Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08342/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 January 2019	**On 19 February 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

P R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Rutherford instructed by M & K Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Albania. He appealed to the First-tier Tribunal against the Secretary of State's decision of 8th April 2016 to make a deportation order against him.

2. Following a hearing at Field House on 25 September 2018 a panel consisting of the Honourable Lady Rae sitting as a Judge of the Upper Tribunal and myself found material errors of law in the judge's decision and as a consequence directed that the matter be reheard in the Upper Tribunal. The judge had allowed the appeal, but we found that he had failed to take into account further issues of deterrence and the need to express society's revulsion at criminality as elements to be taken account of and considering the public interest side of the balance that has to be considered. In addition, we were concerned that the judge had not properly applied the correct test when analysing the issue of undue harshness.

3. In her submissions Ms Rutherford said that there was no further evidence other than a letter from a consultant surgeon concerning the appellant's son. The operation referred to was due to take place in March 2019.

4. The parties were in agreement as to the relevant law. In light of what had been decided by the Supreme Court in KO (Nigeria) [2018] UKSC 53, in assessing undue harshness reference was not to be made to the criminality of the appellant. The question was whether on the facts as found the Tribunal is satisfied that it would be unduly harsh to separate the child from his father. It had been made clear at the previous hearing that the respondent was not arguing that the child could be expected to relocate to Albania.

5. The appellant was the child's primary carer as his wife worked full-time on a night shift. If he had to leave the United Kingdom she had no realistic alternative support available. Her evidence to the First-tier Tribunal had been that her family could not help with childcare. She would have to give up her job as a consequence if he were required to leave the United Kingdom. The respondent might argue that she had coped while the appellant was in detention, but at that time she was dealing with a finite period whereas here it would be removal for an indefinite period. The child was aged 4 and had numerous health problems and required developmental assessment and was due to have surgery. Her job was not just a matter of the money provided but was a matter of career progression. She would again be required to rely on benefits and the child would lose his primary carer. Taken together, the lack of realistic support for the mother, the need for her to give up her job, her child's ongoing health issues and the mother's own health issues leading to a likely deterioration and the consequential effect on her parenting meant that the appeal fell to be allowed. The child was close to his father and this could lead the Tribunal to conclude that it would be unduly harsh for the child to be separated from his father.

6. Mr Melvin relied on and developed the points made in his written submissions. It was not accepted that the appellant was the primary carer for his son other than in a practical manner while his wife was at work. She was the primary carer. None of these factors got to the higher threshold of undue harshness when taking into account the public interest and this involved protection of the public and the deterrence factor and it could not be enough to rely on the child. To find otherwise would be to demonstrate a lack of confidence in the Immigration Rules. The requirement to leave would not be unduly harsh on the facts of the case.

7. By way of reply Ms Rutherford argued that it was not just a question of reliance on the child but on the basis of the circumstances of the family and the particular difficulties that the appellant's wife and child would face.

8. I reserved my determination.

9. The relevant provisions in reply to this case are as follows. Under section 117C of the Nationality, Immigration and Asylum Act 2002 is set out the following.

10. Section 117C(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".

11. Exception 2 is the relevant exception in this case and states as follows:

> "(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."

12. Paragraph 399 of HC 395 is a similar provision in the case of a person who has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the United Kingdom and it would be unduly harsh for the child to remain in the United Kingdom without the person who is to be deported.

13. The essential facts of this case where relevant are that the appellant was convicted on 8 April 2016 of an offence involving money laundering and received a 30 month custodial sentence. Clearly therefore as the offence was one where he was sentenced to a period of imprisonment of less than four years, the public interest requires his deportation unless Exception 2, referred to above, applies. It is important to bear in mind the point made by Mr Melvin, that in light of what was decided by the Supreme Court in KO (Nigeria) the criminality of the appellant is not to be taken into account in assessing whether or not the separation of the child from the father would be unduly harsh.

