Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07546/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 15 July 2019	**On 23 July 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Bates, Senior Home Office Presenting Officer
For the Respondent: Mr Karnik, Counsel

DECISION AND REASONS

1. This decision refers to the circumstances of a young child, S and for that reason I have maintained the anonymity order. S was born in the United Kingdom ('UK') in October 2013, when he was diagnosed with sickle cell anaemia.

2. In this decision, I remake the substantive decision on whether the appeal brought by the respondent ('HM') should be allowed or dismissed on human rights grounds. In a decision promulgated on 10 May 2019, I gave reasons for

setting aside a decision of the First-tier Tribunal ('FTT') sent on 16 November 2018, allowing HM's appeal.

Background history

3. HM arrived in the UK clandestinely in 2006. Shortly after this he was sentenced to six months imprisonment having been convicted of handling stolen goods and obtaining services by deception. His claim for asylum was refused and his appeal dismissed. This led to a signed deportation order dated 30 April 2008. On 28 November 2011 HM was sentenced to 21 months imprisonment having been convicted of 19 counts of making false representations. HM made further representations to remain in the UK but the FTT dismissed his appeal against a decision to revoke the 2008 deportation order on 6 January 2014.

4. In further representations over the course of 2016 and 2017 HM again applied to revoke the deportation order, placing reliance upon his family life. In a decision dated 12 March 2018, the SSHD accepted that HM has a genuine and subsisting relationship with his partner and their son, S (British citizens). The SSHD also appears to have accepted that HM has a genuine and subsisting relationship with two of S's elder siblings, from his partner's previous relationship, albeit he does not have parental responsibility for them. The SSHD however was of the view that it would not be unduly harsh for these family members to remain in the UK upon HM's deportation and refused to revoke a deportation order against HM.

Hearing

5. At the beginning of the hearing before me Mr Karnik submitted a comprehensive skeleton argument. He then applied for additional time to obtain clearer evidence regarding S's hospital admissions and absences from school. Mr Bates did not object to this and the hearing was therefore put back to 2pm. Upon the resumption of the hearing, Mr Karnik placed reliance upon the following evidence: three witness statements from HM; two witness statements from his partner; a 204-page consolidated bundle containing *inter alia*, updated medical evidence (unavailable to the FTT) from the medical professionals involved in S's care; a supplementary bundle containing *inter alia*, a letter dated 15 July 2019 containing a summary of hospital involvement with S from Ms Watson, S's paediatric social worker at Royal Manchester Children's Hospital and a table of school absences.

6. HM and his partner were both briefly cross-examined by Mr Bates. I then heard submissions from each representative, which I address in more detail below. Both representatives agreed that the principal disputed issue is whether or not the high threshold required by the "unduly harsh" test is met for the purposes of Exception 2 in s. 117C(5) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), or alternatively whether there are very compelling circumstances for the purposes of s. 117C(6).

7. After hearing submissions from both parties, I reserved my decision.

Legal framework

8. HM is a foreign criminal who has applied to revoke the deportation order made against him. In these circumstances, paragraphs 390 and 390A of the Immigration Rules apply. This requires a consideration of paragraphs 399 and 399A of the Immigration Rules. These are reflected within section 117C of the 2002 Act, which states as follows:

> "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."

9. There is no dispute that S and his two older siblings are qualifying "children" and as such the relevant test is that of "undue harshness" as set out in Exception 2 above. It is to be noted however that the question whether "the effect" of HM's deportation would be "unduly harsh" is broken down into two parts in paragraph 399, so that it applies where:

> "(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."

10. In the instant case it is only the second limb of 399 set out at (b) above, as reflected in section 117C(5), that requires consideration, as far as the children are concerned. This is because the SSHD has conceded that it would be unduly

harsh for S and his siblings to live in whichever country HM is deported to. HM has a pending statelessness application before the SSHD. This is immaterial to the present case, because of the SSHD's concession in relation to paragraph 399(a).

11. The correct approach to 399(b) and section 117C(5) of the 2002 Act has recently been considered by the Supreme Court in KO (Nigeria) v SSHD [2018] UKSC 53. In the only judgment Lord Carnwath said this at [23]:

> "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 the length of sentence."

12. Lord Carnwath also approved of the guidance given regarding the term unduly harsh in MK Sierra Leone v SSHD [2015] UKUT 223 (IAC). In that case the then President said this.

> "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."

13. It is therefore now clear from KO that the assessment of "unduly harsh" does not require a balancing of the relative level of severity of the parent's offence. The assessment solely requires a careful consideration of whether the elevated threshold is reached from the point of view of ether the child or partner. If that threshold is met then deportation would be a breach of Article 8 of the ECHR and no further analysis is required.

