Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14686/2019

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
Via Teams	
On 25 August 2021	**On 15 October 2021**

Before

UPPER TRIBUNAL JUDGE LANE

Between

ANP
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Greer
For the Respondent: Mr Tan, Senior Presenting Officer

DECISION AND REASONS

1. By a decision dated 2 September 2020, I found that the First-tier Tribunal had erred in law such that it decision fell to be set aside. My reasons were as follows:

> 1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born in 1978 and is a male citizen of India. He appealed to the First-tier Tribunal against the decision of the Secretary of State dated 3 July 2019 refusing his human rights claim. The First-tier Tribunal, in a decision promulgated on 14

February 2020, allowed the appeal on Article 8 ECHR grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The appellant entered the United Kingdom in June 2001 as a visitor. His leave was extended, for reasons which are unclear, until 12 February 2002. After that date, he has not had leave to remain in the United Kingdom. In August 2011, he married Mrs P, a British citizen, in a religious ceremony. The couple have not been married in a civil ceremony. They have two sons, AB, who was born in March 2012 and KB, was born in July 2014. On 22 November 2012, the appellant committed the offence of dangerous driving and was sentenced to 12 months imprisonment. He was also disqualified from driving for four years. On 21 March 2014, the appellant was served with a notice of liability to deportation as a foreign criminal. On 28 October 2014, the appellant applied for leave to remain on the basis of his family and private life. That application was refused and a decision to make a deportation order was issued on 15 June 2015 with no in-country right of appeal. Following proceedings for judicial review, a further decision was made on 16 June 2016 with an in-country right of appeal. The appellant's appeal was dismissed by a decision of the First-tier Tribunal promulgated on 5 February 2017. The appellant made a further application for leave to remain on the basis of his private and family life which was refused on 3 July 2019. It is that decision which forms the basis of the present appeal.

3. The appeal turns on the application of Section 117C (5) of the 2002 Act (as amended):

> 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

The judge concluded at [66-68] that it would be unduly harsh for Mrs P and the children to move to India with the appellant and further that it would be unduly harsh for Mrs P and the children to remain in the United Kingdom without the appellant. The grounds of appeal challenge the adequacy of the judge's reasoning and the failure to apply the dicta of the Supreme Court in KO (Nigeria) 2018 UKSC 53. In his oral submissions at the initial hearing, Mr McVeety, who appeared for the Secretary of State, submitted that the judges reasons amounted to nothing more than an assertion life of the family in India would be 'not as good as it is in the United Kingdom.' Whilst that submission is, perhaps, a little blunt and whilst I hesitate before interfering with the decision of a judge who has had the benefit of hearing from the appellant and his partner, I am not satisfied that the judge has given clear and adequate reasons based on the evidence (which was not in dispute) to justify the conclusion that the consequences of the appellant's deportation on the family can properly be described as unduly harsh.

4. At [66], the judge acknowledges that Mrs P could adapt to life in India but noted that she is a British citizen by naturalisation who was lived in the United Kingdom for 12 years. India is the country of Mrs P's birth and original nationality and, significantly, she speaks Gujarati but only limited English. There was before the tribunal very limited evidence from a GP concerning this Mrs P's mental health. The GP's

letter does not come close to suggesting that, without the assistance of the appellant, Mrs P would be unable to cope with caring properly for the two children on her own. Moreover, as the judge notes at [68], whilst the appellant was in prison Mrs P received 'significant assistance from her sister and/or sister-in-law'. The judge found that it would be wrong 'to equate the temporary assistance Mrs P received during the appellant's imprisonment with the situation that would appertain if the appellant was removed from the UK for at least 10 years as a result of deportation.' However, the judge does not say why in terms it would be wrong. He makes no findings as to why individuals in the family who would considered it necessary to provide 'significant assistance' to Mrs P would not do so in the longer term and at a time when Mrs P herself claims that her mental health is deteriorating. In essence, the judge has asserted that six months cannot be compared to 10 years; consequently, he discounts the possibility of family assistance entirely. The judge has left his analysis incomplete. His approach represents a serious error in the assessment of the evidence, in my opinion.

5. The judge also falls into error at [67]. The judge notes that the appellant is the primary carer for the children and helps Mrs P in situations where her limited English language skills may be a problem. However, he found that, 'as is P would no doubt receive some assistance from family and friends the evidence is clear that the support could never be a substitute for the appellant.' Once again, the judge appears to discount entirely a possible source of assistance for an inappropriate reason, in this case the inability of friends and family to substitute for the appellant. What the judge has not done is to consider the level and nature of support which will be forthcoming from friends and family and to determine whether and if so why, with the assistance and support of such individuals, the circumstances of Mrs P and the children would nonetheless be unduly harsh.

6. In my opinion, the judge has also concentrated excessively upon the nationality of Mrs P and the children. Obviously, the fact that these individuals are British citizens is relevant. However, the judge has fallen into the error of treating nationality as something of a trump card. The judge emphasises that 'these are British children with a British parent who have never lived anywhere else. They are in school [in the United Kingdom]'. The judge has not gone on to consider whether, notwithstanding their British nationality, Mrs P and the children would be able to live together with the appellant as a family in India. The impression given is that it would be unduly harsh for British citizens to live abroad. The nationality of Mrs P and the children, whilst important, should not have marked both the beginning and the end of the judge's analysis.

