Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11921/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 April 2019	**On 7 May 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR K T
(ANONYMITY DIRECTION CONTINUED)

Respondent

Representation:
For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondent: Mr T Bobb, Solicitor Aylish Alexander Solicitors

DECISION AND REASONS

1. I shall refer to the Respondent as "the Appellant" as he was known before the First-tier Tribunal.

2. The FTT made a direction to anonymise the Appellant. This order shall continue to protect the identity of the Appellant's children.

The background

3. The Appellant is a citizen of Turkey. His date of birth is 18 February 1983. He came to the UK lawfully in 2001. In 2005 he was convicted of road traffic offences and sentenced to eight weeks' imprisonment. He was convicted of further road traffic offences in December 2006 and sentenced to eighteen months. On 26 June 2013 he was convicted of perverting the course of justice ("the trigger offence"). He was sentenced to 30 months' imprisonment.

4. The circumstances of the trigger offence can be understood from the sentencing judge's comments. There were two Defendants in that case. There was an incident where an innocent bystander was shot through the hand and both Defendants played an important part in getting the gunman out of the jurisdiction. The First Defendant was sentenced for possession of a firearm. He was sentenced to 5 years. However, the sentencing judge was satisfied that the Appellant did not play a leading role in this. They were both convicted of perverting the course of justice and the sentencing judge found that the Appellant took a "lesser role". He said, "I am satisfied with no disrespect to you that you are not, perhaps, as intelligent as [the co-Defendant] and you were not as involved in whatever the background all of this may have been". However, the judge commented that he had done a "great disservice to the interests of justice". He said that he aspired to have a family life. The Appellant pleaded guilty at the first opportunity. The sentencing judge noted that he is unlikely to trouble the courts again.

5. Following conviction the Secretary of State made a deportation order on 12 February 2016. The order was made pursuant to s 5(1) of the 1971 Act because the respondent considered the Appellant liable to deportation because deportation is conducive to the public good (s.3 (5) of the 1971 Act). In accordance with s32 (4) of the UK Borders Act 2007, for the purpose of section 3(5)(a) of the 1971 Act, the deportation of a foreign criminal is conducive to the public good. Section 35 (5) of the 2007 Act states that the Secretary must make a deportation order in respect of a foreign criminal. It is not challenged that the Appellant is a foreign criminal.

6. The Appellant appealed on human rights grounds. His appeal was allowed by Judge of the First-tier Tribunal ("FTT") S L L Boyes following a hearing on 13 December 2018. The decision was promulgated on 12 February 2019. The appeal was allowed under Article 8 of the 1950 Convention on Human Rights. It was dismissed on protection grounds and under Article 3 and on humanitarian protection grounds. The judge found that the Appellant was not a danger to the community in respect of certification under Section 72 because he had rebutted the presumption, however he concluded that he would not be at risk on return to Turkey. There is no cross-challenge made by the Appellant.

7. The Secretary of State was granted permission to appeal by FTT Judge S P J Buchanan on 7 March 2018, thus the matter came before me to decide whether the judge had erred in allowing the appeal under Article 8.

The decision of the FTT

8. Much of the decision of the judge of the FTT is not material to my decision because it relates to the Appellant's protection claim The Appellant's human rights case relied on his relationship with HP and their British citizen children, LT (date of birth 10 January 2009) and E (date of birth 17 May 2018). The judge found that there was a genuine and subsisting relationship between the Appellant and his partner and children. The Appellant relied on the report of an independent social worker, Mr Ali Khan, of 10 December 2018. The judge recorded his experience at paragraph 96 of the decision; namely that he was a qualified social worker and had practised for 28 years. The judge noted that the focus of the report related to the child L and he concluded at paragraph 98 that he attached "significant weight" to this evidence. The judge stated as follows at paragraph 98: -

> "… The information provided by [L] under such conditions provides compelling evidence that the Appellant has a genuine and subsisting relationship with [L]. Whilst the Appellant is not presently residing within the family home because of his bail conditions, on the basis of the oral evidence before me, when read together with the independent social work report, I am entirely satisfied that the Appellant has always played an integral part in the upbringing of his children on a day to day basis and that he continues to do so. This includes taking [L] to school each day and attending parents evenings, as well as facilitating her attendance at extra-curricular school activities and social events and taking her out for recreational activities."

