IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00812/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 26 July 2022	**On the 06 October 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE FRANCES

Between

MICHAEL ANGELO REGINALD PHILBERT-ANZOLA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K McCarthy, instructed by Duncan Lewis & Co Solicitors (Sackville House London)
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Venezuela. He appealed to the First-tier Tribunal against the respondent's decision of 4 January 2018 refusing a protection and human rights claim.

2. Following a hearing on 20 February 2020 a panel of the First-tier Tribunal dismissed the appellant's appeal. Permission to appeal was refused by a First-tier Tribunal Judge and subsequently by an Upper Tribunal Judge. The

appellant sought judicial review of the Upper Tribunal refusal and permission was refused by Foxton J, but subsequently on an appeal against that decision, permission to appeal was granted by Elisabeth Laing LJ on 29 October 2021. She granted permission first in respect of the First-tier Tribunal's approach to the "unduly harsh" test, having arguably adopted an approach that had been deprecated by the Court of Appeal in HA (Iraq) [2020] EWCA Civ 1176, and also with regard to the absence of any reference to section 117C(6) of the Nationality, Immigration and Asylum Act 2002 in the Article 8 evaluation with regard to advice from the UNHCR about returns to Venezuela and arguably had conflated Article 8 with the protection claim. Permission was not granted with respect to the evaluation of the protection claim, however.

3. In her submissions Ms McCarthy adopted and developed the points made in her skeleton argument. She argued that the judge had failed to consider whether the factors relied on in the protection claim were capable of meeting the test set out in section 117C(6) of the Nationality, Immigration and Asylum Act 2002. It was argued that the court could have come to a different conclusion had it considered these matters in evaluating the Article 8 claim. A lot had been said about Article 15(c) at the hearing and the fact that there was no guidance from the Upper Tribunal concerning Venezuelan appellants and how to locate the appellant within such claims. The Article 8 evaluation gave it very short shrift but there were serious issues in the protection consideration and the UNHCR guidance in view of the current situation in Venezuela and this was capable of amounting to very compelling circumstances. The point should have been considered and had not been. It was accepted that the UNHCR guidance was no more than guidance but it was there together with other background evidence as to the seriousness of the situation in Venezuela and the significant problems being experienced in that country. These two tests were different and therefore the evidence required to be considered in the very compelling circumstances context without it being able to be assumed that because the Article 3 and Article 15(c) refugee protection tests were not met that that meant the test in the Article 8 context could not be met.

4. It was clear from what had been said in the Court of Appeal in HA (Iraq) now endorsed by the Supreme Court at [2022] UKSC 22 that the wrong approach had been adopted to the undue harshness test. This could be seen from paragraph 62 of the panel's decision and the reference there, the conclusion that the deportation of the appellant would not amount to undue hardship going beyond what would necessarily be involved for any child faced with the deportation of the parent. Again, evaluating the evidence in the context of the proper test could have made a difference. The relationship between the appellant and his daughter was not one that would continue by visits to Venezuela and bearing in mind the background evidence so it could only be by modern forms of communication and it should be noted that there were power blackouts and communication difficulties in Venezuela and a big time difference and there was a question of whether the daughter would be able to maintain any form of

relationship with her father. Also, the fact that there were some findings about the relationship did not mean the claim could not succeed. The mother had not attended court, had provided an unsigned statement but there was DNA evidence about the relationship. The relationship between the mother and the father was not good but that did not mean that the relationship with the daughter was not genuine. The use of the term "precarious" to describe the relationship was not a test. There was evidence of regular contact and of the appellant's genuine involvement in his daughter's life and he had a good relationship with her. The test was not an impossible one. The panel had erred in this regard also.

5. In her submissions Ms Cunha argued that the UNHCR evidence was not mandated by statute nor was Venezuela a party to the Convention. The appellant had not really put his case precisely as to fear on return. The situation since he left Venezuela had changed and he had not addressed that. There were bad circumstances in Venezuela but nothing to show that it would be an Article 3 breach of serious harm to him on return. There was no evidence from his father as to risk for the appellant and there was no evidence of indiscriminate violence in Venezuela nor of fear of a particular gang. There was no evidence that the Article 3 threshold would be crossed, nor that there was indiscriminate violence.

