Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12125/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 January 2020	**On 24 January 2020**

Before

THE HONOURABLE LORD UIST
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MIKAEL PRINCE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Miss S Jones, Senior Home Office Presenting Officer
For the Respondent: Mr T Ogunnubi, Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Baldwin ("the judge") promulgated on 13 November 2019 allowing an appeal by the respondent Mikael Prince ("Mr Prince") against a deportation order made by the Secretary of State dated 2 July 2019. The broad proposition advanced by the Secretary of State in support of the appeal is that the judge erred by concluding that the effect of Mr Prince's deportation on his three children would be unduly harsh within the meaning of section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. Mr Prince was born on 1 February 1983 and is a citizen of Cameroon. He entered the United Kingdom on 2 July 2004 using a false French identification card but claimed asylum as a Liberian national. His asylum claim was dismissed on 16 July 2004 and an appeal against that refusal was dismissed on 12 October 2004. His appeal rights became exhausted on 22 February 2005. He was listed as an immigration absconder on 10 August 2005. On 24 June 2006 he married a Latvian woman. On 18 July 2006 he applied for an EEA residence card as the spouse of an EEA national. That application was refused on 27 July 2006 because he had submitted a forged Liberian passport with his application. He made a further application on 13 November 2006 but withdrew it on 1 March 2007. Another application made on 10 April 2007 was refused on 13 May 2007 with no right of appeal. A final application made on 6 June 2007 was refused on 14 January 2008 with a right of appeal which he failed to exercise. On 8 May 2009 he submitted representations. On 6 October 2009 his child S was born. Further representations were submitted on 16 January 2010. On 12 February 2010 he was charged with deception. On 25 October 2010 he failed to attend court to answer an indictment and a warrant for his arrest was granted. He was apprehended on 5 January 2011 and on 15 April 2011 he was sentenced to 13 months imprisonment at Lewes Crown Court. On his release from prison he failed to report to the Home Office and was again listed as an immigration absconder. On 19 November 2014 a notice of intention to deport him was served to his file as his whereabouts were unknown. On 14 January 2015 a deportation order was signed against him and his human rights claims refused, with the decision being certified under section 94B of the 2002 Act. Both the deportation order and the refusal letter were served to file as his whereabouts remained unknown. On 6 April 2016 he was issued with his deportation order and notice of decision to deport at an alternative address which he had provided. On 8 April 2016 he began reporting to the Home Office. On 14 August 2017 he submitted representations. On 14 June 2017 the Supreme Court handed down judgment in the case of *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42. On 26 June 2018 he applied for leave to remain. On consideration of his submissions in light of that judgment the Home Office withdrew the decision to refuse his human rights claim dated 14 January 2015 and the associated section 94B certification. On 2 July 2019 his human rights claim was refused, providing him with an in-country right of appeal. It was an appeal against that decision which was refused by the judge on 13 November 2019.

3. The point which the judge had to determine was whether the effect of Mr Prince's deportation on his children would be unduly harsh (paragraph 399(a) of the Immigration Rules and section 117C(5) of the 2002 Act). He set out what he termed "the factual matrix" for that decision as follows. Mr Prince has been in the UK for 15 years. He entered the UK unlawfully and has never had leave to remain. He developed his relationship with his wife while here unlawfully. His wife and three children live with him, his wife and one child having refugee status until 2022, so that they cannot be

expected to return to Cameroon. His wife works part-time as a trainee dental nurse while undertaking a two years diploma. The eldest child has lived in the UK for ten years and has applied for British nationality. His only conviction was that on 10 February 2010. He pleaded guilty and served his sentence. The offence of seeking or obtaining leave to remain by deception had its origin in a carefully thought through arranged wedding. He is in a stable, genuine and subsisting relationship with his three children and their mother. He has been the main carer for the children for the last year or so.

4. The judge concluded as follows at paragraph 30 of his decision:

> "The reality is that if the Appellant is deported they will not be meeting him again for at least two years and their mother will find it very difficult to look after all three of them at the same time as pursuing her College studies and the part-time work which is an essential part of her studies, and vice versa. The best interests of these children will be very badly served by the deportation of their father and unduly harsh for them. It will also make it impossible for the parents to maintain a full and meaningful relationship, as the mother cannot return to Cameroon. If the Appellant had committed an offence which merited imprisonment of well over 12 months, or it had involved violence, drugs or sexual abuse, or he had committed any other offence since February 2010, any one of those factors would have been able to outweigh the harsh outcome for his children and partner and would justify Deportation. However, the combination of factors present in this case and the best interests of the children are, I find, very compelling. Deportation would, I conclude now make deportation *(sic)* unreasonable and disproportionate and outweigh the great importance I am obliged and do attach to effective immigration control and the public interest."

5. It was submitted on behalf of the Secretary of State that no factors properly capable of bringing the effects of deportation upon Mr Prince's children within the "unduly harsh" exception had been identified by the judge and that this amounted to a material misdirection. Furthermore, he wrongly approached the issue of the "unduly harsh" exception as a balancing exercise. Reliance was placed on the authorities in paragraph 6 below. On behalf of Mr Prince it was submitted that the facts were sufficient to entitle the judge to find that the effect of the deportation on the children would be "unduly harsh".

6. In *MK (section 55 – Tribunal Options) Sierra Leone* [2015] UKUT 223 (IAC) the Tribunal stated as follows at paragraph 46:

> "'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."

In *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 Lord Carnwath, giving the judgment of the Supreme Court, said 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 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 the 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* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 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."

In *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213 Holroyde LJ stated 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."

Hickinbottom LJ stated at paragraph 46:

> "When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with their other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are 'unduly harsh' will deportation be constrained. That is entirely consistent with article 8 of the ECHR. It is important that decision-makers and, where their decisions are challenged, tribunals and courts honour that expression of Parliamentary will."

7. We are satisfied that the judge made a material error of law in considering whether the effect of Mr Prince's deportation on his children would be unduly harsh. On no conceivable view of the facts could the effect of his deportation on his children be said to be "unduly harsh" as that expression was explained in the above cases. Likewise, the evidence does not support what appears to be the judge's conclusion, although it is not entirely clear,

that there are very compelling circumstances over and above those set out in paragraph 399(a) or (b) of the Rules or the very compelling circumstances necessary for an appeal to succeed where the Exceptions in section 117C of the 2002 Act are not made out.

8. He also made a further material error of law in carrying out a balancing exercise involving consideration of the seriousness of the offence against the unduly harsh outcome for the children, in breach of what Lord Carnwath said at paragraph 23 in *KO (Nigeria)*.

9. We shall therefore set aside the decision of the judge. Mr Ogunnubi accepted that if we decided to set aside the judge's decision the decision could be re-made on the basis of the evidence that was before the First-tier Tribunal and that no further hearing was required. In those circumstances, and in the light of our conclusions above, we proceed to re-make the decision by dismissing the appeal.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made, dismissing the appeal.

No anonymity direction is made.

Lord Uist, sitting as an Upper Tribunal Judge. 20/01/2020