Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12834/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 May 2019	**On 15 May 2019**

Before

THE HONOURABLE MR JUSTICE SOOLE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DG
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Ms S Jegarajah, Counsel, instructed by Jacobs & Co Solicitors

DECISION AND REASONS

This is an appeal against the decision of the First-tier Tribunal, Judge Anthony, promulgated 26 October 2018 which allowed the respondent's appeal against the decision by the Secretary of State dated 4 June 2018 to refuse her human rights claim and to deport her.

The respondent is a national of India who came to the UK in December 2011 with entry clearance as a Tier 1 Partner valid in line with her husband, who had been granted leave under the Highly Skilled Migrant Programme. In January 2014 she was granted indefinite leave to remain in line with her husband. She has two children, daughters born in June 2014 and January 2016 who are British citizens. In September 2017 she was convicted at Leeds Crown Court of one count of conspiracy to enter into and being concerned with the acquisition, retention, use and control of criminal property and three counts of entering into and being concerned in the acquisition, retention, use and control of criminal property. She was sentenced to 33 months' imprisonment.

On 30 November 2017 the respondent was served with a decision to make a deportation order against her in accordance with Section 32(5) of the UK Borders Act 2007. She made a human rights claim on 5 January 2018. The Secretary of State refused this on 4 June 2018, finding that none of the exceptions to deportation applied. Her appeal against the decision was allowed by Judge Anthony.

Permission to appeal was granted by Upper Tribunal Judge Smith on 18 December 2018 on the basis that it was arguable that the First-tier Judge had erred in law in applying too low a test in finding it would be unduly harsh for the claimant's children and husband to remain in the UK while she was deported or to go with her to India and/or in failing to give adequate reasons for the decision that this test was met and in particular in failing to give sufficient weight to the public interest in her deportation. The judge added that the high threshold argument was also possibly compounded by consideration of the application of Section 117B(6) before consideration of Section 117(5) of the Nationality, Immigration and Asylum Act 2002.

The matter comes before us to determine whether the First-tier Tribunal had erred in law.

The Decision

For the purpose of her decision, the judge in particular applied the provisions of Section 117B and 117C Nationality, Immigration and Asylum Act 2002 and the related Immigration Rules 398, 399 and 399A and also Section 55 Borders, Citizenship and Immigration Act 2009. The appellant having been sentenced to a period of imprisonment of less than four years but at least twelve months, the claimant fell within Rule 398(b). The judge duly considered whether paragraphs 399 and 399A applied and if not, whether the public interest in deportation was outweighed by very compelling circumstances over and above those matters: s.117C(3) and (6) and Rule 398 as considered by the Court of Appeal in **SSHD v Quarey [2017] EWCA Civ 47**.

Before making her decision on these matters, the judge considered the provisions of Section 117B and in particular subsections (1), (2), (4), (5) and (6). In a case falling within Section 117C it was strictly unnecessary to do so. However, in respect of s. 117B(6) she concluded, on the basis of the evidence she had heard and read, together with her observation of the respondent's two

daughters upon seeing her in the hearing room at the Magistrates' Court, that she was in no doubt there was a genuine and subsisting parental relationship between the respondent and her two children. She then considered Section 55 of the 2009 Act and found as a fact that it would be in the children's best interests to remain with both parents.

Turning to the necessary inquiry under Section 117C and paragraphs 398 to 399A, the judge duly held that paragraph 398(b) applied and that the deportation of the appellant was in the public interest unless Exception 1 or 2 applied. Exception 1 did not apply. As to Exception 2, for the reasons already considered under Section 117B, the respondent had a genuine and subsisting parental relationship with her two children. They were British citizens. Accordingly, the questions for decision were whether in each 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",

see paragraph 399(a), also Section 117C(5).

Dealing first with question (b), the judge concluded that it would be unduly harsh for the children to remain in the UK without their mother. She found as facts that there was no question regarding the respondent's ability to parent her children; and that she had been their primary carer prior to her imprisonment, looking after the children whilst her husband worked. Having considered the report dated 15 September 2018 of Mr Simon Dermody, Consultant in Child, Adolescent and Family Therapy, who had conducted a joint family interview with the respondent's husband and two daughters and a telephone interview with the respondent, the judge accepted that the respondent's absence from the family home had already induced an acute traumatic reaction in both children. The judge noted in particular that the children saw their mother's absence as temporary and in consequence persistently questioned as to when she was likely to return home. She concluded that it would be highly damaging to the children's welfare if there was an enforced and permanent separation from their mother and that the "unduly harsh" threshold was passed.

As to question (a), the judge accepted that the de facto primary caregiver was currently the respondent's husband but noted that he had been receiving medical treatment and a prescription drug for a stress-related problem due to being a single parent for the first time. Reiterating that the respondent would otherwise be the primary caregiver, the judge accepted that she had a close bond with her children and that the younger daughter was still being breastfed when she was taken into custody. If the respondent was removed this would effectively compel the family to leave the UK and the European Union "because this is a family who wishes to stay together".

