IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12271/2019

THE IMMIGRATION ACTS

Heard via Video Link at Field House	**Decision & Reasons Promulgated**
On 13 May 2021	**On 11 June 2021**

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE KEBEDE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JMT
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr O Sobowale instructed by IQ Law Chambers

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal with permission against the decision of the First-tier Tribunal who allowed the appeal of the respondent JMT against the decision of the Secretary of State of 4 July 2019 refusing a human rights claim.

2. We shall hereafter to the Secretary of State as the respondent, as she was before the First-tier Judge, and to JMT as the appellant, as he was before the judge.

3. The appellant came to the United Kingdom, it seems, on 12 January 2011 with a Tier 2 visa and has remained subsequently, having been granted indefinite leave to remain on 18 November 2015.

4. On 28 February 2019 he was convicted at Cambridge Crown Court on two counts of sexual assault, intentionally touch female, no penetration and on 21 March 2019 he was sentenced at the Cambridge Crown Court to three months on the first count of sexual assault and twelve months on the second count for sexual assault, the first to run concurrently with the second. A restraining order was placed against him on 21 March 2019 valid for ten years and he was placed on the Sex Offenders Register for ten years. A deportation order was made on 2 July 2019.

5. The appellant's human rights claim focused on his private and family life with his wife and son. He gave evidence before the judge in which he accepted that the offence for which he was convicted was very serious and he expressed remorse and sought the forgiveness of his victims. He was of previous good character and at the time he was sentenced he was aged 54.

6. The appellant's wife gave evidence. She said that since the appellant had been away her younger son had been affected and was very distressed. Church members assisted in comforting him.

7. She also referred to the death some years earlier of her son's elder brother. They had been very close and were very good friends and after he died her son became a loner and said he did not have anyone and was on his own. With regard to the effect on her son if the appeal was unsuccessful, she said that her son would have no one: having lost his brother he would now lose his father as well.

8. In his evidence the appellant's son adopted his witness statement and referred to the schoolwork he had and how his programme for work and examinations went.

9. As the judge properly identified at paragraph 21 of his decision, the essential question in this case was whether the effect of the appellant's removal would be unduly harsh on his son. He found that the appellant's son had been in the United Kingdom for more than seven years. He observed that whether it would be unduly harsh for his son to remain in the United Kingdom if the appellant were removed involved looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent.

10. The judge considered whether it would be unduly harsh for the appellant's son to live in India and found that in reality there was no prospect of the son or the appellant's wife going to live in India with the appellant. The son was focusing on studying for his GCSEs which he was due to sit the following May (the appeal was heard on 29 October 2019). Plainly his mother would have to remain with him to enable him to sit those examinations given the overall circumstances.

11. The judge referred to the guidance in the authorities such as PG (Jamaica) [2019] EWCA Civ 1213 and KO (Nigeria) [2018] UKSC 53. It was clear that a certain level of family disruption was inevitable when a foreign criminal was deported, this having been decided by Parliament, and it was necessary for Tribunals to look for something beyond that. It was clear that in any case great distress might well be suffered as to the effect of deportation and the lives of those affected would be in a number of ways made more difficult.

12. The court considered in PG (Jamaica) whether there was anything which elevated a case above the norm. It was noted that many parents of teenage children were confronted with difficulties and upsetting events of one sort or another and had 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 was a foreign criminal would no longer be in a position to assist in such circumstances could not of itself mean that the effects of deportation were unduly harsh on his partner or children. Nor were the difficulties which would inevitably be faced increased as they were by the laudable ongoing efforts referred to in that case and the improvement of earning capacity elevate the case above the commonplace so far as the effects of deportation were concerned. Emotional and behavioural fallout reflected the commonplace nature found to exist in that case.

13. The judge found that the effect of deportation of the appellant on his son went beyond the commonplace. Some five years ago his elder brother died. His mother in evidence had described the effect on him given the closeness of their relationship and also the effect upon the relationship between the appellant and his son. The son faced the prospect of losing his father as well and plainly in the ordinary course of events the impact on the son would be harsh.

