Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/13230/2017

THE IMMIGRATION ACTS

Heard at Newport	**Decision and Reasons Promulgated**
On 26th October 2018	**On 20th November 2018**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr T O S

(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mrs Aboni, Home Office Presenting Officer

For the Respondent: In person

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal.

2. The appellant is a national of South Africa born on 24th April 1977. The Secretary of State was granted permission to appeal against a decision of First-tier Tribunal Judge Suffield-Thompson, promulgated on 27th February 2018, allowing the appeal against the decision of the Secretary of State dated 12th October 2018. That decision identified that the appellant's human rights claim against his deportation order was refused. On 15th Mary 2015 the appellant was convicted of possession/control of identify documents with intent and for which he was sentenced to 1 year's imprisonment.

3. The judge recorded that:

   (i) the appellant claimed he arrived in the UK in 2004 but there was no record of legal entry

   (ii) he was granted a work permit for a hotel job in July 2006

   (iii) on 25th April 2007 he was granted limited leave to remain until 25th April 2012

   (iv) on 1st December 2008 youths convicted driving with no insurance certificate and not in accordance with his licence and fined

   (v) on 20th May 2011 he was convicted of shoplifting and given a conditional discharge

   (vi) on 24th June 2014 he made a voluntary departure to South Africa

   (vii) he attempted to re-enter the UK on 23 April 2015

   (viii) he was convicted at Liverpool Crown Court and given a one-year custodial sentence (see above)

   (ix) on 15th June he was served with a stage I decision to deport letter

   (x) he was released from prison on 23rd October 2015 and then released on immigration bail

4. It was noted in the First-tier Tribunal decision that the appellant gave evidence that he and his partner, the mother of his daughter (T), were back together again, and they wanted to make their relationship work for their child. He and his daughter had always been close, and she had become very unwell when he left and developed an eating disorder with which they were still battling.

5. The judge applied paragraph 399 (a) of the immigration rules and appreciated that this was automatic deportation under section 32 (5) of the UK Borders Act 2007.

6. The child was a British citizen born on 24 October 2005 and she had been living continuously in the UK for 12 ½ years. She was a qualifying child.

7. The judge noted the respondent accepted as recorded in the decision letter that it would be unduly harsh for her to live in South Africa and with that the judge agreed. The judge appreciated that the final issue to consider was whether it would be unduly harsh for the child to remain in the United Kingdom without the appellant and that the judge needed to assess the nature of the relationship that the appellant had with his daughter. The judge found that the appellant took his daughter to school, attended all her school events and was heavily involved with her medical care as she was under a hospital for weight issues. He would take her to the gym. The judge noted that the appellant was

> "*… an open individual who has made some mistakes in the past which he has admitted and paid for. It was clear that he is very close to his daughter and has only her best interests at heart and I accepted his oral evidence as honest'.* [36]

8. The decision referred to the texts and emails from the school showing the appellant was on the school list as a parent to be contacted and that he was the joint parent of T.

9. The judge referred to the letter from the appellant's partner which confirmed they had a close relationship, even when he was not living with them, and that when he went back to South Africa and reasoned

> "*… the child began to have serious emotional issues. She became unsettled, misbehaved at school and began to eat excessively. The overeating became so bad that the child was referred to Bristol Children's Hospital who arranged for various forms of physical and emotional support for the child. Even when the appellant was in custody they kept in touch with the child's interest"*. [38]

10. The mother's evidence was accepted that the appellant plays a large part in the treatment plan for their daughter and the judge accepted that from the evidence of the daughter the appellant and she had a close and positive relationship. [40]

11. The judge also found

> *"I had before me the letter from the Children's Hospital, the child's diet sheet, photographs of her at the various sporting activities she does with her father stop the photographs themselves show a little girl is very happy and at ease with her father.*

> *I do not seek to minimise the convictions of the appellant. It is clear that those who breach our criminal laws must pay the consequences… He committed the offence out of desperation to return to the UK to be with his child. He was given a prison sentence which he served and has not committed any other offences since that time. Whatever his past it was clear to me that he is a devoted and committed father.*
>
> *Looking at all the evidence in the round it is clear to me that this is a father and daughter who have a real, genuine and subsisting relationship. They lived together and the child has been having long-term and serious issues which the experts say have an emotional root cause and which her mother confirms began when she was separated from her father with whom she clearly has a deep bond. I find that it would be totally detrimental for her to not have the on hindered access that she currently has with the appellant and I find it would be unduly harsh for her to have to live without her father here in the UK. The immigration rules under 399(a) are met".*

And further:

12. *"I do not find that in this case the child could maintain her relationship with her father in the way that is in her interest via phone or other modern means of communication. I find that there would be serious health consequences both physical and emotional if the child were to be separated from her father and this would be totally contrary to her best interests".* [48]

13. *"I find on the totality of the evidence before me, that he plays a highly significant role in his daughter's life and that this is not a role he can play if he is not in the UK".*

Application for Permission to Appeal

14. The application for permission contended that the judge had failed to identify anything exceptional about the family situation that would outweigh the compelling public interest in the appellant's deportation. The judge had failed to identify any compelling features of the case which might elevate it to the level of unduly harsh or outweigh the public interest in deportation. The Secretary of State relied on **AJ (Zimbabwe)** [2016] ECA 1012 with reference to

> '*The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign Criminals* '

15. It was asserted that '*while the judge noted the appellant's daughter has an eating disorder there is no medical evidence concerning her prognosis or any additional dependence on the appellant specifically'*. It was therefore

submitted that without noting any exceptional circumstances the appellant was simply not able to benefit from the exception to deportation in 399 (a).