7. The judge's conclusion at [68] unfortunately reiterates the errors into which he has fallen. He writes that, 'Mrs P's deteriorating mental health resulting effect on the children and the clear evidence that the appellant's relationship with his children has particular characteristics, inter alia that he is their main source of assistance in communication with the school doctors et cetera and provides assistance with homework and other areas that Mrs P cannot, I find that Exception 2 from s117C(5) applies.' Mr Greer, who appeared for the appellant before the First-tier Tribunal and Upper Tribunal, submitted that the main purpose of a Tribunals' decision is to notify the loser why he/she

has lost and that there was no possibility for any doubt in the instant case. However, as Mr McVeety submitted, a decision may be clear and cogent but also wrong in law. For the reasons which I have given above, I find that is the case with this decision. Accordingly, I set aside the First-tier Tribunal decision. Given that there is little dispute as to the facts in this case, the decision may be remade in the Upper Tribunal at or following a resumed hearing. Both parties may adduce additional evidence provided copies of any documents, including witness statements, are filed and served no later than 10 days prior to the resumed hearing.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 14 February 2020 is set aside. None of the findings of fact shall stand. The decision will be remade in the Upper Tribunal at or following a resumed hearing on a date to be fixed (Upper Tribunal Judge Lane, if available, otherwise any Upper Tribunal Judge or Deputy Upper Tribunal Judge; 2 hours; Gujarati interpreter; Manchester Civil Justice Centre; first available date but contact Mr Greer's clerk on [~] to discuss listing).

2. I have set out the background to the appeal in my error of law decision above. At the resumed hearing on 25 August 2021, I heard oral evidence from the appellant and his wife, HYP. The burden of proof in the appeal is on the appellant and the standard of proof is the balance of probabilities.

Findings of Fact

3. As I noted in the error of law decision, the facts in the appeal are generally agreed. In particular, it is agreed that the appellant enjoys a genuine and subsisting relationship with his wife and British children, AB and KB.

4. As regards matters remaining in dispute, I find that the appellant and his wife remain estranged from their family members in India, in particular the father of HYP; I accept NYP's evidence that, partly as a consequence of the decline in her own mental health, she has lost contact with her father and that, even if it were possible to seek help from him, his financial circumstances (so far as HYP is currently aware) are too straightened to enable him to offer support. I find also that the appellant and his family can realistically expect to receive only very limited help financially and otherwise from their United Kingdom-based families. Mr Tan did not query the oral evidence of the appellant and HYP that uncles living in Blackburn and Leicester are elderly and are primarily committed to using their limited resources in supporting their own children. I accept also the chronology advanced by the appellant as regards his wife's deteriorating mental health. Having carefully considered both the oral and documentary evidence, I do not find that NYP's delay in seeking medical help for her mental health issues undermines the current clear diagnosis contained in the expert medical evidence that her depression is 'in the severe-clinical range.' I accept that NYP's mental health has been deteriorating, as she claims, since at least 2017. I find also that NYP's mental health is so poor that it has, even whilst the appellant has been present in the family home and able to assist her, impacted severely on NYP's ability to care for the

children; I find that a similar, if not significantly worse, impact might be expected were she to have to cope with caring for the children alone if the appellant is deported. The medical evidence is also clear that NYP, diagnosed as having a dependent personality type, cannot receive drug or other therapy which would adequately mitigate the consequences for herself and the children of her being left to cope alone. I find that, as regards the evidence indicating that the wife and children would suffer unduly harsh consequences if deprived of support of the appellant, the report of the independent social worker should not be given only limited weight (as the respondent submits) because she has commented on circumstances in India which are beyond the range of her professional competence; I agree with Mr Greer, who appeared for the appellant, that other evidence confirms the independent social worker's comments to be substantially accurate.

Discussion

5. I acknowledge that the appellant is a 'medium offender' for the purposes of the application of section 117C (3) of the Nationality, Immigration and Asylum Act 2002. I acknowledge also that weight attaches to the public interest in the deportation of foreign criminals such as the appellant. Whilst keeping those matters firmly in mind, I note that the appellant has not offended again since he was convicted and imprisoned nearly a decade ago and, perhaps more importantly, the appellant has, during an adulthood which has been spent wholly outside India, become culturally and socially integrated in United Kingdom society.

6. In conclusion, I find that both the 'stay' and 'go' scenarios, as Mr Greer characterised the tests of Exception 2 of section 117C, would result in NYP and her children enduring unduly harsh consequences. As regards the 'go' scenario, the children would be likely, at least in the short and medium term, to struggle in a education system which employs Gujarati, a language in which AB and KB are not fluent. More generally, the children would be deprived of the advantages of their British citizenship; it is not disputed by the respondent that the Indian education system which they would enter is poor and corporal punishment is not prohibited by law as it is in the United Kingdom.

7. If the appellant were to travel to and settle in India without the children and their mother, then the consequences are, in my opinion, likely to be very severe for NYP, KA and KB. I have no doubt that NYP is a caring and loving mother but her very personality is such that she must seek the support of others to enable to face the daily requirements of looking after her children. I have found that she would not be able to rely on the support of family and friends. She may seek the help of social services but it is my view that (i) the impact of separation from the appellant would have had unduly harsh consequences for both her and the children by the time such help, which is likely to be limited, is forthcoming and (ii) given all the other circumstances which I have discussed above including the need to give proper weight to the public interest, it is not reasonable to

expect NYP and the children to suffer such consequences. I find that the test imposed by Exception 2 of section 117C is met and the appeal is allowed accordingly.

Notice of Decision

The appellant's appeal against the decision of the Secretary of State dated 3 July 2019 is allowed on human rights grounds.

Signed Date 5 October 2021

Upper Tribunal Judge Lane

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.