Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00908/2018

THE IMMIGRATION ACTS

Heard at North Shields (Kings Court)	**Decision & Reasons Promulgated**
On 18 July 2019	**On 29 August 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LOVEPREET [S]
(ANONYMITY DIRECTION NOT MADE)

Respondent
(Claimant)

Representation:
For the Appellant: Ms R Petterson, Senior Presenting Officer
For the Respondent: Ms Cleghorn, instructed by Braitch RB Solicitors
(Claimant)

DECISION AND REASONS

This is an appeal by a citizen of India, who was born in July 1992. He is the respondent in the Upper Tribunal however for convenience, I will be referring to him as the claimant. His appeal is against the deportation decision that was made on 29 December 2017 following a conviction on 17 November 2016 of conspiring to commit immigration offences for which he was sentenced to 30 months imprisonment the following day. He had arrived in the UK on 19 September 2009 as a student and on expiry of his

visa was arrested in relation to the offences that led to his conviction which revolved around a sham marriage to an EU national that had taken place in 2012.

First-tier Tribunal Judge Henderson allowed the appeal against the deportation order on human rights grounds in her decision dated 9 August 2018. The judge considered the case with reference to s. 117C of the Nationality, Immigration and Asylum Act 2002 and was satisfied that there were no insurmountable obstacles to the claimant's integration into India but that it would be unduly harsh for the children of his relationship with a British national, GG to relocate to India. Their best interests lay with having both parents present and in the light of the significant role that the claimant played in their lives, the judge in terms considered that it would be unduly harsh on them for the claimant to be absent.

For reasons given in my decision dated 8 May 2018 (annexed hereto), I concluded that the judge had erred in law in reaching her decision which predated *KO (Nigeria) & Others v SSHD* [2018] UKSC 53. In essence, I considered that the judge had erred in response to the challenge by the Secretary of State by embarking on a proportionality exercise when considering the undue harsh element of s. 117C and failed to give adequate reasons why the threshold in s. 117C(5) had been reached in relation to the impact on the children of the claimant's deportation. There had been no challenge to the finding that it would be unduly harsh for the children to go with the claimant to India and, as to the ambit of the issues in this remaking of the decision, it was accepted that this would turn on consideration of whether the claimant's deportation would be unduly harsh on the children. The outcome would be determinative of the appeal as acknowledged by Ms Cleghorn. Ms Pettersen accepted that the best interests of the children were served by them remaining with their parents in a family unit as was indeed acknowledged by the Secretary of State in the supplementary decision dated 11 July 2018.

The claimant gave evidence along with his partner GG, adopting their earlier and updated witness statements. This was accompanied by a number of letters of support from a wide range of friends, other family members and more recent neighbours in Sunderland where they now live. The evidence of the claimant and his partner, which is undisputed, is that their relationship began in 2012 when the claimant was working in a shop below the flat where the claimant lived. They have two daughters born in 2015 and 2016. After service of the claimant's custodial sentence, a third child was born to GG by a different father for whom the claimant is a father figure. In some distress GG explained the circumstances leading to the birth of her youngest child. Her mother had warned her in terms that it was unlikely that the claimant would be around after serving his custodial sentence.

The claimant's immediate family regularly visited him in prison and they resumed living together in September 2018, the period between then and release being attributable to delays occasioned by the social workers

report and the need to obtain accommodation. GG's mother's antipathy towards the claimant has not lessened and her visits to the family home are at Christmas and for "festivals", the last being at Easter when she called by to give Easter eggs to the children. GG considers that she does not have a relationship with her mother. Her father visits but is unable to stay over due to restrictions on the extent to which he can be with children. Other family members visit from time to time. The evidence from witnesses who are not relatives speak of the affection and regard they held for the family, including the claimant. The evidence without question points to a close-knit family group which has survived the impact of the claimant's incarceration and the mixed reception the relationship has received in GG's wider family. The social worker's report refers to the bond between the claimant and the oldest children and I have no doubt that he is genuine as he is in his affection towards the youngest despite not being the biological father. There is no evidence that any of the children have health difficulties; GG referred in evidence to her concern that the eldest child became depressed during the claimant's absence and she considered this was best dealt with by visits to the prison.

