IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06258/2019

THE IMMIGRATION ACTS

Heard at Field House (Remotely)	**Decision & Reasons Promulgated**
On 6th August 2020	**On 01st September 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

[H A]
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Chauhan of Counsel, Chauhan Solicitors
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

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 because there are minors involved. 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.

1. The appellant appeals against the decision of First-tier Tribunal Judge Brewer promulgated on 14th November 2019 which dismissed the appellant's appeal from the Secretary of State's decision to refuse his human rights claim and make a deportation order. The First-tier Tribunal refused permission to the Upper Tribunal and permission was ultimately granted by Upper Tribunal Judge Coker stating that it was arguable that the judge had imported into his assessment of whether it would be unduly harsh upon the children, an assessment of the extent of the appellant's criminality. She added "Whether this will make a difference to the outcome is not certain given the evidence before the judge in any event. In so far as the citizenship of the children is concerned, it is for the appellant to prove his case, not for the respondent to look for evidence."

   The three grounds of appeal are as follows:

   (1) The First-tier Tribunal failed to follow the Supreme Court judgment in **KO (Nigeria) v the Secretary of State for the Home Department [2018] UKSC 53** attaching weight to the seriousness of the appellant's offending in making its assessment under Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

   (2) The First-tier Tribunal failed to follow the Upper Tribunal's decision in **CS and Others (Proof of Foreign Law) India [2017] UKUT 199 (IAC)** in holding that the appellant's children could return to India.

   (3) The First-tier Tribunal failed to recognise the importance of the British citizenship of the appellant's children and erred in law in failing to attach any weight to the applicable principles.

Immigration History

2. The appellant is an Indian national born on 21st July 1980 and claimed to have entered the United Kingdom on September 2000. He entered illegally and had remained in the UK without valid leave. In December 2011 he married an Indian national in the United Kingdom, but the appellant was then encountered on 25th August 2016, detained and released with reporting restrictions. On 23rd June 2017 the appellant was convicted of seven offences – four counts of dishonesty and making false representations to make gain for self/another or cause loss to other/expose others to risk, two counts of possessing/controlling identity documents with intent and one count of possessing/controlling articles for use in fraud. On 21st July 2017 he was sentenced to two years and eight months' imprisonment and did not appeal against the convictions or sentence.

3. On 1st August 2017, the Secretary of State proposed to deport the appellant. On 6th September 2017 the appellant made a human rights claim. On 20th March 2019 the respondent refused the human rights application and made a deportation order.

4. In his statement of case the appellant advanced that he had three children, two who are now British citizens and one, the youngest, he submitted was stateless. His wife

worked which meant that he looked after the children. His family relied on him for support during the day and he helped the children with their homework.

First-tier Tribunal Decision

5. In the First-tier Tribunal decision, the judge recorded at paragraph 12 that the appellant maintained he was a changed man and had not offended since coming out of prison and recorded as follows

> *"The appellant said he was a changed man and had not offended since coming out of prison. He said that at the time he committed the offences he did not know what he was doing was wrong. He said in terms 'I did not know I was committing an offence'. He said he pleaded guilty to the offences because only after he was arrested did he know that he had done anything wrong. To put this evidence into context, the appellant was convicted of:*
>
> *(i) having and using a false British birth certificate in his name;*
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> *(ii) having and using a false Italian driving license in his name;*
>
> *(iii) a national insurance card in his name for use in connection with fraud;*
>
> *(iv) having and using a false British driving license (obtained by fraud) which he used to open 3 bank accounts and obtain 3 credit cards;*
>
> *(v) obtaining a mortgage by fraud."*

6. At paragraph 13 the judge noted the sentencing remarks of the judge which showed that there were a number of aggravating features. One of the benefits gained was a £190,000 mortgage. Judge Brewer recorded that from both the nature of the offences and the sentencing judge's remarks that the appellant did know that he was acting illegally from the outset of his criminality which "stretched over a period of some 8 years commencing in 2008".

