Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22981/2018 (P)

THE IMMIGRATION ACTS

Decided under rule 34
On 22 May 2020

Decision & Reasons Promulgated
On 29 May 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Appellant

and

SO
(anonymity direction made)

Respondent

DECISION AND REASONS (P)

1. The Respondent (SO) is a national of Nigeria born in 1988. The Secretary of State seeks to deport him because in 2013 he was convicted of conspiring to supply Class B drugs (cannabis) and was sent to prison for 27 months.

2. SO sought to resist automatic deportation on human rights grounds, submitting that his removal would be 'unduly harsh' for his British family. On the 11th November 2019 the First-tier Tribunal (Judge I.M Scott) allowed his appeal, having accepted that at least in respect of his stepdaughter 'C1', SO's case was made out. C1 has been experiencing significant mental health difficulties and was in the process of seeking gender re-assignment. All of the evidence before the Tribunal indicated that C1 required a high level of support from her family, and that she was particularly close to SO whom the Tribunal described as her "closest parent and primary carer". The

Tribunal found that his continuing support was "essential to her emotional and psychological wellbeing" and that in all the circumstances the impact of his deportation would for C1 be unduly harsh.

3. The Secretary of State sought permission to appeal. The central complaint was that the First-tier Tribunal erred in law in finding that it would be unduly harsh for C1 if her stepfather were to be removed. The Secretary of State pointed to several Court of Appeal decisions underlining the high threshold inherent in the test, and submitted that the First-tier Tribunal had failed to "consider adequately that the appellant's wife may care for the children alone, as she would have done while the appellant was in prison".

4. Permission was granted on the 29th January 2020 by First-tier Tribunal Judge Chohan in the following terms:

> "It was a matter for the judge to consider whether it would be unduly harsh on the appellant's stepchild and other children if he were to be removed. There is no error in that respect, however, it does seem that the judge has not engaged with the strong public interest in deportation".

5. The matter was then forwarded for listing.

6. On the 23rd March 2020 the government announced measures to combat the spread of Covid-19. This resulted in the suspension of live hearings at Field House. On the 13th April 2020 the file came before me for review. On that day I wrote to the parties[1] requesting submissions on whether it would be appropriate to determine the appeal in this case on the papers. I also made the following observations, inviting comment from the Secretary of State about the scope of the grant of permission:

> "I have read the grant of permission by First-tier Tribunal Judge Chohan which is, with respect, rather opaque. Judge Chohan appears to expressly refuse permission for the Secretary of State to argue that there was any error of law in respect of the findings on 'undue harshness' but grants permission on the ground that First-tier Tribunal Judge I.M Scott may not have engaged with the strong public interest in deportation. Given the statutory framework (*s33(2) UK Borders Act 2007 read with Part 5A of the Nationality, Immigration and Asylum Act 2002*) and the guidance in KO (Nigeria)v Secretary of State for the Home Department [2018] UKSC 53 (to the effect that 'undue harshness' is a stand-alone test to be determined simply with reference to the child), the grant of permission is rather difficult to understand. If there is no error in approach to undue harshness, it follows that the First-tier Tribunal has already, within the framework of the rules/s33(2), given appropriate weight to the public interest in deportation".

7. I now have before me a 'Rule 24' response prepared by Mr Ell of Counsel on behalf of SO dated 8th March 2020, a 'Skeleton Argument' prepared by Mr S. Whitwell of the

[1] My understanding is that my Directions were not in fact served on the parties until the 21st April 2020. I have adjusted the timetable accordingly.

Secretary of State's Specialist Appeals Team and finally 'Written Submissions' prepared by Ms J. Isherwood, Senior Presenting Officer on behalf of the Secretary of State dated 16th April 2020. What I do not have is a direct response to my directions of the 13th April, as it would appear that these 'crossed' with the endeavours of the parties to assist the Tribunal in writing. I have however been informed by the Secretary of State that I should read Mr Whitwell's skeleton and Ms Isherwood's submissions as her response: this was communicated by way of an email on the 1st May 2020 by Senior Presenting Officer Mr Diwnycz. Neither party has made any objection to this matter being determined on the papers.

