Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07001/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 August 2019	**On 22 August 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R P (INDIA)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, a Senior Home Office Presenting Officer
For the Respondent: In person

Anonymity order
The First-tier Tribunal made an anonymity order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties.
Any failure to comply with this order could give rise to contempt of court proceedings.

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Judge Walker sitting at Taylor House who allowed the claimant's appeal under Article 8 ECHR having dismissed the asylum, humanitarian protection and Article 2 and 3 elements of the claim. The claimant has not challenged the dismissal of her international protection claims, either by way of Rule 24 Reply or cross-appeal.

2. The claimant is an Indian citizen from Gujarat. She is a foreign criminal. Section 32(5) of the UK Borders Act 2007 requires the Secretary of State to make a deportation order unless the claimant can bring herself within one of the Exceptions in section 33 of that Act.

Background

3. The claimant came to the United Kingdom on 11 July 2009 with a genuine Tier 2 General visa valid until 1 January 2012. Her son, born in November 2002, and her then husband joined her on 28 May 2010. The claimant's son is now 16 and on arrival in the United Kingdom he would have been nearly 8 years old. He has spent more than 7 years in the United Kingdom and is a qualifying child under section 117D of the Nationality, Immigration and Asylum Act 2002 (as amended).

4. In India, the child attended nursery and early years education in India up to year 3, taught in both English and Hindi. The claimant's evidence is that her child no longer speaks any Hindi, and that English was spoken at home between her and her (now estranged) husband, who was a Gujarati speaker.

5. The claimant's husband has now left the United Kingdom and is living in South Africa, so the persons who would be removed if the claimant were deported are herself and her son. The child was referred to CAMHS following domestic violence from his father and also because it was considered possible that he had ADHD. Following his father's departure, the child was found not to have ADHD and counselling was not pursued. The child self-referred to the wellbeing service in October 20018 and has had some counselling recently.

6. The family were granted leave to remain until 1 June 2014. The claimant, who was a barrister qualified in India and formerly worked as an immigration consultant there, re-qualified as a solicitor and worked in a firm of solicitors which was involved in the perpetration of a serious fraud for the purpose of obtaining Tier 2 visas. The fraud was described by the trial judge as "breathtaking" and as having driven a "coach and horses" through the immigration laws. The claimant benefited personally from the fraud by obtaining a Tier 2 visa for herself and her family and paying the fraudsters a total of over £10,000 for this.

7. On 12 March 2015 at Oxford Crown Court the claimant was sentenced to 14 months' imprisonment, following her conviction. The sentencing judge accepted that she did not exploit her position as a solicitor when involved in this fraud and was in no

different a position to that of some 70 others who were involved as beneficiaries of fraudulent certificates of sponsorship. He did consider that she had a clear knowledge of what she was doing based on her familiarity with immigration law which was an aggravating feature.

First-tier Tribunal decision

8. The First-tier Judge made no finding of fact as to whether the child speaks any language other than English, although the claimant asserts that he does not. It seems unlikely that that could be correct, given that he went to school in India until the age of 7, a school which taught in English and Hindi and that the claimant herself speaks Hindi. The First-tier Judge noted the claimant's evidence that her primary concern was the child's education and that he planned to take A Levels in physics, chemistry and mathematics.

9. The First-tier Judge did not accept that the claimant would be without family support on return, nor that she would be unable to find employment or support herself and the child. She had an MBA in Business Administration in India, was qualified as a barrister there, and worked as an immigration consultant before travelling to the United Kingdom. In the United Kingdom she achieved a Master of Laws degree, specialising in commercial and e-commerce law from the University of Hertfordshire. Given that he considered she would be able to find work, he considered that the claimant would also be able to access any medical care she required.

10. The claimant had not demonstrated that the exception to automatic deportation in section 33 of the UK Borders Act 2007 was applicable to her.

11. The First-tier Judge accepted, and the respondent did not dispute, that it would be unduly harsh to expect the child to remain in the United Kingdom without his mother. At [78] the Judge defined the remaining key question as "Whether or not it would be unduly harsh for the child to relocate to India with his mother".

12. The First-tier Tribunal accepted at [83] that there would be harsh consequences for the child if he were required to be relocated to India, but the Judge correctly asked himself whether the harshness was undue harshness. In *KO (Nigeria)* Lord Carnwath JSC held that inevitably in the case of a foreign criminal there is a level of due harshness and that for undue harshness to be shown there must be something significantly more.

