-tier Tribunal Judge Woodcraft on 3rd December 2019. Judge Woodcraft observed that arguably, the judge has failed to distinguish 'harshness' from 'undue harshness', an issue on which there has been substantial Court of Appeal authority. The matter comes before me to determine whether the decision of the First-tier Tribunal is vitiated by a material error of law, and if so, to remake the decision.

8. Mrs Aboni relies upon the grounds of appeal and submits the judge gives inadequate reasons for his finding that it would be unduly harsh for the children to remain in the UK without the appellant. She submits the judge has failed to consider the high threshold that must be met. She submits that although there is evidence of a change in the behaviour of [JE] following the incarceration of the appellant, the judge failed to consider whether there were other reasons for that change in behaviour. [JE] undoubtedly has speech and language difficulties and that is capable of explaining the difficulties that [JE] has. She referred to the report of the independent social worker, which confirms, at page 3, that [JE] has no physical health problems but has developed behavioural problems, which as yet remain undiagnosed. The independent social worker records that in discussion with the Deputy Manager of the nursery attended by [JE], he was told that [JE] joined the nursery in April 2018 and has settled well. The independent social worker was told that [JE] has *"... behavioural issues within the nursery that they feel are as a result of [JE]'s speech and language difficulties that leave him frustrated..."*. Mrs Aboni submits that although there is an indication that [DN] was struggling to manage the behaviour, there is also evidence that [JE]'s behaviour is improving, as is [DN]'s mental health. Mrs Aboni submits the judge gives inadequate reasons for finding that the removal of the appellant would have an unduly harsh impact upon the children.

9. Mr Ell submits the decision was one that was open to the judge and the matters now relied upon by the respondent amount to a disagreement with the findings and conclusions reached. He submits the judge was referred to the relevant legal framework and that is properly set out by the judge at paragraphs [9] to [11] of the decision. Mr Ell submits that at

paragraph [18], the judge found that "*... quite plainly separation of [JE] from the appellant would be harsh.".* However, the judge properly noted in the following sentence that the question to be resolved is whether the degree of harshness goes beyond what would necessarily be involved for any child of a foreign criminal facing deportation. The judge properly directed himself that the test is whether it is 'unduly harsh'. The judge accepted the evidence of the appellant's partner [DN] and her evidence that [JE]'s behaviour had taken a sudden change for the worse since the appellant had gone to prison. Mr Ell submits the judge carefully considered all the evidence that was before the Tribunal and at paragraph [18], the judge identified the factors that taken cumulatively, explain his conclusion that it would be unduly harsh for the children to remain in the UK without the appellant.

Discussion

10. Section 32 of the UK Borders Act 2007 defines a foreign criminal, as a person not a British citizen who is convicted in the UK of an offence and, *inter alia*, sentenced to a period of imprisonment of at least 12 months. Section 32(4) of the 2007 Act sets outs out the clear proposition that deportation of a foreign criminal is conducive to the public good. That is a statement of public policy enacted by the legislature, which the courts and tribunals are obliged to respect. Section 32(5) of the 2007 Act requires the Secretary of State to make a deportation order in respect of every foreign criminal, subject to the exceptions set out in section 33. Insofar as is relevant that is:

> "(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach–
>
> (a) a person's Convention rights, or
>
> (b) the United Kingdom's obligations under the Refugee Convention.
>
> …
>
> (7) The application of an exception—
>
> (a) does not prevent the making of a deportation order;
>
> (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
>
> but section 32(4) applies despite the application of Exception 1 or 4.".

11. Part 5A of the Nationality, Immigration and Asylum Act 2002 NIAA 2002 informs the decision making in relation to the application of the section 33 exceptions. Section 117A in Part 5A provides that, when a court or tribunal

is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8, and, as a result, would be unlawful under section 6 of the HRA 1998, the court, in considering the public interest question, must (in particular) have regard to the considerations listed in section 117B and, additionally, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C. Applying s117C(3) of the 2002 Act, the public interest required the appellant's deportation unless Exceptions 1 or 2 set out in s.117C(4) and (5) apply.

12. With specific reference to Exception 2 in S.117C(5), Lord Carnwath in KO (Nigeria) observed, at paragraph 23:

> "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.".

13. In SSHD v PG (Jamaica) [2019] EWCA Civ 1213, Holroyde LJ said, at paragraph 34:

> "It is therefore now clear that a tribunal or court considering section 117C(5) of the 2002 Act must focus, not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation, but rather, on whether the effects of his deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. Pursuant to Rule 399, the tribunal or court must consider both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him."

14. At paragraph 38, Holroyde LJ further observed:

> "In the circumstances of this appeal, I do not think it necessary to refer to decisions predating KO (Nigeria), because it is no longer appropriate, when considering section 117C(5) of the 2002 Act, to balance the severity of the consequences for SAT and the children of PG's deportation against the seriousness of his offending. The issue is whether there was evidence on which it was properly open to Judge Griffith to find that deportation of PG would result for SAT and/or the children in a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation.".

15. The respondent accepts the appellant has a genuine and subsisting parental relationship with his children who are all British citizens. The question to be resolved was whether the degree of harshness goes beyond what would necessarily be involved for a child of a foreign criminal facing deportation. At paragraphs [14] and [15], the judge carefully considers the evidence of the appellant's partner [DN], and the evidence set out in the report of the independent social worker and the letter from Dr Aggarwal. The evidence concerns not only the health of [JE] and [DN] and the particular challenges that they face, but also the cumulative impact that those challenges have upon the family dynamics as a whole, and the ability of [DN] to properly care for [JA] too.

16. At paragraph [18] of his decision, the judge identifies a number of factors that taken cumulatively, establish a degree of harshness going beyond what would necessarily be involved for any child of a foreign criminal facing deportation. In particular, the judge noted:

a. [JE]'s behavioural difficulties swiftly followed the incarceration of his father and the behavioural difficulties at home have been extreme.

b. [JE] has demonstrated poor eating behaviour which began following the incarceration of the appellant.

c. [JE] requires the full support of his mother at his age, and that support is prejudiced by the depression from which [DN] suffers, and the degree of difficulty which she now faces arising from the cumulative impact of the factors identified in her evidence and in the report of the independent social worker.

d. The speech and language difficulties of [JE] have arisen after the appellant's incarceration.

e. [JE] has experienced hallucinations and vomiting that has been treated by the medical profession on a physical basis but form an additional dimension to what would necessarily be involved for any child of a foreign criminal facing deportation.

f. The emotional dependency of [JE] upon his father substantially exceeds the normal emotional ties to be expected between a child of [JE]'s age and the appellant.

17. In reaching his decision the judge plainly had in mind the improvements which had been noted in the report of the independent social worker. In my judgment, in reaching his decision, the judge clearly applied the correct test. Where a judge applies the correct test, and that results in an arguably generous conclusion, it does not mean that it was erroneous in law.

18. As the Court of Appeal said at [18] of Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence. The assessment of such a claim is always a highly fact sensitive task. The FtT judge was required to consider the evidence as a whole and he plainly did so, giving adequate reasons for his decision. The findings and conclusions reached by the judge are neither irrational nor unreasonable. The decision was one that was open to the judge on the evidence before him and the findings made.

19. It follows that I dismiss the appeal.

Decision:

20. The appeal is dismissed and the decision of First-tier Tribunal Judge Hollingworth, stands.

Signed Date 6th April 2020

Upper Tribunal Judge Mandalia

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email.