Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10315/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reason Promulgated**
On 22 May 2019	**On 30 May 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GJ
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms N Willocks-Briscoe, a Senior Home Office Presenting Officer
For the Respondent: Mr M Murphy, instructed by Hatten-Wyatt Solicitors

DECISION AND REASONS

Anonymity

The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to,

amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Rai promulgated on 27 February 2019 allowing the claimant's appeal against the Secretary of State's decision to deport him to his country of origin, India, following two criminal offences committed in the United Kingdom after he obtained indefinite leave to remain.

Background

The claimant entered the United Kingdom on 19 April 1990 as a child as a dependant of his father, who claimed asylum unsuccessfully. In 2007 this claimant successfully sought indefinite leave to remain on the basis of 14 years' unlawful residence in the United Kingdom.

He had indefinite leave to remain from 24 August 2007, when he would have been 22 years old. On 20 August 2010, by which time he was 25 years old, the claimant was convicted of wounding and inflicting grievous bodily harm and destroying or damaging property and was sentenced to six months' imprisonment, wholly suspended for eighteen months. On 14 October 2013 he was convicted of money laundering and sentenced to a term of twelve months' imprisonment, which was not suspended.

On 20 March 2014 the claimant was notified of his liability to automatic deportation, gave reasons why he should not be deported and made further submissions on asylum grounds.

On 26 January 2016 the Secretary of State signed a deportation order, refusing on the same date the asylum and human rights claim and certifying his refusal under Section 94B of the 2002 Act. The Secretary of State's reasons are summarised at paragraph 9 of the First-tier Tribunal decision.

First-tier Tribunal decision

The First-tier Tribunal allowed the appeal on the basis that the claimant's removal would be unduly harsh for two children. The first an 8-year-old child from his marriage and the second the child of his present partner, a person whom he has met at school in England. The claimant and his current partner have known each other for a very long time and his partner's child, with whom the claimant gets on well, is 10 years old. The consideration of whether if the claimant is removed it will be unduly harsh for these two children to remain in the United Kingdom without him is set out at [42] – [51] in the First-tier Tribunal decision.

The First-tier Tribunal accepted that the two children get on well together, noting that the claimant's relationship with his former wife has completely broken down and they communicate only through solicitors or by text message these days. There is a contact order in place as a result of which the claimant's child from his marriage sees her father every weekend and also sees her father's extended family, who are paying for private school in the United

Kingdom for her. There is no question that the children are both qualifying children because they are both British citizens and it was accepted before the First-tier Tribunal that these children could not, for various reasons, be expected to go and live in India with the claimant if he is removed.

The judge's reasoning is at paragraphs 45 and 51 in particular of the First-tier Tribunal's decision as follows:

> "45. I accept this [the inability to go to live in India] would be the position and delving into hypothetical situations serves no purpose, especially where the evidence presented is strong and demonstrates significant bonds [his daughter] has with her biological mother, stepsibling and extended family and friends. Ms Zwizwai's report states that if the [claimant] went to India [the child's] mother would have difficulty in promoting contact. She has her own health issues with a prolapsed disc, which causes mobility issues, but also has no family ties in India. This would mean [the child] would never be able to see her father while growing up unless Ms Sahota allowed her to travel to India, which at this moment in time seems unlikely. Given all the evidence in the round, I find it would be in [the child's] best interests to remain in the UK.
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> ...
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> 51. The evidence of the [claimant] is that [the child] is now settled and in a routine with visits to her father's house. [The child] is able to maintain and build on important relationships formed with her father's side of the family. This is a stark contrast from the effect the [claimant's] absence had on [the child] previously. Both social worker reports confirm the negative effects suffered by [the child] and going forward the effect it may have on her emotional and psychological development. Having found this to be the case, I find the long-term effects are of a harshness which can only be described as 'bleak' or 'severe'. They go beyond a level of harshness that is acceptable or justifiable, even within the context of the high public interest in the deportation of foreign offenders provided at Section 117C(1)."

