Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05800/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 February 2020	**On 3 March 2020**

Before

UPPER TRIBUNAL JUDGE KEKIC
UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDREW [K]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A. Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Mr S. Jaisri, Counsel instructed by Arlington Crown Solicitors

DECISION AND REASONS

Introduction

1. The appellant is the Secretary of State for the Home Department. However, for the sake of clarity, we shall use the titles by which the parties were known before the First-tier Tribunal.

2. The appellant is a citizen of Uganda born on 17 May 1979. He entered the UK as a visitor in September 2002 and remained unlawfully after his leave expired in February 2003. He was granted limited leave to remain on 20 March 2014 until 20 September 2016.

3. On 23 December 2015 the appellant was convicted of causing grievous bodily harm and sentenced to 90 months imprisonment.

4. On 31 October 2017 he was served with a notice of decision to deport him.

5. The appellant made submissions contending that:

    a. his deportation would breach article 8 ECHR because of his family and private life in the UK, in particular the family life he enjoys with his son who is a British citizen born on 16 August 2010; and

    b. he would be at risk of persecution in Uganda because he is bisexual.

6. In a decision dated 5 June 2019, the respondent rejected the appellant's human rights and protection claim. The appellant's asylum claim was certified under section 72(2) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"). It was also not accepted that he was bisexual or would be at risk on return to Uganda because of his sexuality.

7. With respect to the appellant's human rights (article 8) claim, the respondent accepted that the appellant has a genuine and subsisting relationship with his (British national) son, but not that it would be unduly harsh for the child to either live in Uganda or remain without the appellant in the UK (where he would continue living with his mother).

8. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Juss ("the judge"). In a decision promulgated on 23 October 2019, the judge allowed the appeal. The respondent is now appealing against that decision.

Decision of the First-tier Tribunal

9. The judge dismissed the appellant's asylum claim. This part of the decision has not been appealed. We therefore do not consider it further.

10. The judge allowed the appellant's appeal under article 8 ECHR on the basis of his relationship with his son. The judge's reasoning is set out a paragraph 30, where he stated:

> "What is not accepted [by the respondent] is that it would be unduly harsh for this child to live in Uganda should it come to

> that. I do not agree that this is so. Not only is the appellant's son a British citizen but the son's mother [ ] is also a British citizen. She has not indicated that she will leave the UK to go and live in Uganda. The appellant needs both his loving parents, particularly given that he has behavioural problems at school. The effect of the decision to remove the appellant is to sever the child's relationship with one parent. Most importantly, his deportation will extinguish what family life he has maintained with his son in difficult circumstances of long-term imprisonment. Even if this is not so, the decision puts a vulnerable child at a critical developmental stage in his life in a position of having to relocate which is unduly harsh. This is because there is not only a handwritten letter from the son stating that "I have missed my dad for so long" and that he misses being picked up from school by him, which I accept to be genuine. There is also a letter from [the son's school] states [sic] that the son had a problem with "temper tantrums and aggression" such that there has been "cause to request meetings with [his] parents…" and there have been two fixed term exclusions in his case. There is nothing to suggest in this letter that the child's difficulties arise from his separation from his father. Nevertheless, the stabilising and supportive effect of a parent, such as the appellant who was always shown devotion to his child cannot be discounted, particularly as a Community Development Worker refers to the appellant as "a devoted father to his son" and "who he has kept regular contact with while serving his time in prison"."

11. At paragraph 31 the judge stated that a situation where an individual has a "genuine and subsisting relationship with a partner" is also relevant in this appeal.

12. At paragraph 39 the judge set out his conclusion that it would be unduly harsh for the appellant's child to remain in the UK without him.

13. At paragraph 40 the judge stated that the public interest in deportation is "an additional and very weighty factor that must be taken into account" and that the public interest "is reflected in the stringent nature of the test of unduly harsh". He then found at paragraph 41:

> "Even so I do find that there are compelling circumstances, outside of matters considered within the Rules. Ultimately the balance of the scales tips in favour of the appellant and the appeal is allowed."

Grounds of Appeal

14. The respondent has advanced four grounds of appeal.

15. Firstly, it is argued that the judge failed to provide sufficient reasons to support the finding that it would be "unduly harsh" for the appellant's son to remain in the UK without him.