Submissions included reference to the most recent decision of the Court of Appeal on the approach to the issue I am to decide. The Court (per Holroyde LJ) in *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213 set out the familiar legislative framework in particular Part 5A of the 2002 Act and the relevant rules as follows:

> "25. With effect from 28th July 2014 part 5A of Nationality, Immigration and Asylum Act 2002 has made specific provision in relation to the consideration of article 8 in circumstances such as the present. Section 117A provides:
>
> **'117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), *'the public interest question'* means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).'

26. Section 117B sets out a number of public interest considerations which are applicable in all cases. It is unnecessary for present purpose to refer to these in further detail. It is however necessary to refer to 117C, which so far as is material provides:

> '**117C 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.
>
> …
>
> (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.'

27. Also with effect from 28th July 2014, the Immigration Rules were amended to make provision for consideration of article 8 claims by persons liable to deportation. So far as is material, the amended Rules provide:

> '398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> …
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;
>
> …
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> 399. This paragraph applies where paragraph 398 (b) … applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(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; or

(b) he person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

...

399C. Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave.'

28. Thus Part 5A of the 2002 Act, and the amended Rules, together provide a structured approach to the application of article 8 in cases of deportation of a foreign criminal."

Holroyde LJ also set out the relevant case law citing extracts from *NA (Pakistan) v SSHD [2016]* EWCA Civ 662 and *MM (Uganda)* before explaining *KO (Nigeria)* as follows*:*

"32. However, in *KO (Nigeria)* the Supreme Court took a different view as to the interpretation in this context of the phrase 'unduly harsh'. At paragraph 22, Lord Carnwath (with whom the other Justices agreed) said that on its face, Exception 2 in section 117C of the 2002 Act raises a factual issue seen from the point of view of the partner or child. At paragraph 23 he went on to say:

'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. 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 length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2017] 1 WLR 240, paras 55 and 64) can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.'

33. At paragraph 32 of his judgment, Lord Carnwath again differed from the approach taken by Laws LJ in *MM (Uganda*).

34. It is therefore now clear that a tribunal or court considering section 117C(5) of the 2002 Act must focus, not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation, but rather, on whether the effects of his deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. Pursuant to Rule 399, the tribunal or court must consider both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him."

The facts involved in that case related to the impact of deportation of a Jamaican national on his six UK born children aged variously between 3 and 15. He lived with three who were sons of the claimant's current partner. The First-tier Tribunal Judge accepted that the claimant was very involved the three children he lived with and that he played an important role in their lives. She found it unsurprising that the claimant and his partner had given evidence that the latter would be unable to cope with the three boys on her own in the light of her dependency on the former for his emotional and practical day to day support.

By the time the case came before the Court of Appeal, *KO (Nigeria),* had overruled *MM (Uganda)* on which the judge had relied. Holroyde LJ explained at paragraph [38] after referring to the difference of approach now required by the Supreme Court:

> "38. The decision in *KO (Nigeria)* requires this court to adopt an approach which differs from that taken by Judge Griffith and Judge Finch. In the circumstances of this appeal, I do not think it necessary to refer to decisions predating *KO (Nigeria)*, because it is no longer appropriate, when considering section 117C(5) of the

2002 Act, to balance the severity of the consequences for SAT and the children of PG's deportation against the seriousness of his offending. The issue is whether there was evidence on which it was properly open to Judge Griffith to find that deportation of PG would result for SAT and/or the children in a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation."

He continued at [39] and [40] with the application of the law to the facts:

39. Formulating the issue in that way, there is in my view only one answer to the question. I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or children in this country. I accept Mr Lewis's submission that if PG is deported, the effect on SAT and/or their three children will not go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported. That is so, notwithstanding that the passage of time has provided an opportunity for the family ties between PG, SAT and their three children to become stronger than they were at an earlier stage. Although no detail was provided to this court of the circumstances of what I have referred to as the knife incident, there seems no reason to doubt that it was both a comfort and an advantage for SAT and the children, in particular R, that PG was available to intervene when his son was a victim of crime. I agree, however, with Mr Lewis's submission that the knife incident, serious though it may have been, cannot of itself elevate this case above the norm. Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another, and have to face one or more of their children going through "a difficult period" for one reason or another, and the fact that a parent who is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children. Nor can the difficulties which SAT will inevitably face, increased as they are by her laudable ongoing efforts to further her education and so to improve her earning capacity, elevate the case above the commonplace so far as the effects of PG's deportation on her are concerned. In this regard, I think it significant that Judge Griffith at paragraph 67 of her judgment referred to the "emotional and behavioural fallout" with which SAT would have to deal: a phrase which, to my mind, accurately summarises the effect on SAT of PG's deportation, but at the same time reflects its commonplace nature.