16. The judge was going against the relevant jurisprudence which states that the children's best interests cannot always take precedence

17. Permission to appeal was granted by Judge Blundell on the basis that it was arguable that the critical finding was reached without cognisance of the force of the public interest. The judge was not and had not referred to **MM (Uganda)** [2016] EWCA Civ 617.

The Hearing

18. At the hearing, Mrs Aboni accepted that the application for permission might have been better phrased, but she advanced that the judge had not reasoned the 'unduly harsh' test within the jurisprudence. The decision was not adequately reasoned.

19. Mr S, his partner and daughter attended the hearing, but he was not represented.

Conclusions

20. The legislative framework is set out at paragraph 399(a) of the Immigration Rules and Section 117C of the Nationality, Immigration and Asylum Act 2002 as follows:

> *399. This paragraph applies where paragraph 398 (b) or (c) applies if –*
>
> *(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and*
>
> *(i) the child is a British Citizen; or*
>
> *(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case*
>
> *(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and*
>
> *(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported;*
>
> **or**
>
> *(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and*
>
> *(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and*

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

21. ***117C Article 8: additional considerations in cases involving foreign criminals***

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) 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.

(4) Exception 1 applies where –

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) 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 child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

22. The lead judgment with regard to 'unduly harsh' and Section 117C, which, for children, mirrors paragraph 399(a) is now **KO (Nigeria) v Secretary of State for the Home Department** [2018] UKSC 53. The question addressed was whether

> *"the specific rules allow any further room for balancing of the relative seriousness of the offence, beyond the difference between the two categories"*

23. Exception 1 in Section 117C is considered to be self-contained and the approach in **MM (Uganda)**, (and to which the grant of permission referred), such that the seriousness of the offending should be introduced into the balancing exercise, was disapproved. The Supreme Court decided there should be a degree of harshness going beyond what would necessarily be involved for any child faced with deportation of a parent [23]. However,

> *"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".*

24. The introduction of exceptional or compelling reasons is not part of the test to be applied. The elevation of the test in this way was disapproved by the Supreme Court in KO at [43].

25. The reference in the grounds for permission refer to 'compelling features of the case' and anything 'exceptional about the family's situation'. As seen, that is not the test specific to children. **KO** approved the test as adopted in **MK (Sierra Leone) v Secretary of State for the Home Department** [2015] UKUT 223 (IAC) which emphasised the need for an evaluative assessment of the consequences upon the *children* by the Tribunal:

> *"By way of self-direction, we are mindful that '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".*

26. At [33] **KO (Nigeria)** concluded that the consequences would be 'unduly harsh'

> *"… if they are 'inordinately' or 'excessively' harsh taking into account all of the circumstances of the individual"* [33]

27. In this case, the judge made the relevant findings which I have outlined above. From a careful reading of the decision, the judge did not treat 'unduly harsh' as 'merely undesirable' as ruled against at [35] of KO **(Nigeria)**. The child has an emotional/eating disorder which can clearly be discerned from the documentation provided. Although there was no medical evidence concerning her prognosis there was medical evidence to confirm her referral to the weight management service and the judge

was entitled to conclude from the documentary evidence which was identified and the oral evidence of the mother and the appellant as to the requirement of the father for the child's emotional wellbeing in the light of the child's medical problems. The judge was obliged to consider and evaluate the facts as they were found as at the date of the hearing. I am not clear whether any medical professional could give a clear picture as to the 'prognosis' bearing in mind this is, in part, a mental health problem. The child was being treated by the specialist paediatric service at a Children's Hospital in Bristol. As such I find that the criticism levelled at the approach to the medical evidence is misconceived.

28. The judge appreciated that there is a much stronger emphasis on the words 'unduly harsh' which give the meaning of 'severe' or 'bleak'. The judge made a very clear and adequately finding, having considered the evidence, that it would be

> *"… totally detrimental for her to have the unhindered access that she currently has with the appellant and I find it would be unduly harsh for her to have to live without her father here in the UK".*

and in a sustainable finding having evaluated the evidence added that

> *"I do not find that in this case the child could maintain her relationship with her father in the way that is in her interests, via phone or other modern means of communication. I find that there would be serious health consequences both physical and emotional if the child were to be separated from her father and that this would be totally contrary to her best interests".*

29. It is clear that the judge did not consider that the child's best interests would always take precedence and indeed at paragraph 32 of the decision he stated that "a child's best interests are *capable* of outplaying the public interest in deporting a criminal'. This statement clearly reflects a realisation that the child's best interests are not a trump card, or paramount and can be outweighed by the public interest.

30. The judge also considered Section 117 B finding that removal would constitute a gross breach of the child's human rights. The judge equally noted that what must be show was more than mere hardship or mere difficulty or obstacles.

31. Following **Shizad (sufficiency of reasons: set aside)** [2013] UKUT 00085 (IAC)

> *"Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge".*

32. For the reasons given I find there is no material error of law in the judge's decision which incorporated adequately reasoned findings for dismissing the appellant's claim. The First-Tier Tribunal decision will stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Helen Rimington* Date 31st October 2018

Upper Tribunal Judge Rimington