16. Secondly, it is submitted that the judge failed to identify how the "unduly harsh" threshold was met, given that, as stated in *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213 at [39], "the fact that a parent who is a foreign criminal will no longer be in a position to assist in [difficult periods faced by a child] cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children".

17. Thirdly, the grounds submit that the judge has referred at paragraph 31 to the appellant's relationship with his partner as being "relevant" but has not explained how or why this is the case.

18. Fourthly, it is submitted that the judge failed to consider, or make findings as to, whether there are very compelling circumstances as required by s117C(6) of the 2002 Act.

Submissions

19. Ms Fijiwala argued that the judge conflated the issue of whether it would be unduly harsh for the appellant's son to live in Uganda with the entirely distinct question of whether it would be unduly harsh for him to remain in the UK without the appellant. She drew attention to the intermingling of these issues in the analysis contained within paragraph 30 of the decision (cited above at paragraph 10). She also argued that the judge had not properly considered the threshold that must be crossed before separation from a parent can be characterised as "unduly harsh".

20. She also submitted that the judge had failed to properly direct himself to, or apply, the correct test under s117C(6), which required an evaluation of whether there were "very compelling circumstances".

21. Mr Jaisri argued that paragraph 30 of the decision contains within it an adequate evaluation of whether the appellant's deportation would be unduly harsh for his son. He argued that it is evident the judge had regard to all of the relevant factors when assessing undue harshness. He also maintained that paragraph 30 needs to be read in conjunction with paragraph 39, which is where the judge set out his conclusion on this issue.

22. He also argued that the evidence, as set out in the decision, adequately establishes the basis upon which the judge found there to be "very compelling circumstances" and that mere omission of the word "very" is not a basis to set aside the decision when the judge plainly was aware of, and had in mind, the correct test.

Relevant Law

23. Section 117C of the 2002 Act provides as follows:

> (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."

24. In *KO (Nigeria) v SSHD* [2018] UKSC 53, the Supreme Court considered the nature of the exercise required by section 117C (5). Lord Carnwath stated at [23]:

> "… [T]he 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 … 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." [emphasis added]

25. The need for there to be a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent has been confirmed – and emphasised – by the Court of Appeal in subsequent cases. For example, in *SSHD v KF (Nigeria)* [2019] EWCA Civ 2051 at [30], it is stated:

> "Furthermore, and with respect to the First-tier Tribunal judge, I consider that his conclusion on the evidence about the respondent's family that his deportation would be unduly harsh is unsustainable in the light of Lord Carnwath's analysis of the proper interpretation of Exception 2 in s.117C(5), namely that:
>
> > "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."
>
> Looking at the facts as found by the First-tier Tribunal that led to the conclusion that family would suffer adverse consequences as a result of the deportation, and in particular the consequences for the respondent's son separated from his father, it is difficult to identify anything which distinguishes this case from other cases where a family is separated. The First-tier Tribunal judge found that the respondent's son would be deprived of his father at a crucial time in his life. His view that "there is no substitute for the emotional and developmental benefits for a three-year-old child that are associated with being brought up by both parents during its formative years" is indisputable. But those benefits are enjoyed by all three-year-old children in the care of both parents. The judge observed that it was a "fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child" and that he was entitled to take judicial notice of that fact. But the "fact" of which he was taking "judicial notice" is likely to arise in every case where a child is deprived of a parent. All children should, where possible, be brought up with a close relationship with both parents. All children deprived of a parent's company during their formative years will be at risk of suffering harm. Given the changes to the law introduced by the amendments to 2002 Act, as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness

over and beyond what every child would experience in such circumstances."

26. Similarly, in *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213 at [39] the Court of Appeal stated:

> "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…"

27. In this appeal, subsection (6) of s117C is applicable because the appellant was sentenced to more than 4 years imprisonment. Accordingly, it was not sufficient for the appellant to rely on the effect of his deportation on his son being "unduly harsh". He needed to show something "above and beyond" this, as was explained in *SSHD v JG (Jamaica)* [2019] EWCA Civ 982 at [16]:

> "… in so far as the Respondent sought to rely on the effect of his deportation on his son (who, being a British citizen, was a qualifying child) it would not be enough to show that that effect would be "unduly harsh", in the sense explained in KO. That would satisfy Exception [2], but because his case fell within section 117C(6) he needed to show something over and above that, which meant showing that the circumstances in his case were, in Jackson LJ's phrase in NA, "especially compelling". **In short, at the risk of**

> **sounding flippant, he needed to show that the impact on his son was "extra unduly harsh".**" [emphasis added]

Analysis

28. Under s117C(5) of the 2002 Act, the judge was required to consider whether it would be unduly harsh for the appellant's son to live in Uganda and/or whether it would be unduly harsh for him to remain in the UK without the appellant.

