Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: PA/14067/2018 (P)

THE IMMIGRATION ACTS

Decided under rule 34	**Decision & Reasons Promulgated**
On 3 July 2020	**On 21st July 2020**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

D B S

(ANONIMITY DIRECTION MADE)

Respondent

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Zimbabwe born in 1979. His appeal against the deportation was allowed by First-tier Tribunal Judge J K Thapar on 14 August 2019.

2. The Secretary of State appealed on the grounds that:

   a. the judge failed to give clear reasons at [21] for finding that it would be unduly harsh for the other family members to remain in the UK if the Appellant was deported;

b. the judge failed to conduct a balancing act;

c. there was no consideration of the support the Appellant's family may receive from the eldest child's school or social services; and

d. the judge failed to give reasons why the children's mother [PZ] would not be able to cope, resulting in a complete collapse in the physical, emotional and psychological welfare of the children.

3. Permission to appeal was granted by Designated First-tier Tribunal Judge Peart, on 14 November 2019, on the grounds that it was arguable the judge failed to accord great weight to the public interest in deporting foreign criminals and failed to undertake a genuinely contextual assessment of whether deporting the Appellant would be unduly harsh in the circumstances. He stated: "It was incumbent on the judge to carry out a balancing exercise, first considering paragraph 399 and s.117C set against the relevant law such as Heshim Ali [2016] UKSC 60, KO (Nigeria) [2018] UKSC 53 and PG (Jamaica) [2019]EWCA Civ 1213. All grounds are arguable."

4. The hearing of the appeal was vacated due to the outbreak of Covid 19. Directions were sent to the parties on 11 May 2020 indicating that the error of law hearing would be conducted without a hearing, subject to any view expressed by the parties, and inviting the parties to make written submissions.

5. A request for an oral hearing was expressed in the grounds and in the Rule 24 response, but there was no objection to the error of law hearing proceeding without an oral hearing in response to specific directions. I have considered the submissions made by the Appellant and the Respondent in response to directions. Given the restrictions of operating in a pandemic, I extend time to comply with directions. I am satisfied that, in the interests of justice, this appeal can be decided without a hearing.

6. The issue before the First-tier Tribunal was whether it would be unduly harsh for the family to remain in the UK if the Appellant was deported. It was accepted there were genuine and subsisting relationships between the Appellant, his wife and children and that it would be unduly harsh for the family to relocate to Zimbabwe. It was accepted that if the Appellant's deportation was unduly harsh on the eldest child [JZ] it would also be unduly harsh on the youngest child [AZ].

7. The judge made the following findings of fact at [13] to [17]:

(i) The Appellant is the main carer of the children, JZ and AZ, and his wife, PZ, is employed full-time;

(ii) The Appellant is not the biological father or JZ, but the Appellant has played a parental role for most of JZ's life;

(iii) JZ has been diagnosed with Autism Spectrum Disorder [ASD];

(iv) The Appellant regularly attends school to assist JZ including parent's meetings, school trips and accompanying JZ to and from school;

(v) The Appellant attends sports classes with JZ (funded by PZ) and appointments with outside professional agencies;

(vi) The Appellant is heavily involved in the lives of his children and has taken a course to better understand the needs of JZ;

(vii) JZ requires a high level of support and has a set routine when arriving at school each day. Any changes would cause him to become dysregulated for the whole day;

(viii) JZ requires adult supervision to manage his behaviour and safety;

(ix) The Appellant accompanies JZ to swimming, school and they enjoy playing football;

(x) The judge relied on the comprehensive report from an independent social worker [ISW] who concluded that, although additional support was available at school, many of JZ's needs and demands would still have to be met at home;

(xi) The Appellant was a stabilising figure for JZ and his removal would likely cause JZ's behaviour to become more extreme;

(xii) JZ's diagnosis was lifelong and its manifestations would change as he got older;

(xiii) The Appellant was actively involved in the care of JZ and in the management of his condition.

8. At [21] the judge found: "The Appellant's circumstances meet Exception 2 (section 117C(5) of the NIA Act 2002 and reflected in Paragraph 399 of the Immigration Rules.) The effect of the Appellant's deportation would be to undermine the existing emotional bonds he has with his wife and their children. He would be precluded from returning to the UK for at least 10 years (unless the deportation order was revoked by the Respondent). They would not be able to visit him in Zimbabwe in light of Mrs Z's immigration status. The family have a close and loving relationship. It is in the children's best interests to continue to be raised by both their parents, as they have been for most of their lives. To bring that to an end would, in my judgment, be unduly harsh on the children and in particular to their eldest child. The Appellant is equally involved with his care and his needs are such that he requires significant constant support and attention from at least one parent not only at home but at school too. This is a role taken mainly by the Appellant. I am told that any changes in routine do adversely affect their eldest child and therefore any changes in the status quo could be detrimental."