14. In BL (Jamaica) v SSHD [2016] EWCA Civ 357 the Court of Appeal concluded that the Tribunal did not undertake a sufficient inquiry into whether there was any other family member who could be able to care for his children and emphasised the need to consider the extent to which social services would be able to assist in reducing the adverse impact of the children losing their father to deportation at [53].

> "What the UT did in the course of their detailed and no doubt conscientious decision was to accept KS's son's evidence that KS could not manage her money and drank more that was good for her and made the inference that without BL the family would descend into poverty and require the support of social services. As against this, however, KS had looked after the family while BL was in prison or immigration detention and the UT had not made any findings that the family had then descended into poverty or required the support of social services, or that if that were to happen, there would not be adequate support services for these children. The UT were entitled to work on the basis that the social services would perform their duties under the law and, contrary to the submission of Mr

> Rudd, the UT was not bound in these circumstances to regard the role of the social services as irrelevant. The Secretary of State had made the point in the decision letter that there was no satisfactory evidence that KS had not coped with the children's upbringing in BL's absence and so the UT were aware that this point was in issue. KS's son's evidence was an insufficient evidential basis for the UT's conclusion on this point. His evidence was in reality uncorroborated and self-serving hearsay on this issue."

Discussion

15. S's best interests clearly support the continued presence of HM in his life in the UK. S's best interests are to be treated as a primary consideration. HM's deportation would deprive S of the daily contact he has with the only father-figure in his life. I accept that HM has close relationships with all members of the family, S's partner and three minor children. Having considered the medical evidence from a variety of sources and having heard from HM and his partner I accept that HM has an exceptionally close relationship with S. In the last few years S has been particularly dependent his father and has become increasingly dependent upon his almost constant care and support for reasons relating to his medical condition, in addition to the love that is normally found to exist between a parent and child. I note that in the past and dating back to 2010, there have been concerns regarding HM's mental health and ability to look after himself far less others. I am satisfied that these concerns no longer exist, hence the supporting letters regarding HM's caring responsibilities for his son from the professionals involved in S. I also note that HM's last criminal conviction pre-dates S's birth. I accept that since that time HM has devoted himself to family life and caring for S.

16. S's best interests are in no way determinative and as KO (Nigeria) makes clear the onus is upon HM to establish that the high threshold required by the "unduly harsh" test is met. Although S has three older siblings including a 20 year old, they are all in full-time education, and I accept they play a minimal parenting and caring role in S's life. HM and his partner each have no other family members in the UK. I accept that since starting to live with the family full-time (and with the exception of the periods when he was in immigration detention) HM has been S's primary carer, as his mother works full-time as a security guard. More significantly, I accept the evidence that S's medical condition has made him particularly dependent upon his parents, and in particular HM such that S will face a degree of harshness that goes beyond that which would be involved for any child faced with the deportation of a parent, for the reasons I set out below:

    (i) In a letter dated 23 May 2019, Dr Kausar, a Consultant Paediatric Haematologist described HM as playing a "*vital role*" in the management of S's condition. Ms Mcdonald, the Paediatric Haemoglobinopathy Homecare Practitioner described HM as playing an "*integral part*" of all aspects of S's daily care in her letter dated 17 May 2019. This role is varied and extensive given that the condition has acute and chronic phases impacting on all aspects of S's life. This includes: the day to day

management of S's condition including dealing with daily fatigue; preventative care and supervision to avoid episodes developing or worsening; substantial care at home during crises; coaxing to encourage movement, positivity, eating and school attendance when in pain; reassurance and care when invasive procedures must be conducted during in-patient hospital stays. S's regular hospital attendances are detailed in chronological order from 2016 in Ms Watson's recent summary, as prepared and emailed on the day of the hearing. In the particular experience of S, these are not hypothetical matters but real and practical issues that require a huge investment of time and emotional support from all involved in S's care and upbringing. That care must be proactive as well as reactive. The care and support required on a day to day basis even when S is not in crisis requiring hospitalisation is almost constant: at home there is almost constant preventative care as well as intensive care when S is in pre-crisis or crisis short of the need for hospitalisation; S goes to school but as his father explained he is often late and often has to be collected early for reasons relating to his medical condition.

(ii) Sickle-cell is unpredictable and crises can be extremely painful and debilitating. This is evidenced in S's recent history: although he has bouts of stability I accept that he has regular episodes which are unpredictable, serious and severe. As Ms Watson explained in her letter a child in pain requires much more than pain relief and medical or social care. He requires "cuddles" and close vigilance, emotional and physical support. This assists in relieving pain in the short-term as well as reducing the risk of a deterioration in symptoms. HM has played the primary role in the provision of this type of less tangible and difficult to define type of care and support. This type of care and support is very difficult to replace.