14. The judge found that in light of the tragedy which had befallen his elder brother and the consequences of that tragedy for him, the effect of the appellant's deportation upon his son would be unduly harsh. The loss of his elder brother in bringing him closer to his father would entail greater distress in separation than the level of distress which would arise following removal of his father had he not lost his elder brother. The level of distress would substantially exceed that which could be characterised as commonplace or that which would be anticipated as the ordinary consequence of removal in the context of family life. The judge noted the appellant's wife's evidence concerning her son's approach to his education

which was in effect as to whether it was worthwhile to be concerned with it. They had all been devastated when the elder son had died and the appellant's wife believed they had become overprotective of the remaining son. The appellant spent a lot of time with him and they were very close. The son had already lost his brother and now he felt that he had also lost his father. The son had described feeling demotivated since his father had been in prison and felt that going to school without having his father at home was pointless. He described his father as his best friend and confidante. He described being dependent on his father and needing him to support him. As a consequence the judge concluded that the requirements of the Immigration Rules had been met.

15. He went on to consider whether there would be a breach of Article 8 outside the Rules. He set out the Razgar [2004] INLR 349 criteria and the approach in Huang [2007] UKHL 11. As regards the issue of proportionality the judge recognised the importance of the maintenance of effective immigration control. The appellant could speak English and was capable of earning his living. He accepted the immigration history set out by the respondent in applying the concepts of precariousness and unlawfulness. He noted that the deportation of foreign criminals is in the public interest and that the more serious the offence committed by a foreign criminal the greater is the public interest in the deportation of the criminal. Exception 2 pursuant to section 117C of the 2002 Act applied where the appellant had a genuine and subsisting parental relationship with a qualifying child and the effect of the deportation on the child would be unduly harsh. He had found that the child was a qualifying child and that the effect would be unduly harsh.

16. In considering the public interest he recognised the need for deterrence and the need to express public revulsion. He noted the sentencing remarks of the judge and how the offending had been described by the respondent. He accepted the assessment of risk. He applied section 55 and found that it was unquestionably in the best interests of the son that he lived with both parents. The respondent had accepted in the refusal letter that it would be unduly harsh for the child to live in India at the current time. The judge found that the public interest was outweighed and the appeal fell to be allowed.

17. The Secretary of State sought and was granted permission to appeal on the basis that the judge had misdirected himself in law, failed to take into account material matters and failed to provide adequate reasons.

18. Mr Melvin developed these points, together with reliance on the written submissions that he had put in prior to the hearing. The judge's reasoning was challenged and also his findings in respect of proportionality which were based on the undue harshness findings almost entirely. He relied on what was said in HA (Iraq) [2020] EWCA Civ 1176. That decision did not lower the undue harshness threshold. Reliance was placed on the points summarised at paragraph 7 of the written submissions.

19. The judge had focused on the consequences of the death of the appellant's elder son in 2014/2015. He had accepted the oral evidence of the appellant that this created a special bond. There was however no medical evidence as to how the family were affected by this. It was accepted there was much difficulty and distress for the family but it was argued that that was not enough to reach the elevated threshold test set out at section 117C(5). Family life could be maintained if the appellant were removed to India by modern means of communication and visits.

20. The judge had also failed to consider that the appellant who had worked in India before had family support there. In the Home Office bundle there were letters of support from friends and the church. When the appellant was in prison the son had had behavioural problems and the judge had noted this and it had taken the child a little while to come back to normal. The family and the church provided support.

21. With regard to the effect on the child's education, there had been no GCSEs in 2020 as we now knew, but the Secretary of State accepted it was a crucial time in his education so it would be unduly harsh for the child to go to India. There was very little in the evidence other than non-attendance at school on a number of occasions and no evidence of extra support or any impact on his education of his father's impending removal. There was little evidence of impact on the child or the mother. Reliance was also placed on what had been said in PG (Jamaica) [2019] EWCA Civ 1213 and Imran [2020] UKUT 00083 (IAC).

22. In his submissions Mr Sobowale relied on and developed the points made in the written submissions that he had previously provided. With regard to the points made by Mr Melvin, in particular at paragraphs 7 and 8 of his written submissions, it had been clarified in HA that the threshold could be met more often than was the case as considered by Mr Melvin. At paragraph 56 in that case it was said that cases of undue harshness might occur quite commonly. Also with regard to paragraphs 51 to 53 in HA the need for a case sensitive assessment was set out, the need to take account of all material considerations such as the strength of the relationship between the child and the deportee and that could be enough without more. Factors to be considered were set out at paragraph 56 including the age of the child, whether they lived with the parent, the degree of emotional dependency on the parent and the relationship with the remaining parent. The judge had based his decision on at least six of the seven points set out at that paragraph in HA. He was aware of the son's age, the fact that he was living with both parents, the degree of his emotional dependency on the parents. The church had had to step in previously. The availability of emotional and financial support from the remaining parent was considered. The judge had explored the individual characteristics of the child and made a valid assessment based on the likely effect of separation.