7. In relation to any fear of returning to India owing to persecution, Mr Malik in his submissions said this was simply not plausible and he was not relying on it.

8. The judge set out paragraph 23 of **KO (Nigeria)** which specifically states in relation to Section 117 is that the public interest in the deportation of foreign criminals:

> *"One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of the parent. What it does not require in my view (and subject to the discussion of the cases in Page 11 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 length of sentence."*

9. The judge also directed himself as to the test of 'unduly harsh' in line with the case of **MK (Sierra Leone) [2015] UKUT 223**.

10. The judge's factual findings were as follows:

(1) The appellant was less than honest about his relationship with his children. At first, the appellant and his wife suggested the children could not speak Punjabi but that, it then transpired, that the appellant has little English and the children therefore did speak Punjabi and in the circumstances the judge found it highly unlikely that the appellant assists the two older children with their homework, which is in English. [Paragraph 26].

(2) Considering the children's best interests, the two older children are aged 8 and 6; both attended school, lived with their parents and had friends. The youngest was 2 and not at school but lived with his family. The children were deprived of their father for around fourteen months when he was in prison, and throughout his criminal offending career the appellant ran the risk that his children could be deprived of his presence if he was apprehended. Nevertheless, on the basis of the evidence before him the judge concluded that it was in the best interests of the children to remain with their parents.

(3) At paragraph 29 the judge stated:

> *"The issue therefore is whether, if the appellant were deported there would be unduly harsh consequences for the children. In my view there is nothing preventing family life continuing in India. I see no reason why the appellant's wife and children would not and could not return to India with him. They all speak Punjabi, and although there would be some disruption to the children's education, the fact is their best interests are a primary, but not the only concern, and in all the circumstances I cannot find that the consequences for them would be unduly harsh."*

(4) The judge then went on at paragraph 30 to state:

> *"I take into account the significant weight to be given to the public interest in the deportation of foreign criminals and in that context, I note that the appellant's offending history is in fact a history of serious offending and, as I have found, a lack of remorse. He has maintained his account that he thought his behaviour was 'innocent' until his criminality was pointed out to him notwithstanding the crimes for which he was convicted (which includes the relevant mens rea) and the judge's sentencing remarks that he was aware of his offending throughout."*

(5) At paragraph 31 the judge observed

> *"I also note here that there was no suggestion by the appellant that beyond the question of whether his deportation would be unduly harsh on his children, there were no other very compelling circumstances in his case."*

(6) The judge recorded a key submission made by the appellant that the appellant's Counsel chose to concentrate on the key aspect of this case which is Exception 2 in Section 117C of the 2002 Act in short "*He says it would be unduly harsh on the children if the appellant was deported*".

(7) The judge's assessment of that submission for the purpose of Section 117C(5) is found at paragraphs 20 to 40 under the heading Discussion. The judge stated:

> *"I take into account the significant weight to be given to the public interest in the deportation of foreign criminals and in that context, I note that the appellant's offending history is in fact a history of serious offending and, as I have found, a lack of remorse. He has maintained his account that he thought his behaviour was 'innocent' until his criminality was pointed out to him notwithstanding the crimes for which he was convicted (which includes the relevant mens rea) and the judge's sentencing remarks that he was aware of his offending throughout."*

11. Ground 1 of the appeal asserted that this was inconsistent with **KO (Nigeria)** when making the assessment under Section 117C(5). The judge was obliged to disregard the seriousness of the appellant's criminal offending.

12. In terms of Ground 2 the appellant has three children who do not hold Indian citizenship. The judge found that in his view there was nothing preventing him forming a continued life continuing in India. The Secretary of State produced no evidence as to India's domestic law to support her case that the children will be permitted to enter or reside in India with the appellant. In the absence of such evidence the judge was obliged to find that relocation to India was not possible.