29. It is clear that at paragraph 30 of the decision (quoted above at paragraph 10) the judge assessed – and determined – whether it would be unduly harsh for the appellant's son to live in Uganda. However, as argued by Ms Fijiwala, the assessment of whether it would be unduly harsh for the appellant's son to remain in the UK without the appellant appears to have been conflated with consideration of the son living in Uganda. For example, at paragraph 30, immediately after stating that deportation will "extinguish what family life he has maintained with his son" (a factor relevant to the harshness of the appellant's son remaining in the UK without him) the judge stated that the respondent's decision put a vulnerable child in a position "of having to relocate which is unduly harsh" (a factor relevant to the appellant's son living in Uganda). Nonetheless, as submitted by Mr Jaisri, despite the conflation of issues in paragraph 30 of the decision, the judge did make a clear finding that it would unduly harsh for the appellant's son to remain in the UK without the appellant (at paragraph 39), and did, in paragraph 30, give several reasons that support this conclusion. The difficulty for the appellant, however, is the adequacy of those reasons.

30. The reasons given by the judge to support his finding that the impact on the appellant's son of remaining in the UK without the appellant would be unduly harsh comprise of the following:

    a. the appellant's son needs both his loving parents;

    b. the appellant's relationship with his son will be severed;

    c. the child has missed the appellant whilst the appellant was in prison;

    d. the appellant's son has problems with temper tantrums and aggression, and has had two fixed term exclusions from school; and

    e. the appellant has always been devoted to his son and has a strong relationship with him.

31. In order to substantiate a finding of undue harshness under s117C(5) of the 2002 Act the judge was required, in accordance with *KO*, to identify a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. However, the factors identified by the judge, considered both individually and cumulatively, do not do this. The only factor

that could, potentially, have indicated a harshness beyond that which ordinarily will follow from a child being separated from a committed and loving parent is the appellant's son's difficulties at school. However, there was no evidence from the school (or any professional, such as a social worker) indicating that there is a link between the child's difficulties and separation from the appellant. Indeed, the judge acknowledged this at paragraph 30 where he stated that "there is nothing to suggest in [the letter from the appellant's son's school] that the child's difficulties arise from his separation from his father". Accordingly, it was, in our view, not open to the judge, based on his findings of fact and evaluation of the evidence, to conclude that the effect of separating the appellant from his son would be "unduly harsh", in the sense explained in *KO*.

32. The judge also fell into error by not applying the correct legal test under s117C(6). At paragraph 41 the judge found that there were "compelling circumstances outside of matters considered within the Rules". There are three mistakes in this formulation of the test under s117C(6):

    a. First, the judge omitted the word "very". Under s 117C(6) there must be very compelling circumstances, not just compelling circumstances.

    b. Second, the very compelling circumstances must be over and above undue harshness. By using the phrase "outside of" rather than "over and above" it appears the judge may not have had in mind the elevated threshold in s117C(6).

    c. Third, the reference to "outside of matters considered within the Rules" suggests that the judge failed to appreciate that the test of "very compelling circumstances" is not only within the Rules (paragraph 398 of the Immigration Rules) but is also within primary legislation (s117C(6) of the 2002 Act). It is not "outside of" anything.

33. Moreover, the conclusion that there were very significant obstacles over and above undue harshness was not open to the judge because it cannot be established that s117C(6) is satisfied by relying solely on the contention that the effect of deportation would be unduly harsh on a child, if the effect on the child does not even meet the threshold in 117C(5). Indeed, reliance on such factors would not be sufficient to meet s117C(6) even if they were enough to (just) meet s117C(5). This is explained *NA (Pakistan) & Another v SSHD* [2016] EWCA Civ 662 at [30], where it is stated:

> "**In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible**

> **to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2**. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute" very compelling circumstances, over and above those described in Exceptions 1 and 2", whether taken by themselves or in conjunction with other factors relevant to application of Article 8." [emphasis added]

34. Another way of framing this, using the language of the Court of Appeal in *JG,* is that if the effect of deportation on the appellant's son would not be "unduly harsh" it could not be "extra unduly harsh".