Permission to appeal

The Secretary of State challenged that decision, arguing that although it was accepted that it would not be in the best interests of the child if the claimant were to be deported she would remain with her mother, who is her primary carer, and her new family, her mother has a new relationship with another child, which provides a secure and stable home environment.

The grounds conclude:

> "The situation facing [the child] and her mother is not dissimilar to that faced by many families where one of the biological parents is to be deported but [she] has the support of her mother and her new partner and as such all her basic needs will be met. The separation of a healthy child whose basic needs will be met with no specific concerns raised from her biological father

> even for a long time is not sufficient to outweigh the public interest in deportation."

Permission was granted by First-tier Tribunal Judge Davidge as follows:

> "2. First-tier Tribunal Judge Rai found that the social work evidence confirmed that the best interests of the appellant child were for him to remain in the United Kingdom and that going forward there will be negative effects suffered by [the child] which may have an impact on her emotional and psychological development. The judge concluded that the long-term effects would be of a harshness which can only be described as bleak or severe and go beyond a level of harshness that is acceptable or justifiable in the context of Section 117C(5).
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> 3. The grounds arguing that the social work evidence did not justify that conclusion is arguable."

That is the basis on which this case came before the Upper Tribunal today.

Social worker's report

What was the evidence before the judge in this case? It was accepted that there is a strong bond between the claimant and his child, and also between the claimant and his partner's child. There was before the judge a social work assessment by Sophie Zwizwai, who described herself as an independent social worker. Ms Zwizwai considered that there was likely to be an adverse impact on the child's welfare from a second separation from her father, which is "very likely to cause considerable harm to the integrity of [her] family life".

In her report at [20], Ms Zwizwai noted the remorse that the claimant had expressed. There followed a lengthy discussion of attachment theory and of the familial relationships, much of which appears to be speculative, ending with rather generic conclusions that the removal of the claimant from the United Kingdom would not be in the child's best interests. There was no evidence of previous disruption or bad behaviour by the child following on from separation while her father was incarcerated.

The report concluded at [41]:

> "As discussed in this report, children from separated families may experience more externalising problems such as conduct disorders, delinquency and impulsive behaviour than kids from two parent families. [The child] has suffered multiple separations already and any further separation would not be in her best interests and will not promote her growth and development. It is imperative that children are provided with a sufficiently stable environment to enable them to develop and maintain a secure attachment to their primary caregivers to ensure optimum development, ensuring attachments are not disrupted, providing consistency of emotional warmth over time. This is very important for [the child] as she is growing up.
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> Howe (2005) states that attachment theory values the idea that parents need to connect with their children's emotional and mental states and social understanding. Given the current funding and inheritance arrangements by

> the daughter's grandfather and the new social circumstances of the biological mother, it is being argued that the deportation of the father would adversely affect the young daughter in multiple ways. There is also no guarantee that the existing contact order would be adhered to as prescribed."

No copy of that contact order is before me and the Family Court Protocol has not been activated.

Submissions

For the Secretary of State, I heard submissions from Ms Willocks-Briscoe, who relied on the Secretary of State's grounds of appeal, noting that modern means of communication would be available to maintain contact between the child and her father if he were in India rather than the United Kingdom and that the evidence before the First-tier Judge was not over and above what would be experienced by any child whose father was deported as a foreign criminal. She relied on paragraphs 49 to 51 of the First-tier Tribunal decision and the social worker report, to which I have had regard. Dealing with the unduly harsh test, the Secretary of State relied on *The Secretary of State v AJ* (*Zimbabwe*) [2016] EWCA Civ 1012, at [16] in the decision of Lord Justice Elias, with whom Lord Justice Vos agreed.

For the claimant, Mr Murphy argued that the Secretary of State's grounds were really no more than a disagreement with a conclusion which was open to the judge on the evidence before her, that the offence was years ago, the conviction having been in 2014, and that the child had already experienced one separation from her father when she was 2 years old. Every child was different and the likely effect of the claimant being removed to India was that the relationship with his child from his marriage and between that child and his extended family would break down despite the fact that they were paying the school fees and that the difference in quality between being able to have his daughter every weekend and half and half in the holidays and having remote contact by modern means of communication was sufficient to amount to undue harshness.