9. The judge went on to conclude at paragraph 100 of the decision that the social worker provided "compelling evidence" that the Appellant enjoyed a genuine and subsisting relationship with his children. The judge went on to consider the children's best interests in accordance with ZH (Tanzania) [2011] UKSC 4. He concluded at paragraph 107 that it would be in L's best interests to remain in the UK growing up with both parents, whereas in E's situation because he is still a baby his interests would be met wherever he was residing as long as he continued to have the day-to-day involvement of both parents. L was at school. Neither child had lived in Turkey. They had a number of relatives here in the UK with whom L enjoyed a close relationship.

10. The judge went on to consider "the public interest considerations" between paragraphs 110 to 117. He concluded that there was a low risk of the Appellant reoffending. He said that he had committed a serious offence. He had helped a dangerous gunman to evade justice and took into account the judge's sentencing comments.

11. At paragraphs 118 and 119 the judge directed himself on the law in relation to KO and the test to be applied. He went onto consider unduly harsh and the context of separation of the family. At para 122 he set out the following parts of the social worker's report;

> *[L] has not experienced life in Turkey and there are no significant or in fact any family networks that either she or the parents have identified there. In the event that the father*

is deported to Turkey it is unlikely that [L] and [I's] mother will be able to meet their needs as effectively as both parents are able to at the moment.

[L] will experience her father's absence as a betrayal of trust on is part and she will likely blame him for being absent from her everyday life.

[Mr T] is a father who is emotionally available to both of his children. This means that the impact of removal will be extremely traumatic for [L]. She has missed him enormously in the past when he has been absent form [sic] *the family home or unable to accompany them on holiday. The shared experiences of family life that make for a childhood and in [L's]* [sic] *case a happy childhood, will be missing for want of the father in both of the children's lives.*

Without the guidance and support from the father it is likely that [L's] education will suffer and arrangements for meeting the daily needs of both the children on her own will become an enormous challenge for the mot. Both children are tied emotionally to their father. [L] more completely than her young brother with whom the process of forming a secure attachment is just beginning.

[L] will feel the absence of her father on a daily basis and will pine for him; probably quietly and as at present she is unlikely to share the more painful aspects of this separation with anyone. It is unlikely that she will ever get over this painful event and it will remerge [sic] *as a painful and intrusive memory as she goes into her adolescence.*

The outcome for [L] will not be a positive one and her education and ability to form trusting relationships is likely to suffer. She is deeply affected as it is with the situation that her father and the family find themselves in. In the event that [L] is separated from her father in an involuntary and irreversible manner the damage to her educational and emotional development will be profound and she will suffer significant harm. [L] tends to internalise her difficulties and does not have the complete emotional resources to be able to deal with the permanent loss of her father form her daily life.'"

The judge found, at paragraph 125, that both children could visit their father in Turkey and L could have telephone contact with him and contact him via social media. However, deportation would prevent face to face daily contact taking place whilst they are growing up. The judge found that E was too young to use electronic methods to communicate with his father and that deportation "would result in severance of any meaningful contact with his father other than during occasional visits" which the judge found would be a poor substitute for both parents having day to day involvement with their upbringing. The judge considered that the Appellant would be excluded for 10 years and that he would miss much of E's early development and the period would span the rest of [L's] childhood and teenage years". The judge found that it was clear from the evidence from the school and the social worker that the Appellant's involvement in L's life is "of great significance" to her and that separation from him when he was imprisoned was "very disturbing for her and is having an ongoing, significantly deleterious effect upon her emotional well-being." The judge, at paragraph 127 found that the "absence of the Appellant from the children's lives on a day to day basis would have an ongoing significant effect on their wellbeing and would be likely to cause them significant emotional harm." He considered that the absence would not be short lived and that would

mean for L until she reached majority and for E "this would mean that he would have no real opportunity to properly bond with his father during his early formative years"

The Legal Framework

12. **"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.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(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.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

13. "**Deportation and Article 8**

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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

(a) 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 at least 4 years;

(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; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, 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) or (c) 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) the 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."