35. Accordingly, we set aside the decision of the First-Tier Tribunal on the basis that it involved the making of an error on a point of law.

Remade Decision

36. Both parties accepted that we should proceed to remake the decision.

37. The appellant submitted a single item of further evidence, which is a letter from his son's school dated 4 February 2020. This letter states that the appellant's son has experienced episodes of extreme anger and emotional outbursts (with inconsistent and unpredictable triggers) and that he receives emotional support from the special education needs department. The letter states that the appellant shares parental responsibility with the child's mother, and that he is listed as the second point of contact. It is also stated that the appellant has:

> "…begun to take on more responsibility for collecting [his son] from school at the end of the school day, and frequently takes the opportunity to discuss [his] progress with staff when he is collecting his son."

38. The appellant's son lives with his mother. In her witness statement dated 19 September 2019 she described the appellant as being a devoted and loving father and expressed her desire for him to stay in their son's life and continue helping with his upbringing. She stated that it has been hard for her son having his father in prison and she would not want him to grow up without a father figure.

39. The evidence of the appellant's son, by way of a letter dated 19 September 2019, is that he is sad because he misses his father and that he will not see him if he is sent to Uganda.

40. The appellant's evidence, in his witness statement before the First-tier Tribunal, is that he has a very close bond with his son and wants to maintain the relationship. He states that he was given a "clear indication" that his child's aggressive behaviour leading to expulsion from school was due to his absence.

41. We are in no doubt that the appellant's deportation will cause his son to be distressed and upset. Nor do we doubt that his life will be more difficult – and worse – because of the absence of his father. It is in the best interests of the appellant's son to have both of his parents living close to him, and for his father to continue to be engaged in his life. The effect of deportation would certainly be harsh.

42. However, for the effect to be "unduly harsh" there must, as explained by the Supreme Court in *KO* and confirmed subsequently by the Court of Appeal in *KF*, *PG* and *JG*, be a degree of harshness that goes beyond what would necessarily be involved for any child faced with the deportation of a parent. The evidence, taken at its very highest, does not show there to be such a degree of harshness. There is nothing in the evidence of the appellant, his son, or his son's mother - or in any documents that have been submitted – which shows the effect of deportation on the appellant's son goes beyond that which is a necessary and expected consequence of deportation. The appellant's strongest argument is that the degree of harshness goes beyond that which would necessarily be involved because of his son's difficulties with extreme anger and emotional outbursts. However, there is no evidence from the school or any professional indicating that these difficulties are related to the appellant's absence or will be made worse by his deportation. Accordingly, Exception 2 in s117C(5) does not apply because it would not be unduly harsh for the appellant's son to remain in the UK without the appellant, in the sense explained in *KO*.

43. As it would not be unduly harsh for the appellant's son to remain in the UK without him, it is not necessary for us to determine whether it would be unduly harsh for the appellant's son to live in Uganda. However, our finding on this issue is that it would be unduly harsh because it would entail separation from his mother, with whom he has lived his entire life.

44. Where, as here, an appellant who has been sentenced to over four years imprisonment is relying on the effect of his deportation on his child to resist deportation under article 8 ECHR he must show something over and above undue harshness. The appellant is unable to meet this requirement because, for the reasons explained above, the effect of his deportation on his son does not even meet the unduly harsh threshold.

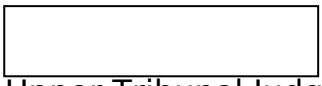
Decision

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

46. We do not set aside the decision of the First-tier Tribunal to dismiss the appellant's claim that his deportation would breach the UK's obligations under the Refugee Convention because this aspect of the decision has not been challenged.

47. We set aside the decision of the First-tier Tribunal allowing the appellant's appeal on the basis that his deportation would be unlawful under s6 of the Human Rights Act 1998 and remake the decision by dismissing the appeal on human rights grounds.

Signed



Upper Tribunal Judge Sheridan Dated: 13 February 2020