The Secretary of State's Appeal

8. I have read the grounds, and the written submissions of Mr Whitwell and Ms Isherwood with care. The Secretary of State's case is that the First-tier Tribunal erred in law in the following material respects:

   i) **In failing to take material matters into account**. *In particular*: the fact that the Appellant's wife cared for the children alone when he was in prison and the fact that a previous Tribunal had determined, in 2015, that the Appellant's deportation would not be unduly harsh for C1;

   ii) **Failing to give adequate reasons**. *In particular*: the Judge has not explained why it would be unduly harsh for C1 to attend her counselling sessions on her own, or alternatively in the company of her mother or grandmother;

   iii) **Misapplication of the 'undue harshness' test**. The Secretary of State submits that the Judge has erred in finding the circumstances of this case capable of reaching the high threshold of undue harshness. Reliance is placed on a number of Court of Appeal authorities: AJ (Zimbabwe) [2016] EWCA Civ 1012, AR (Pakistan) [2010] EWCA Civ 816, PG (Jamaica) [2019] EWCA Civ 1213 and OH (Serbia) [2008] EWCA Civ 694 to submit that the best interests of the child are not to be treated as routinely outweighing the strong public interest in deportation, that the statutory scheme expects and approves the separation of families as a result of deportation, and that the commonplace distress that children will feel when a parent is deported is insufficient to meet the very high test.

9. In respect of ground (i) Mr Whitwell emphasises the significance of the findings of a 2015 Tribunal which had concluded that the primary care-giver in the family was the children's mother; SO's deportation was found to present a "huge disruption" for the family but this fell short of undue harshness in circumstances where his wife could care for the children alone. Mr Whitwell submitted that these *Devaseelan* findings were as a matter of law, the starting point for Judge Scott, who had not adequately explained why she now chose to depart from them. Although Judge Scott does refer to the passage of time, Mr Whitwell points out that she does not go on to explain why that might justify reaching a different conclusion from her predecessor. In respect of C1's exploration of the possibility of gender reassignment Mr Whitwell points out that it is no more than that at this stage, and submits that it is unclear why

this necessitates the presence of her stepfather. There was suggestion in the evidence that he attends the counselling sessions with C1 because it is her preference, and because her mother is finding it hard to come to terms with the idea that her daughter might become a son. In Mr Whitwell's submission these facts are not capable of disclosing undue harshness.

10. Under the heading 'ground (ii)' Mr Whitwell submits that in its evaluation of the public interest the First-tier Tribunal has erred in failing to recognise that this was an application to *revoke* an existing deportation order: as such paragraphs 390 and 390A should have been applied. I am unsure as to why this submission falls under the heading of ground (ii); indeed I am unsure if it is a matter raised in the grounds at all. I am however prepared to consider it in the context of the Secretary of State's general complaint about the approach to the public interest.

11. I note for the record that Ms Isherwood's submission introduce two more points that are not pleaded in the grounds. The first is that there was no evidential basis for the Judge's conclusion that C1 has a relationship with her stepfather *capable* of meeting the undue harshness test. Again, permission was neither sought nor granted on this point – essentially a rationality challenge – but I am prepared to consider it as part of the Secretary of State's general assault on the 'unduly harsh' findings made by the First-tier Tribunal. The second new matter raised by Ms Isherwood is her submission that the First-tier Tribunal erred in going on to make findings on proportionality 'outside of the rules' on Article 8. I am not going to address that matter save to say that I refuse permission to argue it on the basis that it is irrelevant to this appeal and is in any event a submission that is wrong in law: Hesham Ali [2016] UKSC 60.