13. The First-tier Tribunal found that there would be education facilities available for the child in India and that although he has mental health problems causing him severe anxiety and depression symptoms, he was currently receiving only very low-level intervention involving some counselling.

14. The First-tier Judge allowed the appeal with reference to paragraph 399A(2)(b) of the Immigration Rules, specifically on the basis that the claimant's son had not yet sat for his GCSE examinations (the hearing was on 11 April 2019) and that the disruption

caused by missing his examinations was sufficient to tip the balance and make his removal to India with his mother unduly harsh. The Judge found that returning the child to India would have harsh consequences but not such as to amount to undue harshness, save for the disruption which his removal would cause to his educational development:

> "84. However, there is a further aspect which, when taken into account and combined with the other factors already set out, does in my judgment make the consequences so harsh for [the child] that they amount to undue harshness. That aspect is the stage he has reached in his education in this country. This is confirmed by a letter from his school dated 3 April 2019 … together with an indication that he has been offered a provisional place to study A levels from September 2019 onwards at Varndean College. … I accept the [claimant's] oral evidence that his exams start in the second half of May [2019].
>
> 85. *Ms Davies [for the Secretary of State] confirmed that the proper approach to take when considering the harshness of any deportation is to assume that deportation will take place on the date that the decision is made.* If that is the case, [the child] would be relocated right in the middle of his GCSE exams. I consider that relocation at such a very crucial moment in his educational life does, when combined with the other factors which I have considered, cross the threshold of undue harshness. Removal at such a time would cause very substantial disruption to his academic progress. It is difficult to imagine a more damaging moment in a child's educational development for them to be removed than this. He would not be able to complete his GCSE examinations and would, therefore, have to effectively re-do this crucial year's work. Not only that, but he would have to do so in a kpel new educational system to which he would also have to adjust.
>
> 86. Taking all the evidence together I am satisfied that it would be unduly harsh for [the child] to be required to live in India with his mother. …"
>
> [*Emphasis added*]

15. The First-tier Judge did not write his decision immediately. Following the hearing on 10 April 2019, the First-tier Judge finalised his decision on 14 May 2019, but unfortunately it was not sent to the parties by the First-tier Tribunal administration until 10 July 2019. It is very likely that by 10 July 2019, the GCSE examinations were no longer in the future and that the child had completed sitting them.

16. The appeal was allowed. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

17. The Secretary of State challenged the decision on perversity grounds. She argued that the high threshold of unduly harsh consequences was not met, on the evidence, and that the First-tier Tribunal having found the claimant to be well educated, able to work and support herself and the child, and that the health concerns fell below the unduly harsh threshold, had erred in fact and law in finding that the GCSE examinations tipped the balance. The Secretary of State contended that

> "There are no reasons given as to why the [claimant's] son could not continue his education in India, even if it meant retaking exams, a country his mother was able to obtain a Master's degree in, as such the First-tier Judge has failed to give clear reasons as to how this threshold of unduly harsh consequences has been met and is bordering on being irrational."

18. First-tier Judge McCarthy granted permission. He noted that there was no challenge to the dismissal of the refugee and international protection claims. He granted permission because:

> "3. It is arguable that Judge Walker erred in law when finding that the [claimant's] deportation to India would have an unduly harsh impact on her son, because of the interruption to his education in the United Kingdom. It is arguable Judge Walker misdirected himself by treating the [child's] impending GCSE examinations and academic ambition to go to sixth form college and then university as meeting the test of undue harshness whilst binding decisions from the Court of Appeal indicate that at most such issues will address the issue of reasonableness.
>
> 4. I mention that in addition to the issues identified the Upper Tribunal may wish to consider the Judge's delay in reaching his decision and in its promulgation. Although the appeal was heard on 11 April 2019, the decision was not written until 14 May 2019 and was not sent to the parties until 10 July 2019. This timeline may add to the concerns raised by the [Secretary of State] because the delays mean that the potential interruption was to some degree alleviated in that the [claimant's] son would have sat all GCSE examinations and the pending deportation would not impact on that pressing academic issue."

Rule 24 reply

19. There was no Rule 24 Reply by the claimant.

20. That is the basis on which the Secretary of State's appeal came before the Upper Tribunal.

Upper Tribunal hearing

21. The claimant represented herself at the Upper Tribunal hearing. She maintained that the First-tier Tribunal's decision was open to the Judge because the child had mental health issues, had studied and enjoyed the social environment in the United Kingdom, and no longer knew any language but English. He had never returned to India after they left in 2010 and she had no support there (the First-tier Tribunal had found to the contrary). Her son had been successful in his GCSE examinations and now had a place in Year 12 which he would like to take up.