Turning to the specific question of whether it would be unduly harsh for the children to leave the UK, she again took account of Mr Dermody's report and conclusion in respect of an acute traumatic reaction to their mother's absence from the family home. She noted that the elder daughter was now 6 and currently in year 1 at school and likely to have formed friendship groups. Both children had been born in the UK and had not lived anywhere else. To require them to leave the UK now would effectively punish the children for their mother's wrongdoing. She found that to require the children to uproot and re-establish themselves in a foreign country would cause significant setbacks to their development and welfare in circumstances when what they crucially required was a stable home and environment and the love and care of their mother. The conclusion was that this would be unduly harsh.

In the light of observations to that effect in **MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450** the judge also considered the seriousness of the offence committed. She noted that this was a first offence and that the OASys Report concluded that she presented a low risk of reoffending. Taking into account both the seriousness of the offences and the other matters, her conclusion remained that the effect of deportation on the children would be unduly harsh.

It is not in dispute that in the light of the Supreme Court decision in **KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53** at paragraph 22, a decision handed down the day before this decision was made but of course after the hearing, the level of seriousness of the offence is not a relevant factor in the inquiry under Exception 2 and paragraph 399(a). Accordingly, and in retrospect, it was an error of law to consider the relative seriousness of the offences; but for reasons which follow the error was immaterial.

In case she was wrong on the issue of "unduly harsh", the judge went on to consider whether this was a case within paragraph 398 where there were "very compelling circumstances" which outweigh the public interest in deportation. She concluded that the "unique facts of this case" provided a "paradigm example of a very compelling circumstance sufficient to protect the appellant against expulsion". For this purpose, the Judge stated that she applied the balance sheet approach endorsed in **Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60**. She placed the effect of the respondent's deportation on the children on one side of the balance and the low risk of reoffending on the other.

The grounds of appeal are focused on two particular bases of challenge. The first is that the First-tier Tribunal's assessment applied too low a threshold for the test of unduly harsh and that the facts of the case are no different from any other deportation case where a family unit is broken up as a result of the decision to deport. This ground relies in particular on the observations of the Supreme Court in **KO**. Secondly, that the Tribunal failed to carry out the appropriate balancing exercise on the "unduly harsh" issue in that it only took account of factors in the respondent's favour.

As Mr Melvin on behalf of the Secretary of State in effect acknowledged in oral argument today, the second ground cannot be pursued in the light of authority. It depends on the decision in **Quarey** and the observations of Lord Thomas CJ in **Hesham Ali**. Those cases have application when considering whether there are "very compelling circumstances" within the meaning of Rule 398 and Section 117C(6) and (3). There is no balancing exercise when considering whether the case of a "medium offender", i.e. imprisonment for at least twelve months but less than four years, falls within Exception 1 or 2, see **NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662**. If it does, the human rights claim succeeds. If it does not, the inquiry then proceeds to the question of whether there are "very compelling circumstances" : see the judgment of Jackson LJ at paragraph 36; also the Upper Tribunal decision in **RA v Secretary of State for the Home Department [2019] UKUT 123**.

Returning to the first ground, the Supreme Court in **KO** said at paragraph 23, contrasting the test of reasonableness in Section 117B:

> "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. … 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."

The Secretary of State generally submits that there is nothing in the evidence, including the report of Mr Dermody which takes the case outside the typical effect for children, including young children, of deportation of their mother. This is so whether the consequence is (a) relocation of the family to the country to which the mother is to be deported or (b) the children remaining in the UK without their mother.

As to relocation, the judge failed to consider what the unduly harsh consequences would be for the family. She ignored the fact that the children at their age, now 6 and 3, would be able to adjust to life in India with the help of the Indian national parents so that there would be no or few issues with India's culture and language, nor had she considered that their father as a Tier 1 Migrant had transferable skills.

There were no findings on whether the extended family would be able to help with their transition. Pausing there, we note that it is not apparent that there

was any evidence of the existence or details of an extended family in India. Further or alternatively, it is submitted that there were inadequate reasons for the conclusion that relocation would be unduly harsh.

As to remaining in the UK without their mother, Mr Melvin submitted that the evidence about children missing their mother and asking when she would be returning home, including that evidence contained in Mr Dermody's, report were not untypical reactions in such cases. Furthermore, the responsibility for meeting the children's emotional and physical needs would be met by the respondent's husband, if necessary with further assistance from the children's school, Social Services or independent support. The judge did not find that this would not be the case, nor had she considered the availability of such additional support. The finding that the respondent's husband is a lone parent who has had to give up work to care for the children and is unable to afford a nanny was, again, not an unusual or uncommon occurrence.