SO's Response

12. I bear in mind that Mr Ell's 'Rule 24' response was drafted prior to the Secretary of State's submission of either the skeleton or her written submissions. In summary SO submits that Judge Scott directed herself to the correct legal tests (as expressed in the Immigration Rules at paragraphs 398-399) and that there is nothing to indicate that she erred in the application of those tests. The First-tier Tribunal specifically considers the significant weight to be attached to the public interest in the deportation of foreign criminals, and directs itself to the findings of the earlier Tribunal. On the *Devaseelan* point Mr Ell submits that Judge Scott was perfectly entitled to depart from the findings made in 2015, given the passage of time and the changed circumstances of this family, viz the increased reliance of C1 upon SO, and her changing mental health needs. It is further submitted that on the specific facts of the case the First-tier Tribunal was entitled to find that the distress that would be experienced by C1 upon her stepfather's deportation elevated this case above the 'commonplace'.

Discussion and Findings

13. The real difficulty with this appeal is encapsulated in Judge Chohan's grant of permission, and in my commentary upon it in my directions of the 13th April 2020 [at §6 above]. The central thrust of the Secretary of State submissions, supported by what Mr Whitwell memorably describes as a "cacophony of cases", is that the public interest in the deportation of foreign criminals is very great indeed. There can be no doubt about that. But in a case such as this, the structure of Part 5A Nationality, Immigration and Asylum Act 2002 and the decision of the Supreme Court decision in KO make clear that this weight is already accounted for by the test at s117C(5): where the impact of deportation on a child is found - as a matter of fact - to be unduly harsh, then the public interest will be outweighed. The statements made by the Secretary of State about the weight to be attached to her side of the scales are all perfectly correct in law, but in this case the real question is whether the First-tier Tribunal erred in making the findings that it did about C1.

14. The cases pleaded in the grounds, and referenced at my §8(iii) above, are unanimous in their emphasis on the high threshold to be surmounted by applicants who seek to establish that their deportation would be unduly harsh for a family member. It is not a threshold that can be met by showing that a child will be upset, or that he or she will miss the deported parent. Parliament has expressly contemplated that child be separated from parent so the ordinary consequences that would flow from such a separation are not going to be sufficient to meet the test. The child being extremely distressed is not likely to be sufficient (except perhaps where there was strong evidence of psychological damage). Life being made more difficult for the family concerned, for instance in the presentation of practical challenges, is not going to pass muster since most families will undergo some period of adjustment. Such difficulties can properly be described as commonplace. The outcome for the child concerned needs to be serious: it needs to be "bleak" or "severe". The Secretary of State concludes her review of the caselaw [at §13 of her grounds] by asserting that in its light, it can be seen that the "FTTJ has erred in finding that the appellant's deportation would result in unduly harsh circumstances on his step-child". How might the Judge have done so?

15. The first ground is that the Tribunal failed to take material matters into account. I start with the *Devaseelan* point. As Mr Whitwell elucidates in his written argument, SO had already had a human rights appeal dismissed. In January 2015, following a hearing in December 2014, the First-tier Tribunal (Judge A.E Walker) had found that SO had failed to demonstrate that the test of undue harshness was met. Mr Whitwell correctly submits that these findings had to be the starting point for First-tier Tribunal Judge I.M Scott, and that in accordance with the guidance in Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702 Judge Scott had to provide some explanation as to why, on the evidence before her, she found otherwise. Mr Whitwell acknowledges that Judge Scott addresses this matter at her §57-60, but submits that her reasoning was not adequate.