Application of the Legislation and the Immigration Rules

14. In KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, Lord Carnwath (giving the judgment of the Supreme Court) analysed the exception, based on the deportee's relationship with a qualifying child, in Section 117C(5) NIAA 2002 and paragraph 399(a) IR. At [15], he explained that he started from the presumption that the provisions were intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" (see Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 per Lord Hodge at [10]). He concluded that the exception was self-contained and so, in deciding whether or not it applied, the decision maker should only consider the factors specified and disregard the degree of seriousness of the parental offending and other public interest considerations (at [20]-[23]).

15. Lord Carnwath gave guidance on the meaning of unduly harsh at [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. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 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."

16. Lord Carnwath cited with approval the guidance given by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223:-

> "… '*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".

17. The Upper Tribunal has recently considered KO in RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC) and decided that unduly harsh in the context of Section 117C(5) does not mean that the test includes the way in which the Upper Tribunal applied the formulation to the facts of the case before it in MK (Sierra Leone). As a result of KO the position is in determining whether exception 2

in Section 117C(5) applies a court is not to have regard to the seriousness of the offence committed by the person who is liable to deportation. However, as concluded in RA the expression "unduly harsh" sets a high threshold. In this context the Upper Tribunal rejected submissions that the Upper Tribunal was obliged to adopt the same approach as MK (Sierra Leone) to children aged at or around 7 and said in respect of this as follows:-

> "14. We reject these submissions. Although the application of a legal test to a particular set of facts can sometimes shed light on the way in which the test falls to be applied, it is the test that matters. If this were not so, everything from the law of negligence to human rights would become irretrievably mired in a search for factual precedents.
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> 15. What might at first appear to be hard-edged findings of fact often turn out to be evaluative assessments. On analysing the above passages from MK (Sierra Leone), that is the position here. The Upper Tribunal's conclusion that children aged 7 are at a 'critical stage of their development' was such an assessment, based on the facts before it. It was not the laying bare of an obvious fact, of which any other court or tribunal must take 'judicial notice'. One could envisage an equally valid argument that a child of 2 or 3 is at a critical stage of its development; or a child at or approaching puberty, and so on. Childhood is a developmental progression towards becoming an adult.
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> …
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> 17. As can be seen from paragraph 27 of KO (Nigeria), the test of 'unduly harsh' has a dual aspect. It is not enough for the outcome to be 'severe' or 'bleak'. Proper effect must be given to the adverb 'unduly'. The position is, therefore, significantly far removed from the test of 'reasonableness', as found in section 117B(6)(b)."

Submissions

18. I heard submissions from Mr Kotas who relied upon the skeleton argument of 21 March 2019. He accepted that the judge gave correct self-direction at paragraphs 118 and 119. The thrust of the submissions was that the judge did not identify how the evidence before the judge established unduly harsh. Mr Kotas submitted that the judge relied quite heavily on the social worker's evidence, but that the conclusions of the social worker on which the judge relied were speculative, for example, the judge at paragraph 122 set out the conclusions of the social worker that the impact of separation on L would be irreversible. The conclusion is speculative. In any event, the evidence of the social worker does not establish that the elevated standard is met. The consequences identified do not amount to more than the normal consequences of deportation where children are concerned. Mr Kotas submitted that, at paragraph 98 of the FTT's decision, where the judge indicated he attached significant weight to the social worker's report, this was in the context of whether there was a genuine and subsisting which was an issue before the FTT. The judge did not have regard to how the family coped when the Appellant was in custody for a period of fifteen months, which represents a material omission. Whilst the evidence may not have been challenged by the presenting office before the FTT, it was incumbent on the judge to

appraise the issue for himself, and in any event, what is identified by the social worker in his report is not capable of meeting the elevated threshold.