22. The claimant sought to reintroduce a claim for international protection at the hearing, relying on the emergency situation in Kashmir, which is hundreds of miles from her home area of Gujarat, arguing that there could be war between India and Pakistan at any time. I am not seised of international protection issues in this appeal

as the claimant did not challenge the dismissal of her asylum and humanitarian protection claim.

23. For the Secretary of State, Mr Tufan relied on section 117C and on *RA* (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC) and *KO (Nigeria) and others v Secretary of State for the Home Department* [2018] UKSC 53. The standard for 'undue harshness' as opposed to the 'due harshness' which followed a criminal conviction was high and demanding, and was not met on the facts of this appeal. Mr Tufan asked me to allow the Secretary of State's appeal and substitute a decision dismissing the claimant's appeal on all grounds.

Analysis

24. Parliament has established the correct approach to Article 8 ECHR in the case of a foreign criminal. The First-tier Judge was required to consider section 117C of the 2002 Act. Section 117C provides as follows:

> "117C (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".

25. On any view the claimant does not meet Exception 1, since neither she nor her child have been resident in the United Kingdom for most of their lives. As regards Exception 2 it is not disputed that this claimant has a genuine and subsisting parental relationship with her son, who is a qualifying child. It is accepted that her

deportation would be unduly harsh for him, if the child were to remain behind in the United Kingdom; in any event, he has no lawful status here.

26. The question then was whether it was open to the First-tier Tribunal to find that deportation of the child and the claimant to India would be unduly harsh for the child. I have regard to the guidance given by the Upper Tribunal in *RA (Iraq)* on the approach to applying *KO (Nigeria)*:

> *"(1) In KO (Nigeria) & Others v Secretary of State for the Home Department [2018] UKSC 53, the approval by the Supreme Court of the test of "unduly harsh" in section 117C(5) of the Nationality, Immigration and Asylum Act 2002, formulated by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), does not mean that the test includes the way in which the Upper Tribunal applied its formulation to the facts of the case before it.*
>
> *(2) The way in which a court or tribunal should approach section 117C remains as set out in the judgment of Jackson LJ in NA (Pakistan) & Another v Secretary of State [2016] EWCA Civ 662.*
>
> *(3) Section 117C(6) applies to both categories of foreign criminals described by Lord Carnwath in paragraph 20 of KO (Nigeria); namely, those who have not been sentenced to imprisonment of 4 years or more, and those who have. Determining the seriousness of the particular offence will normally be by reference to the length of sentence imposed and what the sentencing judge had to say about seriousness and mitigation; but the ultimate decision is for the court or tribunal deciding the deportation case.*
>
> *(4) Rehabilitation will not ordinarily bear material weight in favour of a foreign criminal."*

27. The First-tier Judge did not find any very compelling circumstances in this case of the type contemplated in *NA (Pakistan)*. Educational inconvenience or delay, as here, does not reach the demanding standard of undue harshness required by *KO (Nigeria)* and *RA*. There was no evidence of the workings of the educational system in Pakistan (other than the claimant's assertions) or of any recognition of United Kingdom-acquired qualifications, for example.

28. For completeness, I have considered the issue raised by First-tier Judge McCarthy that by the date of promulgation of this decision, the GCSE examinations were no longer in the future and that the child would have completed sitting them. The GCSE examinations would inevitably carry less weight if considered at the date of promulgation (10 July 2019) by which time only the results were awaited. I recall the decision of the Court of Appeal in *E v Secretary of State for Home Department* [2004] EWCA Civ 49 (*E and R*) that it is the date of promulgation on which any factual matrix falls to be assessed. However, since this issue was not relied upon by either party at the Upper Tribunal hearing, it is not necessary for me to rule on this point.

29. I am satisfied that in allowing the appeal for the reasons given in his decision, the First-tier Judge erred in law and that such error was material to the outcome of the

appeal. Even on the factual matrix as it stood at the date of hearing, at worst there would have been some delay to the child's educational attainment. That is not capable, even with the very low-level mental health intervention, of reaching the 'unduly harsh' standard.

30. I therefore set aside the decision of the First-tier Tribunal and substitute a decision dismissing the claimant's appeal.

Conclusions

31. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision.
I remake the decision by dismissing the claimant's appeal.

Signed *Judith AJC Gleeson* Date: 21 August 2019

Upper Tribunal Judge Gleeson