(iii) HM and his partner jointly provide the physical and emotional support required by S but HM's role is greater because his partner has worked full-time at all material times. However, HM and his partner have overlapping parental roles. This means that when one is required to focus solely upon S's needs, the other can manage the day to day care for the other minor children in the family unit. Mr Bates submitted that S's mother would be able to cope as S's sole carer, and submitted that she could give up her employment to do so. Given the nature and extent of the challenges presented by S's medical condition in combination with the demands of the other children, it would be very difficult for HM's partner to simply replace S's father, merely by giving up her employment. I accept the evidence that the constant demands of S in combination with other family responsibilities would be nearly impossible for one parent on her own, without other family assistance. In doing so I acknowledge that the family would have the support of S's medical team and social services. I have considered this submission carefully but do not accept that this will reduce the effect of HM's deportation to a level that goes below undue

harshness. This is because I accept the parents' evidence that they each play vital roles in caring for and supporting S. These responsibilities, when combined with looking after the two other minor children of the family are deep-rooted and extensive. As such, I accept their evidence that they could not cope with S effectively without each other. They are a team and have always worked as a team. I also accept Mr Karnik's submission that sickle cell is not a condition in which a paid carer can help out for a few hours a day. The independent supporting evidence from the professionals supports the proposition that the parents maintain self-care management throughout the day, which promotes wellness and has a mitigating effect. In addition, these parents are aware of S's specific warning signs and are best placed to mitigate pain and deterioration of symptoms by providing comfort, "cuddles" and reassurance throughout the day and when waking at night, in a manner that would be more difficult for a paid carer to achieve. Indeed, HM explained that S sometimes says to him "*don't let me die, I'm feeling so much pain*". I accept HM's evidence that sometimes the only real and effective relief from the pain is to be cuddled and massaged by his father or mother. I also accept HM's evidence that S continues to sleep in his parents' bed for this reason and HM is often required to collect S from school or keep him at home for reasons relating to his condition. This is consistent with S's school attendance for 2018-2019. This record 58 absences out of 370 sessions, and 40 lates. I accept HM's evidence that S is often late because of the time that it takes to get him ready for school.

(iv) S's mother and social services cannot substitute for the intimate, intensive emotional support that HM has provided S both when he is having a crisis and at other times in order to prevent a crisis. This is not because either are unwilling to do as much as they can to assist S. S's mother is clearly devoted to him and social services must perform their statutory duties toward children in need. However, the difficulties faced by S are constant – he is a child in pain and discomfort for significant periods. It is very difficult to see how social services could practically offer services to replace the comprehensive love, attention and support S has received from his father both when he is having a crisis and at other times. I therefore accept Mr Karnik's submission that HM's deportation will mean that S will lose the care, comfort and pain relief his father brings, and this in turn increases the likelihood of more frequent and intense crises, with concomitant hospitalisations.

17. Mr Bates drew my attention to a four-month period in 2016 when HM was detained. He invited me to find that S's parents were unable to articulate the particular difficulties S faced at the time, when his mother was required to manage his condition on her own. This must be considered in context. There is independent evidence from Ms McDonald contained in her letter dated 25 July 2016, that around the time that HM was last taken into detention, S "*has become very unsettled and irritable*" and his mother struggled to cope with looking after

his medical needs. S was under three years old at the time. The history of S's episodes and hospital admissions have worsened since 2016. It is clear from the chronology provided by Ms Watson that S did not require any in-patient admission to hospital in 2016, but has been admitted to hospital and required to stay for a number of days in each year from 2017 to 2019. S is now nearly six years old. He is much more aware of and overtly dependent upon the stability and security provided jointly by the only two significant individuals in his life – both of his parents. I therefore do not accept that because there was an absence of any significant difficulties for S in 2016, it follows that this continues to be the case.

18. The nature and extent of S's pain and suffering is such that it would be very difficult to replace or mitigate the gap left by his father, even on the assumption that his mother gives up employment and the family would continue to be supported by the medical team, the homecare practitioner and social services. Having considered all the relevant evidence and submissions, I am satisfied that it is not merely desirable for HM to remain in the UK to be with S, rather the effect of HM's deportation on S would reach the high threshold required for it to be "unduly harsh". I am therefore satisfied that Exception 2 in section 117C(5) is met in relation to S, and HM's appeal must therefore be allowed on human rights grounds.

19. I do not need to address the submissions based upon HM's relationship with his partner or step-children, or the submission based upon section 117C(6) of the 2002 Act, in the light of my findings regarding Exception 2 above.

Notice of decision

20. The appeal is allowed on human rights grounds.

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 their 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 *UTJ Plimmer* Date

Upper Tribunal Judge Plimmer 17 July 2019