



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal No: UI-2022-002364
FtT No: HU/14827/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 March 2023

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

L B

(anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Heard at Field House, London on 1 February 2023

*For the appellant, Mr S Whitwell, Senior Home Office Presenting Officer,
attending remotely*

No appearance by or for the respondent

DECISION AND REASONS

1. Parties are as above, but the rest of this decision refers to them as they were in the FtT.
2. By a decision promulgated on 28 March 2022, FtT Judge Khawar allowed the appellant's deportation appeal.
3. The appellant has a daughter, S B, aged 9 at the date of the FtT hearing, residing with her mother, I M. The appellant is now in a relationship with E M.

4. The SSHD did not accept that the appellant had any meaningful relationship with his daughter (which was unsurprising, as he had provided no evidence at that stage). However, the FtT found at [34] that he had “considerable input” into her life, and at [39] that this was “a genuine and subsisting parental relationship.”
5. At [52] the tribunal found that on separation S B would be “devastated ... consequences ... considerably greater than simply mere distress”. Its ultimate conclusion is at [64]:

On the entirety of the above evidence/considerations, I conclude the appellant has established a strong private and family life in the United Kingdom, his deportation would result in unduly harsh consequences in the life of his nine-year-old daughter in circumstances which clearly establish that the risk of the appellant reoffending is low; he is “assessed as having a low recidivism rate, therefore according to the generalised statistics he is unlikely to commit a further offence” ... Therefore, on the totality of evidence, I conclude the appellant’s deportation would be disproportionate to the public aim of prevention of crime and disorder. Thus, the appellant is entitled to succeed in this appeal. He is entitled to revocation of the Deportation Order as his case falls under the Article 8 ECHR exception provided in Section 33 of the 2007 Act.

6. The SSHD sought permission to appeal to the UT. The grounds, headed as material misdirection of law and inadequacy of reasoning, recite the case law on the test of “unduly harsh consequences”, and submit that the tribunal’s reasoning “simply does not establish” that the high threshold is met.
7. FtT Judge Haria granted permission on 27 April 2022: ...
 2. The grounds assert that the Judge erred by failing to have regard to the elevated threshold in concluding the appellant’s deportation would result in unduly harsh consequences for his daughter SB.
 3. The Judge in assessing the circumstances of S B correctly directs himself at [51] as to the level of harm required to meet the test under Section 117C(5). Having done so it is arguable that the factors identified, such as the appellant is an important part of S B’s life, do not warrant a finding that the deportation would result in “considerable emotional harm” to S B such that it would be unduly harsh.
8. Notice was issued to the appellant on 13 January 2023 of the hearing on 1 February 2023 at 10 am, with a request to arrive 15 minutes in advance. By 11.50 am there was no appearance by or for the appellant. He had not communicated with the UT or with the respondent. He had not advised the UT of any telephone number. Mr Whitwell found one on Home Office records. The tribunal clerk called that number twice but there was no reply. I was aware of public transport strikes causing travel difficulty, but

that would not explain absence of communication. In all the circumstances, I was satisfied that the appellant had a fair opportunity to appear, there was no explanation for failure to appear or to communicate, and it was in the interests of justice to proceed with the hearing in his absence under [38] of the Tribunal Procedure (Upper Tribunal) Rules 2008.

9. (Nothing has been heard from the appellant, up to the time of completing this decision.)
10. Mr Whitwell made his submissions, for which I am obliged. I then reserved my decision.
11. The FtT's decision sets out much law on deportation, but some of that is irrelevant and the rest is uncontentious.
12. On the crucial matter of the "unduly harsh" criterion, the FtT says at [43], correctly, that the focus is on the child not the appellant. It further directs itself at [45] that a "best interests" assessment is relevant, and at [46] that the threshold is high, by reference to the passage in *MK* [2015] UKUT 223 which was approved in *KO* [2019] EWCA Civ 2051:

... 'harsh' ... denotes something severe, or bleak ... the antithesis of ... pleasant or comfortable ... 'unduly' raises an already elevated threshold still higher.

13. The FtT did not refer to *HA (Iraq) v SSHD* [2020] EWCA Civ 1176. Since the date of the hearing in the FtT, the Supreme Court in *HA and others v SSHD* [2022] UKSC 22 has clarified that there is no "notional comparator" test, there being too many variables for that to be workable, and confirmed the *MK* and *KO* approach; *per* Lord Hamblen:
 43. Whilst it may be said that the self-direction involves the use of synonyms rather than the statutory language, it is apparent that the statutory language has caused real difficulties for courts and tribunals, as borne out by the fact that this is the second case before this court relating to that language within four years. In these circumstances I consider that it is appropriate for the *MK* self-direction to be adopted and applied, in accordance with the approval given to it in *KO (Nigeria)* itself.
 44. Having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it.
 45. Such an approach does not involve a lowering of the threshold approved in *KO (Nigeria)* or reinstatement of any link with the seriousness of the offending, which are the other criticisms

sought to be made of the Court of Appeal's decision by the Secretary of State.