14. The appellant's son was born on 7 August 2014. The judge had before him evidence as to the child's health problems. It is summarised at paragraph 106 of the judge's decision. The child was delivered by emergency caesarean section for absent fetal movements. He was born in a poor condition and required ventilation via a facemask. He was intubated after four hours, due to worsening respiratory parameters and required 48 hours of ventilation. He also suffered from cardiovascular instability requiring inotropic support. The letter sets out the treatment he received before discharge and concluded by saying that he would be followed up by the team and would require long term neurodevelopmental follow up. In the letter from Mr Clifton the consultant ENT surgeon, there was a reference to a diagnosis of sleep disorder breathing and overnight oximetry suggesting moderate to severe OSA. The child was due to be operated on for adenotonsillectomy but that was postponed. He was to be referred onwards for treatment at a tertiary centre as it was thought

desirable for him to have surgery in a tertiary hospital with backup facilities.

15. Returning to the judge's decision, there was further correspondence concerning the ongoing developmental check-ups required by the child. He had recently developed glue ear which would require surgery but the reports did not show any serious developmental issue at this early stage though the parents were concerned about delayed speech. As noted, the medical correspondence did recommend continuing developmental assessment. The judge accepted evidence that the healthcare facilities in Albania were inferior. That is however by the way, since the issue is not whether the child would go to Albania but the impact on him and on the family generally of separation from the appellant.

16. The appellant's wife has suffered from depression in the past. While her husband was in prison she was able to support the child while relying on state benefits. The judge accepted her evidence that it was a particularly difficult period for her especially in light of the concerns over the child's development.

17. The consequences of the appellant's removal would be, as Ms Rutherford suggested, that his wife would have to give up work. She would return to the situation that she was in when he was in prison of having to rely on benefits, as she would have to be at home in order to look after her child. In the longer run when he is at school it may be that she would be able to return to work, but of course the available hours for her to do that would be limited, in the absence of family backup for help with the child. There would also be an impact on her, bearing in mind her history of depression and the difficulties she experienced in looking after the child during the time when the appellant was in prison. I bear in mind Ms Rutherford's point that there is a difference between coping with a difficult situation which is finite and one which is, in relative terms, infinite.

18. The essential issue I have to decide is whether the effect of the appellant's deportation on his child would be unduly harsh. It is clear also that in assessing the public interest in deportation I must attach weight to the need to deter other potential offenders and to take into account the need to express society's revulsion at the appellant's offence.

19. At paragraph 23 in KO (Nigeria) the Supreme Court said the following:

> "23. On the other hand the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under section 116B(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 ..."

20. Inevitably cases are fact sensitive, but the guidance in KO makes it clear that what the test involves is a degree of harshness as I have said going beyond what would necessarily be involved for any child faced with the deportation of a parent.

21. No doubt it will be more difficult for the appellant's wife and son if he is removed from the United Kingdom. But in my judgment that does not extend beyond harshness to undue harshness. The child has some medical problems, but not of a serious nature. In the audiology initial assessment on 31 January 2018 it was said that he has no significant medical history but there is reference to a speech problem. It seems he had a mild hearing loss in the right ear and a mild to moderate hearing loss in the left ear. As the judge said, the medical reports had not thrown up any serious developmental issue. There is however the recommendation of continuing developmental assessment. As I say, these are matters which though as concerned parents the appellant and his wife are bound to be anxious about, they are not indicative of anything at all approaching a major problem.

22. Also as regards the impact on the appellant's wife, and on the family generally, as in the case of any wife or partner of a deported man who has pre-school children, it is likely that they would have to give up work in order to look after the child or children. That is a matter which would necessarily occur in the circumstances set out. It is not a matter of undue harshness but although undoubtedly a harsh consequence for a wife/mother and child, it is no more than that. Again, the mental health problems of the appellant's wife appear to extend to no more than to the depression that she has experienced in the past. It is relevant to bear in mind that she was able to support her child and cope in the past while relying on state benefits, and I again bear in mind Ms Rutherford's point that this will be for a potentially significantly longer period.

23. However, bringing these matters together, I do not consider it has been shown that the effect of the appellant's deportation on his child or partner would be unduly harsh in the sense in which that test is to be considered as a matter of law. Accordingly, his appeal against the respondent's decision is 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 him or any member of his 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.

Signed  Date 8 February 2019

Upper Tribunal Judge Allen