13. In **CS and Others (Proof of Foreign Law)** held that "The content of any material foreign law is a question of fact normally determined on the basis of expert evidence." The Secretary of State's case in **CS** was that the family could return to India and the Upper Tribunal in **CS** at paragraph 22 noted that the Secretary of State sought to persuade the panel that the effect of the Indian immigration laws was that the family would at some unspecified date, be reunited on Indian soil.

14. The judge should have found, in line with **CS and Others (Proof of Foreign Law),** in the absence of any evidence on India's domestic law adduced by the Secretary of State that the main pillar that the Secretary of State sought justify (family could be reunited on Indian soil) was devoid of foundation. The burden of proof under **CS and Others (Proof of Foreign Law)** was on the Secretary of State. The judge misunderstood the position. It was for the Secretary of State to justify the interference with the rights protected under Article 8.

15. Ground 3 argued that the British citizenship of the children was particularly relevant to assessing whether they should leave the United Kingdom with a parent who had no right to be in this country, **ZH (Tanzania) v the Secretary of State for the Home Department [2011] 2 AC 166** paragraph 32 and **Zoumbas v Secretary of State for the Home Department [2013] UKSC 34**. It was a complete failure on the part of the judge to appreciate the importance of the British citizenship of the appellant's children. The judge held that the children might return to India but failed to have regard to the loss of benefits they might endure. The appellant accepts British citizenship was [not] a trump card but failure to attach due weight amounted to an error of law.

16. The Secretary of State in her Rule 24 notice response to the grounds submitted that the judge had directed himself appropriately and in accordance with **NA (Pakistan)**

[2016] EWCA Civ 662 and **KO (Nigeria)**; the judge did consider the unduly harsh test but then moved on to consider the wider assessment. The key aspect of the case was Exception 2 and Section 117C(5). In relation to the evidence on settlement in India it was not clear this point was taken. On the issue of British citizenship and the relationship between the appellant and his children, the judge on the findings would have found that it would not be unduly harsh for the children to remain in the UK without the appellant.

17. At the hearing before me, Ms Cunha accepted that the judge when considering whether it was unduly harsh for the children to relocate to India had referred to the appellant's offending. She resubmitted however that it was not material.

Analysis

18. The Judge set out **KO (Nigeria)** but failed to apply that authority. The Judge proceeds seamlessly, when considering the undue harshness of the appellant's children relocating to India at [29], to include a consideration of the appellant's 'offending history' at [30]; his finding is cited at 10(7) above. The juxtaposition of the two paragraphs shows the Judge unquestionably imported a consideration of 'offending history' into his consideration of 'unduly harsh'; he stated so in terms. That is a material error of law. What the Judge might have done under Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 with regards the consideration of the children remaining in the United Kingdom, separated from the appellant, was not explored by him.

19. With regard the ability to settle in India it is for the party asserting the fact to prove it. The analysis, however, did not address the question of the children remaining in the United Kingdom without the appellant.

20. Further, I pointed out that the judge had failed to address the question of the British citizenship and its relevance and importance' when considering the removal of the family from the United Kingdom, further to **Patel (British citizen child – deportation) [2020] UKUT 00045**. Ms Cunha agreed that that was indeed material and I consider that to be a sensible concession particularly as the Judge failed to consider the children remaining in the United Kingdom and thus separation from the appellant. She requested, however, that the findings on credibility be maintained.

21. Mr Malik submitted that the decision overall legally flawed accepted the credibility findings might be maintained.

22. I find material errors of law for the reasons given above and set aside the conclusions of the First-tier Tribunal decision save for the parts preserved as indicated.

23. I have considered the evidence given and although I set aside the conclusions of the decision, I preserve the record of the evidence given from 9 to 18 on to the findings made by the judge and the record of the submissions made by Mr Malik thereon.

24. I find that there are relevant and important findings which have not been made in respect of the children removing to India or indeed to be remaining in the United Kingdom without the appellant, further to Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 and for that reason and because of the nature and extent and the findings to be made, this matter should be remitted to the First-tier Tribunal.

Signed *Helen Rimington* Date 24th August 2020
Upper Tribunal Judge Rimington