16. I am quite satisfied that it was. This was a case involving a child. At the date of the appeal before Judge Walker, C1 was 8 years old. SO had been married to her mother for less than two years when he had gone to prison, and had only been back in the family home a matter of months when the appeal was heard. At the date of the hearing before Judge Scott, C1 was 13 years old, and had spent the preceding five years of her life living with SO. A considerable amount of time in the life of this young person had therefore elapsed, as Judge Scott points out at her §60. She need not articulate the point in any more detail, since its import is obvious – in the context of a family, the passing of five years is likely in itself to be significant. Indeed in granting SO permission to judicially review the refusal to treat his application to revoke the deportation order as a 'fresh' human rights claim – litigation which ultimately resulted in the appeal before Judge Scott – Upper Tribunal Judge Jackson also refers to the "passage of time" as being an important factor in this case[2]. The evidence before the First-tier Tribunal moreover indicated that in that time the dynamics within the family had changed. In 2014 the evidence before Judge Walker was that the primary carer of the children was their mother. In 2015 it indicated that C1 had developed a particularly strong bond with SO, who was supporting her with mental health issues that had emerged in her early adolescence. Judge Scott makes reference to these matters at her §60 in the context of the social worker's report and the medical evidence relating to C1. Judge Scott's decision to evaluate that evidence as it stood at the date of the hearing before her was entirely in accordance with the guidelines in Devaseelan.

17. I would add that there is another reason why it would not have been appropriate for Judge Scott to go further than she did in her recognition of the decision of Judge Walker. That is that Judge Walker made his decision in 2015, long before the Supreme Court's decision in KO (Nigeria), and indeed before the Upper Tribunal's decision in MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 (IAC) which foreshadowed it. His 'undue harshness' assessment was therefore made by balancing the interests of the children against the interests of the state in deporting SO, an unhelpful muddying of the waters for Judge Scott, who was obliged by the later clarification of the law to take a quite different approach.

18. The Secretary of State further submits that the First-tier Tribunal has failed to have regard to the fact that SO's partner cared for the children alone when he was in prison. That she did so adequately was plainly relevant to determining what detriment that they might suffer from his absence today. I am not satisfied, having had regard to this comprehensive decision, that the First-tier Tribunal failed to appreciate the material history of this family. At its §37 the Tribunal records the evidence of SO's partner that during his absence "she found it very difficult to support herself and the children financially. His absence was also difficult emotionally"; the decision goes on at §38 to note that the children found SO's absence from the family home "very hard". C1 became "very emotional" whilst C2, then a little boy of about 6, became violent, both at home and at school. What has happened since then, explains the First-tier Tribunal at its §41 and 47, is that C1 has

[2] Order of UTJ Jackson dated 13th March 2018

developed mental health issues, and that SO is the central figure supporting her through those difficulties. It is this latter factor which leads the Tribunal to make the findings that it does: §76-81. In those circumstances I am not satisfied that the First-tier Tribunal failed to appreciate that SO was not living with his family whilst he was in jail; I am further satisfied that any finding on their circumstances then – some seven years ago – is going to be of any real relevance in its evaluation of their circumstances now.

19. Ground (ii) is that the First-tier Tribunal has failed to explain why it concluded that C1 needed SO to attend her counselling sessions with her. There is no merit in that ground. First, it suggests a rather reductionist reading of the First-tier Tribunal's decision. C1 did need SO to take her to her counselling sessions but her needs were not limited to that: as the First-tier Tribunal points out at its §78 and §79, it was their "very close bond" which was of significance to her on a daily basis. Second, because reasons were offered as to why it had to be SO, and those reasons were accepted by the Tribunal: C1 does not feel able to discuss her desire for gender re-assignment with her mother, who is in turn finding it difficult to cope with her daughter's desire to become a son, and C1's maternal grandmother "is elderly and is not well enough" [at §45].

20. We then reach the nub of the Secretary of State's case, at ground (iii): that it simply was not open to a rational decision maker to conclude that the high threshold of 'undue harshness' was on these facts met. I would observe at the outset that the Secretary of State is on somewhat shaky ground in making this submission now. In 2018 Upper Tribunal Judge Jackson granted SO permission to judicially review the negative 'fresh claim' decision, finding it arguable that this was a claim with a "realistic prospect of success before a properly directed Tribunal". The Secretary of State thereafter appears to have accepted that position, since she consented to the matter proceeding to a fresh appeal. The evidence before Judge Scott being a good deal stronger that that available to Judge Jackson in 2018, it is difficult to see how it can be said that a claim with a realistic prospect of success *then* can be one that was bound to fail *now*.