The Respondent's submissions

9. The Respondent submitted that the judge failed to give clear and adequate reasons for his finding at [21]. It was submitted that these are the expected circumstances in every deportation scenario. The judge did not refer to any relevant authority and failed to appreciate the high threshold of the unduly harsh test set out in **KO (Nigeria)** at para 23:

> *"On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is 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 a parent."*

10. The Respondent submitted that the judge failed to establish how the circumstances at [21] go beyond what would necessarily be involved with the deportation of a parent. Although the JZ had been diagnosed ASD, this was not an uncommon condition or a determinative factor, without more. There may be a detrimental effect on the routine of the child, but the judge failed to provide clear and adequate reasons for why this would amount to unduly harsh consequences. The Appellant's wife is involved with the care and upbringing of JZ and has utilised services provided by the NHS. As set out these services and potentially those from social services/school/other support agencies would be available in the absence of the Appellant. The judge failed to engage with or consider this crucial and material point in issue.

11. The Respondent relied on **BL (Jamaica) [2016] EWCA Civ 357** at [53] *"…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."*

12. The Respondent acknowledged that dealing with a child with ASD can be challenging and present its own difficulties and problems, but submitted the judge failed to give reasons as to why PZ would be unable to cope such that the result would be a collapse in the physical, emotional, or psychological welfare of the children. As such the impact has not been shown to be unduly harsh or going beyond the commonplace **PG (Jamaica) [2019] EWCA Civ 1213**. Periods of difficulty and adjustment are envisaged in deportation scenarios and do not amount to unduly harsh consequences in themselves.

13. The Respondent also relied on **Imran (Section 117C(5); children, unduly harsh) [2020] UKUT 00083 (IAC)**:

> 1. *To bring a case within Exception 2 in s.117C(5) of the Nationality, Immigration and Asylum Act 2002, the 'unduly harsh' test will not be satisfied, in a case where a child has two parents, by either or both of the following, without more:*
>
> *(i) evidence of the particular importance of one parent in the lives of the children; and*
>
> *(ii) evidence of the emotional dependence of the children on that parent and of the emotional harm that would be likely to flow from separation.*
>
> 2. *Consideration as to what constitutes 'without more' is a fact sensitive assessment.*

14. The Respondent submitted that, although **Imran** was decided after the First-tier Tribunal decision was promulgated, the issue of the remaining parent and their circumstances was an obvious factor in the unduly harsh assessment. The judge failed to consider the ability of the mother to look after the children in the absence of the Appellant or provide reasons why the Appellant is particularly important such that his absence could not be compensated by the mother/other support (as it has been previously). It was submitted that the ratio set out in **Imran** clearly applied, and the evidence and brief reasons set out by the judge did not amount to the 'without more' requirement in **Imran**. The Respondent submitted that the judge materially erred in law and the decision should be set aside.

The Appellant's submissions

15. In summary, the Appellant submitted there was substantial cogent evidence to demonstrate that the Appellant's deportation would have unduly harsh consequences for his family members. The judge properly applied the relevant rules and statutory provisions and gave adequate reasons for her conclusions. There was also evidence before the judge which showed that the Appellant and PZ also had a caring role for PZ's sister's children. PZ's sister was murdered by her husband, the children's father. There would be serious adverse consequences for these children which further demonstrated that the Appellant's deportation would be unduly harsh.

Conclusions and reasons

16. The judge's conclusions at [21] are informed by her findings at [13] to [17] and the content of the ISW's report. These findings support the conclusion that

there would be unduly harsh consequences beyond what would necessarily be involved in the deportation of a parent.

17. These findings also demonstrate that the Appellant's support could not be replaced by social services or support at school. PZ would not be able to continue in employment without the Appellant caring for the children. The Appellant accompanies JZ to activities outside school which PZ pays for. In the Appellant's skeleton argument, which the judge takes into account at [6], it was submitted that the PZ suffered from PTSD, anxiety and depression as a result of her sister's murder and that she could not cope without the Appellant.

18. There is ample evidence in the ISW's report to support the judge's finding that it would be unduly harsh to deport the Appellant. The judge's findings of fact at [13] to [17] adequately explain the judge's conclusions at [21].

19. The judge applied to correct test in assessing whether the Appellant's deportation would be unduly harsh. There was ample evidence before the judge to demonstrate a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. Any failure to specifically refer to this evidence was not material. The judge considered the evidence as a whole and was entitled to attach significant weight to the ISW report.

20. The judge cannot be criticised for failing to apply Imran, but in any event there was evidence of the particular importance of the Appellant in the lives of the children and evidence of the emotional dependence of the children, in particular JZ, on the Appellant and of the emotional harm that would be likely to flow from separation (ISW report at page 75 to 81).

21. The judge's finding that the Appellant's deportation would be unduly harsh was open to her on the evidence before her and she gave adequate reasons for coming to that conclusion. Alternatively, any lack of reasoning was not material given the strength of the evidence before the judge.

22. At the date of hearing, the Appellant's last conviction was over eight years ago and he was at low risk of re-offending. JZ was 7 years old and AZ was four years old. Applying section 117C, the public interest requires the Appellant's deportation unless one of the exceptions is satisfied. The Appellant has shown that his deportation would be unduly harsh and he satisfies exception 2. The judge's conclusion at [22] demonstrated that she carried out a balancing exercise and her finding that the Appellant's deportation would be disproportionate was open to her on the evidence before her.

23. I find there was no material error of law in the the First-tier Tribunal decision of 14 August 2019 and I dismiss the appeal.

Notice of decision

Appeal dismissed

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 her or any member of her 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.

J Frances

Signed Date: 3 July 2020

Upper Tribunal Judge Frances