Mr Murphy also argued that the child would lose the relationship which had been growing between her and her stepmother and her stepbrother and which was a significant addition to the child's family life. Mr Murphy submitted that the First-tier Judge had directed herself properly and reached a conclusion which was open to her in a well-reasoned and rational decision.

Legal framework

The claimant is a foreign criminal. It is common ground that Exception 1 in section 117C(3) is not applicable. The best interests of relevant children can outweigh the public interest in deportation only if Exception 2 at section 117C(4) of the Nationality, Immigration and Asylum Act 2002 (as amended), applies:

> "117C Article 8: additional considerations in cases involving foreign criminals
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> (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. …
>
> (5) Exception 2 applies where C has … *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."*

I am guided by the decision of the Court of Appeal in *AD Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348 in March 2011, in which Lord Justice Sedley, giving the judgment of the court, in an appellant's appeal against a decision upholding the deportation order, said this:

> "27. The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does. Sometimes the balance between its justification and its consequences falls the other way but whether it does so is a question for an Immigration Judge. Unless he has made a mistake of law in reaching his conclusion – and we readily accept that this may include an error of approach – his decision is final. …"

The Court of Appeal in *AJ (Zimbabwe)* in 2016 held that something more than separation and emotional upset is required to outweigh the significant public interest in the deportation of foreign criminals:

> "16. More recently, this court considered a number of appeals together in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662. In some of the cases sentences of between 12 months and four years had been imposed. Jackson LJ, delivering the judgment of the court (Jackson, Sharp and Sales LJJ) made this observation with respect to the interests of the children in the context of 'exceptional circumstances' (paras. 33-34):
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> > '….. it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.
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> > The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals..."

> The court then cited with approval the observations of Rafferty LJ in para. 38 of the *CT (Vietnam)* case, reproduced in para. 14 above.
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> 17. These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules if the interests of the children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be largely otiose. In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary."

I am also guided by the decision of the Supreme Court in *KO (Nigeria) & Ors* [2018] UKSC 53 in the judgment of Lord Carnwath, with whom Lord Kerr, Lord Wilson, Lord Reed and Lord Briggs agreed, and in particular at paragraph 23 thereof:

> "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. 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…",

and at paragraph 27:

> "27. Authoritative guidance as to the meaning of 'unduly harsh' in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563, paragraph 46, a decision given on 15 April 2015. They referred to the evaluative assessment required of the Tribunal:
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> > 'By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context denotes something 'severe' or 'bleak'. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb unduly raises an already elevated standard still higher.'"

Analysis

The question for the Tribunal is whether the First-tier Judge gave adequate weight to the public interest in deportation in section 117C and Exception 2 in section 117C(4): would the removal of this claimant have an effect on a child with whom he has a parental relationship, which is 'unduly harsh' in the sense of 'bleak or severe'. I do not consider that the child of his new partner, despite the good relationship he has with that child, although a British citizen and thus a qualifying child, is one with whom he has a genuine *parental* relationship: that child has a father who is still involved, and a mother with whom the child lives.

The relevant child is the claimant's own child from his former marriage. It is accepted that it would be in the child's best interests to have the claimant remain in the United Kingdom. However, the evidence, including the social worker's report, is only of the normal type of upset which the separation of a child from its father causes. That child has a mother, a step-father, a half-sibling, and paternal grandparents who would still be in the United Kingdom, and who are sufficiently involved to have made inheritance provision and pay for the child's schooling. The child of the marriage would lose connection with the child of the claimant's new partner, but would still have the new family and the extended family.

I am satisfied that the evidence before the Judge did not come close to 'bleak or severe' consequences for the claimant's child if he is removed. Rather, this is the type of 'due' harshness which inevitably follows from serious criminal behaviour and conviction.

The Secretary of State's appeal is allowed, and I substitute a decision dismissing the claimant's appeal.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision. I re-make the decision in the appeal by dismissing it.

Signed Judith AJC Gleeson Date: 24 May 2019
Upper Tribunal Judge Gleeson