The evidence of treatment and medication for the husband's stress-related problem took it no further. There was no suggestion that the children would not have all their essential needs met. All in all, in respect of neither (a) or (b) did the evidence meet the degree of harshness which the Supreme Court considered to be intended by the expression 'unduly harsh'. In oral argument Mr Melvin submitted that, in his words, the judge had paid "lip service" to the test of what is unduly harsh and had in effect treated it as being the same as the reasonableness test in Section 117B.

Conclusions

In our judgment, the decision of the First-tier Tribunal discloses no error of law nor perversity of conclusion on the unduly harsh issue, nor were the reasons inadequate. True it is that the judge and indeed the parties did not have the benefit of the further clarification of that test as provided by the Supreme Court in **KO**. However, it is apparent that the judge in fact assessed the evidence against the high threshold imported by the words unduly harsh. We do not accept the submission that she paid lip service to the test in Section 117C, nor that she treated it as being the same as the question of reasonableness under Section 117B. On the contrary, when turning to Section 117C in her judgment the judge stated at paragraph 37:

> "Given that this is a deportation case, I find that the reasonableness question may be somewhat overtaken by the provisions of Section 117C(5) which contain the exceptions to deportation in respect of children and a partner and imposes in my view a higher test than the reasonableness test set out in Section 117B(6)."

That she focused on the correct question, albeit without the benefit of the decision in **KO**, is further emphasised by the weight that she properly gave to the report of Mr Dermody, including its conclusion that the respondent's absence from their home had already induced an acute traumatic reaction in both children. That report records that at the time when the respondent went to prison she was still breastfeeding the younger daughter. This interrupted

the natural bonding and feeding process. Her husband immediately started to bottle-feed. She still awoke during the night, crying out for bottle-feeding every three hours, whereas typically a child of 2 would sleep through the night for a minimum of six hours between feeding episodes. The attention which was required by his younger daughter had reduced the previous parenting input to the elder daughter and had led to troubling rivalry for attention. The elder daughter's appetite had significantly reduced and she had lost 15 to 20% of her previous body weight. She awoke during the night, asking for her mother and was difficult to comfort and reassure. She had become socially withdrawn at school and with her friends. Her mood was sad most of the time. Mr Dermody expressed grave concerns about the further negative impact of the separation on the children's physical, psychological and broader physical and educational developmental wellbeing.

He expressed concern that the loss of appetite of the older daughter might well develop into full-blown childhood anorexia. The respondent's husband was struggling to fight off depression and burnout. If his wife were deported and permanently absent from the home he was very likely to experience a psychological breakdown and require psychiatric care for clinical depression. The potential effect on the children from that would of course be apparent.

As to relocation to India, the judge concluded that this would have a further traumatising impact upon them. The elder daughter had strong attachments both to her school and peers. She would experience the relocation as a very unwelcome event and even a punishment. The report of Mr Dermody recounts a visit by the respondent and her elder daughter to India in 2016 when the appellant's mother was ill and dying. The daughter found the separation from home too stressful and refused to eat. Mr Dermody again expressed the concerns about this impact on her future wellbeing including the prospect of full-blown childhood anorexia. With the elder daughter's established life and British identity, she would find it very difficult to adjust emotionally and psychologically to enforced relocation in India.

In our judgment, the appeal takes no adequate account of this independent expert report. The cited extracts in the notice of appeal and skeleton argument and the passages read today only touch the surface of its contents. In addition, the judge had the benefit and took into account the oral evidence of the respondent and her husband and an observation of the reaction of the children upon seeing their mother at the Magistrates' Court hearing. These were all relevant to her conclusions on the 'unduly harsh' test under both heads (a) and (b). The various criticisms, which we have identified, amount to little more than assertions and re-argument of the matters canvassed below and do not address the real gravamen of the case and the evidence in respect of the effect on the children.

In our judgment, each case depends on a multi-factorial assessment by the judge, taking account of the evidence in the particular case. Whilst the judge must keep the unduly harsh test firmly in mind when making the assessment, the appellate tribunal must accord a good deal of deference to the judgment which is made. We do not consider that the decision in this case wrongly

elevated typical effects of separation or relocation into the 'unduly harsh', nor otherwise went outside the exercise of a reasonable judgment on the evidence before the Tribunal. We therefore dismiss the challenge.

In these circumstances, it is unnecessary to consider the alternative decision in respect of "very compelling circumstances" or the balancing exercise which that entails. Accordingly, it is also unnecessary to consider the discrete ground of appeal concerning the public interest considerations identified in Section 117B and the significance of the Tribunal's finding that the appellant speaks English but is not financially independent, at least in prison: s.117B(2) and (3); also the decision of the Supreme Court in **Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58**.

Notice of Decision

The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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 Michael Soole Date 13 May 2019

Mr Justice Soole