19. I heard submissions from Mr Bobb. There was no Rule 24 response. He submitted that unduly harsh is not a fixed test. It is fact-specific. What may be the ordinary consequences of deportation for one family may not be for another. Mr Bobb referred to the vast and extensive experience of the social worker. He submitted that there will always be a degree of speculation because the impact of deportation is a forward- looking test. However, the conclusions of the social worker are not perverse or fanciful. The judge was entitled to attach weight to his opinion. L is an emotionally vulnerable child.

Conclusions

20. The social worker's conclusions were far reaching. He interviewed the children and parents together and separately. He considered the impact of deportation (page 55, Appellant's bundle). He concluded (page 57, Appellant's bundle) that ... "it is unlikely that [L] will ever get over this painful event and it will re-emerge as a painful and intrusive memory as she goes into her adolescence." He concluded that "the outcome for [L] will not be a positive one and her education and ability to form trusting relationships is likely to suffer. She is deeply affected as it is with the situation that her father and the family find themselves in. In the event that [L] is separated from her father in an involuntary and irreversible manner the damage to her educational and emotional development will be profound and she will suffer significant harm. [L] tend to internalise her difficulties and does not have the complete emotional resources to be able to deal with the permanent loss of her father from her daily life"

21. The judge was entitled to attach weight to the report of the social worker. There was no issue about the timeliness of the service of this piece of evidence. If the Secretary of State took issue with the conclusions reached, he should have mounted a challenge to it. Whilst I accept that some of the conclusions in the report, read in isolation, appear unsupported, it must be read in its entirety to understand the social worker's reasoning. I accept Mr Bobb's submissions that inherent to an assessment of future impact is a degree of speculation. Whilst a qualified psychologist's opinion may be capable of carrying greater weight when assessing the emotional wellbeing of a child than that of a social worker, there was no persuasive argument by the Secretary of State before the FTT or UT that such evidence is not within the remit of a qualified and experienced social worker. What weight to attach to this evidence was a matter for the judge. The judge was entitled to attach significant weight to the evidence. In any event, the judge accepted the evidence about the Appellant's family life. The sole source of this evidence was not the social worker's report. The judge attached weight to it the evidence in resolving all issues; both whether there was a genuine and subsisting relation and when assessing unduly harsh. I reject Mr Kotas' submission on this point.

22. There were a number of matters relied on by the judge which I accept amounted to nothing more than the normal consequences of deportation and in isolation cannot meet the elevated test. However, what is significant in this case is the evidence in respect of the eldest child, L and the cumulative effect of all the factors identified by the judge. A fair assessment of the evidence about L, including that of the social worker, described a particularly vulnerable child who had experienced extreme difficulties following the incarceration of her father. On meeting L, the social worker opined that "she presents as a serious child who rarely smiles, speaks in a low subdued voice and appears worried" (page 50, Appellant's bundle). The social worker conducted an exercise called "the three houses" with L and the result was a reversal of the more normal scenario (see p56, Appellant's bundle). Having taken it account all factors cumulatively the judge was entitled to conclude that the elevated test in this case had been met. The grounds are a disagreement with the findings of the judge.

23. In the case of Secretary of State for the Home Department v Garzon [2018] EWCA Civ 1225, there was no material misdirection and all relevant considerations were taken into account, but the SSHD challenged the weight given by the FTT to various factors, and the FTT's conclusion. I am mindful of what McFarlane LJ said at [28] and [30]:

> "28. … an appellate court must afford due deference and respect to the evaluation of an expert tribunal charged with administering a complex area of law in challenging circumstances (per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678 at paragraph 30) … There is no error of law …The appeal solely turns on the attribution of weight. The tribunal heard oral evidence …
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> "30. Whilst another specialist tribunal might have reached a contrary conclusion, it is, in my view, not possible to hold that the FTT in the present case arrived at a conclusion which was insupportable on the evidence or otherwise perverse…"

24. There is no error of law and the decision of the judge to allow the appeal under Article 8 is maintained.

Notice of Decision

25. The grounds amount to a disagreement with the findings of the judge but do not properly identify an error of law.

26. The decision of the FTT to allow the appeal under Article 8 is maintained.

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 *Joanna McWilliam* Date 6 May 2019

Upper Tribunal Judge McWilliam