14. The appellant (when not imprisoned) lived in Gravesend, and S B in Nottingham. They visited each other in both places, and communicated indirectly. The FtT's summary of the evidence and analysis at [33 - 39] ends with a well justified finding of a genuine and subsisting parental relationship. The SSHD makes no challenge to that. The FtT then says at [40]:

Furthermore, I conclude that there is no evidence to challenge the appellant's account to the effect that he feels his daughter would be "devastated" if he was to be deported to Gambia and not be able to continue to see her on a regular basis. Indeed such potential impact upon S B is corroborated by [I M & E M].

15. The FtT returns to the matter at [52]:

There is little doubt that the appellant is an extremely important part in the life of S B. In the event of an effective permanent separation, not having her father in her life, is likely to cause considerable emotional harm. He also provides for her financial needs. In view of the evidence in this case that she is likely to be "devastated", I accept that in the event of the appellant being removed to Gambia, the consequences upon SB will be considerably greater than simply mere "distress". In coming to this conclusion, I accept entirely the evidence of [I M]. No challenge, meaningful or otherwise, was raised in relation to this evidence or indeed any other aspect of the evidence relating to the appellant's family life with his daughter, during this appeal by the Home Office presenting officer Ms. McKenzie.

16. The FtT does not say, in terms, what would be in S B's best interests in respect of her father's deportation. It is obvious, however, that the FtT thought it would be better for her if her father were to remain in the UK so that, although living at a distance from each other, they could continue their relationship by meeting in person. It is generally in the best interests of children to foster their relationships with both parents. No other finding might reasonably have been reached on the evidence. However, there was substance in the submission of Mr Whitwell that the FtT, in effect, reduced the case to a best interests test, and identified nothing beyond that level.
17. I am unable to detect that the FtT's finding on the extent of the effect of separation on the child is based on any more than the word used by the appellant and echoed by other witnesses, elevating the descriptor from "distressed" to "devastated". Evaluation of such matters is difficult, but it must be based on assessment of specific circumstances, not just selection of a word which heightens emotional intensity.

18. The FtT did not misdirect itself on the law on the relevant exception to deportation, but it failed to apply the correct approach to the facts. It did not identify anything which met the elevated standard.
19. Having directed itself correctly at [43] to focus on the child, the FtT went on at [56 – 63] to express considerable sympathy for the appellant over his character and conduct, finding his offence to be a completely isolated incident with no practical risk of repetition for clear enough reasons; but that strays from the central issue. Section 117C of the 2002 Act prescribes that the deportation of a foreign criminal is in the public interest. Although that interest is greater, the more serious the offence, the degree of flexibility for a lesser offence is moveable only within the limits of the statute.
20. The FtT's finally at [64] focuses on the low risk of recidivism, and specifies nothing about the consequences for S B.
21. There can be no doubt what the FtT's conclusion would have been, on a free-ranging proportionality analysis, unfettered by the statutory scheme for deportation; but that exercise was not open to it.
22. The decision accordingly cannot stand.
23. The appellant was granted a delay in listing his case for hearing in June 2022. It was set down for hearing on 9 September 2022, when the UT granted him an adjournment as a further opportunity to find a representative. Nothing further has been heard in that respect.
24. The appellant has been advised, when permission was granted and when the case was listed for hearing, that the UT would not consider evidence which was not before the FtT unless it decided to admit that evidence. The appellant has done nothing to advance his case. There has been no suggestion that he would have anything to add to the evidence he put before the FtT, or that there has been any noteworthy change of circumstances since that time.
25. The UT's standard directions to parties and its practice statement provide that on setting aside a decision of the FtT the UT is likely to proceed to remake the decision unless satisfied that the effect of an error has been to deprive an appellant of a fair hearing, which is not the case here, or "there are other highly compelling reasons why the decision should not be remade by the UT. (Such reasons are likely to be rare.)" There are no such reasons.
26. It is appropriate to proceed to remake the decision. There is no reason to delay, or to remit to the FtT.
27. After the appellant's deportation, his daughter would continue to live with her mother, as she has always done, where she is well cared for.

28. The child has regular direct contact with her father. It would be in her best interests for that to continue.
29. It would be upsetting to the child for her direct contact with her father to end.
30. Although it is no adequate substitute, indirect contact may continue. The relationship need not come to a complete stop, but it will be significantly diminished. Realistically, resumption of direct visiting would lie a long way into the future.
31. There is no evidence that separation from her father might be significantly detrimental to the child's long-term wellbeing and development.
32. Even on the FtT's sympathetic view of the appellant's offending and the risk of recidivism, that does not outweigh the public interest in deportation.
33. The appellant's evidence falls short of showing that his deportation would have effects on his daughter reaching the unduly harsh threshold.
34. The decision of the FtT having been set aside, the following decision is substituted: the appeal, as originally brought to the FtT, is **dismissed**.
35. Under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, unless and until a tribunal or court directs otherwise, the appellant and his immediate family members are granted anonymity. No-one shall publish or reveal any information, including their names or addresses, likely to lead members of the public to identify them. Failure to comply with this order could amount to a contempt of court.

Hugh Macleman

Judge of the Upper Tribunal
Immigration and Asylum Chamber
2 February 2023