40. So far as PG's offending history is concerned, I accept Mr Lewis's submission that neither the nature of the offences committed after PG had served his prison sentence, nor the overall passage of time, can assist SAT or the children now that *KO (Nigeria)* has made it clear that the seriousness of the offending is not a

> relevant consideration when determining pursuant to section 117C(5) of the 2002 Act whether undue harshness would be suffered."

In the course of her submissions Ms Petterson contended that the only evidence regarding medical difficulties was the reference by GG to her eldest daughter suffering depression for which no medical evidence had been provided in support. Whilst both parents asserted matters would be difficult which was accepted in the majority of the case law is not the test but a normal reaction a child might have. She contended that great distress did not amount to unduly harshness. As to the length of time that had passed between the claimant's arrest in 2011 and his ultimate prosecution, he had pursued a number of applications to remain in the United Kingdom. Rehabilitation was not a factor in assessing the undue harshness.

Ms Cleghorn's submissions focussed on what should be the correct approach to the assessment of undue harshness in the light of the recent approach taken by the Court of Appeal and argued that there was a risk of conflating the test with that for those in the serious category of sentence (using the description in *NA (Pakistan).* There was no authority on the precise point and she also argued that with reference to the Upper Tribunal decision in *RA (s.117C: "unduly harsh"; offence: seriousness) Iraq* [2019] UKUT 123 (IAC) permitted consideration of factors in the instant case such as the creation of family life after the claimant had been arrested in 2011. She submitted that the strength of the family relationship was a relevant factor which she contrasted with the circumstances of those where there was less of a bond evidenced by the volume of work in the family courts. A finding that it would be unduly harsh for the children to live in India elevated the position of those who could go abroad to those who could not. She argued that the claimant, his wife and children were a remarkable family in terms of their closeness evidenced by the numerous visits to prison and it was a rare case where there was such a degree of commitment including the youngest child. The problem for the family was that there were no other close family members and she reminded me of the many character approvals that had been provided in the evidence.

I am satisfied on the evidence that the deportation of the claimant will remove a significant bulwark from the lives of the three children and their mother which will be the lessor for his absence. Their family life will continue without him and GG's own wider family will come forward to help but the demands on her and her ability to cope with such a young family will be a struggle. There will be times when she will feel not only disheartened but also experience a profound sense of loss. These are the inevitable consequences of the splitting up of a close loving nuclear family.

It will be harsh for the children and indeed for GG were the claimant to be deported. The approach to be taken was clearly set out by Lord Carnwath in [23] in *KO (Nigeria)*. On the facts of this case however, the evidence does not show there is something going beyond the level of harshness

which is “acceptable or justified”. The fact that a family is close-knit and mutually supportive represents an ideal which many families meet. Interference with such a relationship is unfortunately commonplace in the sense that inevitably all will be affected by separation. In my judgment, without more, it would not be unduly harsh on the children for the claimant to be deported. I reach this decision not without some reluctance and have admiration for the way in which this family have survived their difficulties.

In his short judgment in *PG (Jamaica),* Hickinbottom LJ observed at [46]:

> “46. When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with their other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are "unduly harsh" will deportation be constrained. That is entirely consistent with article 8 of the ECHR. It is important that decision-makers and, when their decisions are challenged, tribunals and courts honour that expression of Parliamentary will. In this case, in agreement with Holroyde LJ, I consider the evidence only admitted one conclusion: that, unfortunate as PG's deportation will be for his children, for none of them will it result in undue harshness.”

Sadly here too, the evidence in this case points to only one conclusion. This appeal is dismissed.

No anonymity direction is made.

Signed Date 22 August 2019

UTJ Dawson

Upper Tribunal Judge Dawson