23. It was argued that what was said at paragraph 9 of Mr Melvin's written submissions was misleading. The judge had not almost solely relied on the unfortunate death of the elder child some years previously. It could be seen from paragraphs 24 and 25 that the judge had also looked at the impact on the family and at the evidence of the appellant's son and the appellant's wife. It was not just speculation but an informed assessment of the likely impact on the son. He was entitled to take it into consideration. It was corroborated by the evidence from the church and from the appellant's wife also. He had not just experienced initial distress but it was more than that and it had carried on for a considerable period of time and frustration and depression in his behaviour had been observed. It could be different if it had not been for the two losses. The judge was right to take the impact of grief into consideration.

24. The Secretary of State could not dictate what evidence should be before the court. There was no requirement for medical evidence. The evidence was not really challenged by the Presenting Officer at the hearing. The judge had made an evaluative assessment on the basis of all the evidence. It could be that a different Tribunal could come to a different conclusion but there was a range of reasonable conclusions and the question here was whether or not the finding of undue harshness was within the range of reasonable conclusions the judge might reach. Reference was made to paragraph 38 in AA (Nigeria) and also paragraph 159 of HA. The individual circumstances had been considered together with the rest of the evidence. The grounds were a matter of disagreement only.

25. By way of reply Mr Melvin argued that the threshold needed to be met and the judge had not considered this factor of other emotional support, there was no evidence of therapy or help from friends or the church. These matters needed to be considered.

26. We reserved our decision.

27. The challenge in this case is essentially a reasons challenge to the judge's conclusion that it would be unduly harsh for the appellant's son to be separated from him were he to be removed to India. This is based as can be seen from what is set out above, from the fact that the son had already suffered the devastating loss of his older brother some years previously and was now faced with in effect the loss of his father also.

28. We are in agreement with the submissions of Mr Sobowale that there is no error of law in the judge's decision. The question of whether or not the impact of removal of the appellant in this case on his son is essentially fact-sensitive, and as has been pointed out, does not require medical evidence to be established. No doubt medical evidence of an adverse impact might well assist in such a case, but its absence cannot be said to be fatal to the possibility of such a finding being made. In this case the judge gave thorough and detailed consideration to the issues. He took full

account of the evidence of the appellant's son and also of the appellant's wife of the impact on the son first of all of the tragic death of his brother several years earlier and the fact that he was now to be faced with his father's departure from his life effectively. No doubt, as Mr Melvin has pointed out, communication could be maintained of a sort and visits could be made, but that is a very different matter from day-to-day life being lived in the company of a person with whom there is a very close relationship, as in this case. The summary of the guidance from HA set out at paragraph 7 of the respondent's written submissions was, as Mr Sobowale has argued, in effect very significantly complied with by the judge despite that decision coming out after his. He clearly identified the need for there to be a degree of harshness going beyond what would necessarily be involved with any child faced with the deportation of a parent and an informed, evaluated assessment was made of the impact on the child of his father's deportation. The judge was clearly aware of the difference between harshness and undue harshness.

29. It is, as Mr Sobowale accepted, a decision to which not every judge would have come. That is not the test however. Mere disagreement will not suffice. The undue harshness test was clearly understood by the judge in this case and properly applied by him. The fact that there was assistance in the past from the church and others to help the appellant's son after the loss of his brother and that that could be repeated was no doubt not without relevance, but the issue for the son in this case was the loss of his father as well as the loss of his brother, and that double loss was properly and carefully considered by the judge. He came to findings that were properly open to him and as a consequence we find no error of law in his decision. Accordingly the Secretary of State's appeal against the judge's decision allowing the appeal is dismissed, and hence that decision allowing the appeal on Article 8 grounds stands.

30. An anonymity direction is made.

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 their 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 Date 1st June 2021

Upper Tribunal Judge Allen