21. The dicta cited by the Secretary of State in her grounds emphasises that the threshold is a high one, and that the commonplace distress ordinarily suffered by any child who faces the loss of a parent will not be sufficient to meet it. C1 was not however an ordinary child suffering that commonplace distress. As the history set out in the determination explains, she is a child whose early years were marred by serious domestic violence at the hands of her biological father [§35] and who has since developed a particularly strong bond with her stepfather SO [for instance §25 and §30]. She experienced behavioural problems when he was sent to prison but she has overcome these since his release in 2014 [§27]. Her current difficulties are centred on her desire to change her gender, an enormously challenging psychological issue for a young person to be dealing with [§25, 29, 30]. Judge Scott had before her independent evidence of C1's high levels of anxiety and self-harming behaviour, and in particular how it is SO that C1 looks to for support. It was he, rather than her mother or grandmother, who she chose to "come out" to, not long after his release

from prison. The independent social worker whom Judge Scott accepted as an expert witness put it like this:

> "I am aware that she has a close bond with her step-father, whom she idolises. Therefore the hurt she feels and harm that she causes to herself is entangled in the threat of separation as well as aspects of her past and present that continue to impact upon her mental wellbeing. Whilst it is important that [C1] receives psychotherapy to fully explore her history and to support her in this transitional journey, is it vital that aspect of her life remains stable through that process.
>
> [SO] is the parental figure whom she relies upon. Therefore separation of this relationship is not as simple as a parent leaving the family home, but more significantly losing a part of herself and the unique attachment that derives from this relationship".

As Judge Scott notes at his §55, this evidence was consonant with the conclusions of a mental health outreach worker who had also spent time with C1.

22. It is therefore abundantly clear that C1 was not an ordinary child living in ordinary circumstances. The psychological harm that she would suffer if her stepfather were to be removed from the family home was not the "commonplace" distress or difficulty that any family member would experience when impacted by a deportation. The consequences for C1 could properly be described as bleak or severe. It follows that Judge Scott's decision was within the range of reasonable responses and the Secretary of State's ground is not made out.

23. I deal finally with the point made by Mr Whitwell in his written submissions. That is that this was a human rights claim with its origins in an application for the revocation of the deportation order made in 2013. It is clear from the First-tier Tribunal decision that Judge Scott understood perfectly well that this was a revocation case: the relevant chronology is set out at the beginning of the decision. Mr Whitwell is however correct to note that the Tribunal fails to direct itself to paragraphs 390 or 390A of the Rules. I am not satisfied that anything turns on that, since it is apparent from those provisions that success under paragraph 399 would be determinative of the outcome of the appeal:

> '390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
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> (i) the grounds on which the order was made;
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> (ii) any representations made in support of revocation;
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> (iii) the interests of the community, including the maintenance of an effective immigration control;
>
> (iv) the interests of the applicant, including any compassionate circumstances.
>
> 390A. **Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies** and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.'

24. For the reasons I have set out above I am not satisfied that the Secretary of State has established that the decision of the First-tier Tribunal is flawed for error of law and the decision is upheld.

Anonymity

25. SO is a foreign criminal who would not ordinarily attract any right to the protection of anonymity. This case does however turn on the presence in the United Kingdom, and mental health of, his children. Having had regard to the guidance in the *Presidential Guidance Note No 1 of 2013: Anonymity Orders*, I am concerned that the identification of SO could lead to the identification of his children, and that it would therefore be appropriate to make an order in accordance with Rule 14 of the *Tribunal Procedure (Upper Tribunal) Rules 2008* in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant before the First-tier Tribunal (herein referred to as 'SO') is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

26. The decision of the First-tier Tribunal contains no material error of law and it is upheld.

27. There is an order for anonymity.

Upper Tribunal Judge
Date 22nd May 2020