6. As regards the very compelling circumstances issue, it was accepted that the evidence had not been considered in that context but this did not materially affect the rest of the decision and did not cross that high threshold. Paragraph 62 had to be read in context and reference was made to paragraphs 64 to 66 and the consideration of the case law there. The threshold was high in deportation cases. The panel had considered KO [2018] UKSC 53 and in fact the proper tests had been applied in the consideration of among other authorities NA (Pakistan) and KF (Nigeria). There had been little evidence, which explained its brief application to the facts. There could have been a reference to the pictures provided but the panel had accepted that there was a genuine and subsisting relationship between the appellant and his daughter. The relationship with the mother was not accepted. It was not unreasonable to infer from the mother's absence that there was no working relationship between them. There was no evidence that the appellant's removal would be unduly harsh for the child. The section 117C(5) exceptions were not met. The reasoning at paragraph 47 to paragraph 50 was relevant here. The best interests of the child had been considered. As was said in paragraph 49, he had continued to commit offences even after his child was born. There was no social worker's report and a real world consideration had been made as required.

7. By way of reply Ms McCarthy argued that the factors were cumulative and that it was an elevated test and not as high as very compelling circumstances in considering undue harshness.

8. Ms McCarthy argued for a remittal to the First-tier Tribunal, whereas Ms Cunha argued that it was not likely to be necessary for there to be fact-finding, so the matter could be kept in the Upper Tribunal.

9. We reserved our decision.

Discussion

10. It is clear from what was said by the Supreme Court in HA (Iraq) that a test involving a notional comparator child, as employed by the Tribunal at paragraph 62 of the decision in this case, is not the proper approach to evaluating the issue of undue harshness in the case of a person such as the appellant in this case who has been sentenced to a period of between eighteen months and four years. The evaluation of undue harshness on the child of such a person requires an evaluation as set out at paragraphs 41 to 44 in HA setting out the nature of undue harshness and assessing the effect of deportation on the qualifying child and making an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case. Elisabeth Laing LJ at paragraph 6 of her reasons outlined the difficulties in this case in establishing undue harshness, and Ms Cunha's submissions echoed some of those points. Nevertheless we accept the argument made by Ms McCarthy that a judge could decide the issue of undue harshness differently on the basis of the evidence that was before the judge in this case and as a consequence, we consider that there is a material error of law in this regard.

11. As regards the very compelling circumstances argument, it is common ground that the judges did not consider the background evidence including the UNHCR guidance in assessing the situation with regard to return of the appellant to Venezuela but rather limited their consideration of these issues to the international protection argument before it.

12. Again, we consider that the panel materially erred in law. As Elisabeth Laing LJ pointed out, there is no reference to section 117C(6), which, as was held in NA (Pakistan) [2016] EWCA Civ 662, has to be read into section 117C(3). We consider that Ms McCarthy has made out a sufficiently strong case for contending that it could have made a difference in assessing the potential relevance of the situation in Venezuela to the section 117C(6) test. The context of that evaluation is potentially materially different as between the Article 8 claim and the international protection claim.

13. As a consequence, we consider that the challenge to the judges' decision is made out and we find that the panel erred in law as set out above.

14. As regards disposition, though we bear in mind the points made by Ms McCarthy at paragraphs 27 to 29 of her skeleton argument, the fact that further evidence both as regards the situation in Venezuela and the best interests of the child may be provided, it does not seem to us that that necessitates a remaking of the decision to the extent that it is necessary for the matter to be reheard in the First-tier Tribunal. Accordingly, the matter will be relisted for re-evaluation of the Article 8 issue only, in the Upper Tribunal.

Notice of Decision

The appeal is allowed to the extent set out above.

No anonymity direction is made.

Signed Date 5 October 2022

Upper Tribunal Judge Allen