Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13275/2015

THE IMMIGRATION ACTS

Heard at Field House
On 10 May 2019

Decision & Reasons Promulgated
On 23 August 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

HENRY [G]
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Greg O' Ceallaigh of counsel
For the Respondent: Mr T Lindsay, a Home Office presenting officer

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of the First-tier Tribunal (FTT). On 28 December 2018 Judge of the First-tier Tribunal A K Hussain (the judge) decided to dismiss his appeal against the respondent's decision to refuse a human rights claim and make a deportation order against him.

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2. Upper Tribunal Judge Freeman gave the appellant permission to appeal that decision on ground 4 of the 7 grounds raised in the grounds of appeal on 2 April 2019. However, the appellant had earlier been given permission to appeal on grounds 3, 5 and 6 by Judge of the first-tier Tribunal Kelly on 21 January 2019. The net effect is that the appellant has permission to appeal on:

    1) Ground 3 – Judge Grimmett had made earlier findings (in 2016) which were subsequently the subject of a successful appeal but, it is argued, nevertheless formed part of the reasoning of the FTT.

    2) Ground 4 – that the judge had been wrong to reject the grounds of an independent social worker on the grounds that it was expressing an opinion on medical matters.

    3) Ground 5 – the judge had been wrong to consider the appellant's offending history when assessing his separation from his partner and children. That separation would be unduly harsh for the purposes of article 8 of the ECHR.

    4) Ground 6 – in considering the appellant's removal and whether it would be unduly harsh the FTT had failed to make any or any adequate findings on what would "actually happen to be appellant on return" medically or otherwise

3. The appellant was refused permission to appeal on Ground 7 – failing to take adequate account of the impact on the appellant's children of his separation for the purposes of article 8 of the ECHR. Nevertheless, the appellant attempted to ventilate that ground at the hearing.

Background

4. The appellant is a citizen of Jamaica, who was born of 23 November 1969. He has been in the UK since November 2002. He was granted six months leave to enter as a visitor. Unfortunately, on 30 July 2004 appellant pleaded guilty to an offence of conspiracy to supply class A drugs. This was on the basis he was involved on seventeen occasions with the supply of drugs at a house in Birmingham between February and March 2004. Sentencing him on 30 July 2004, at the Queen Elizabeth II Law Courts in Birmingham, Judge Allan Taylor described the offence as indicative of the appellant having "gone completely wrong by coming into this country and getting involved in the drug scene". If it were not for the appellant's ill-health the sentence of three years' imprisonment would have been longer than it was. As it was, that was the minimum tariff the Judge could impose. The Judge expressed the view that it "may well be that you will be returned to Jamaica before then".

5. On 2 August 2014 his representatives, Michael Green and Kay, solicitors, wrote stating that he had been diagnosed with leukaemia and therefore he wished to be deported to Jamaica in order to receive suitable bone marrow

treatment. However, this did not occur, but much has happened in his life since his release from prison.

The hearing

6. At the hearing Mr G O'Ceallaigh explained the background to the appeal was that the appellant had originally agreed to deportation, but he had not been deported. Unfortunately, his client had suffered from leukaemia but in 2010 it improved. He had begun a relationship with [MW], who had a son called [D] by an earlier relationship. In 2010 the appellant had a child with [MW] called [W], born on 21 July 2010. At the date of the hearing [W] would have been aged 9 but he would now be age 10. Together I will refer to [D] and [W] as "the children".

7. The respondent originally made a deportation order against the appellant on 12 August 2005, but it seems that the deportation order was subsequently revoked.

8. The present proceedings arise **out** of a decision by the respondent on 14 October 2015 to deport the appellant for reasons fully set out in the decision notice at that date.

9. In relation to the grounds Mr O' Ceallaigh submitted that:

   Ground 3

10. The FTT had been wrong to refer to the case of **Re - N** as **Paposhvili v Belgian [2017] Imm A R 867** represented the present state of the law in relation to medical treatment and its interrelationship with article 3 of the ECHR. The judge had been wrong not to consider the fact that some of the appellant's medication would not be available in Jamaica. It was the medical treatment practically available to him that was of importance, not what theoretically he would be able to obtain. The evidence was very stark – the appellant would be dead within two years, Mr O'Ceallaigh suggested. There was also a failure by the judge to consider article 8 in the context of the appellant's medical condition.

    Ground 4

11. There was a report from an independent social worker, but the judge had criticised the evidence as, he said, the social worker concerned had not been medically qualified. The judge had referred to the independent social worker (the ISW) who had expressed the opinion that "the children" were on an "emotional trajectory from which they may not recover" as a consequence of the appellant's threatened deportation and possible life-threatening ill-health.

12. It was submitted that the judge had been wrong to reject the evidence from two ISW's to the effect that [D] was suffering from anxiety and panic attacks whereas [W] was "having nightmares". This was part of a wider picture of tragedy at home – there had been a fire in the property and [MW]'s sister ([S]) had died in August 2018. The significance of that was that [MW] had been dependent on her sister. The judge ought to have asked whether it was unduly harsh to return the appellant to Jamaica having regard to the emotional impact on all, including the children.

Ground 5

13. Considering the issue of undue harshness, the FTT had erred in its assessment at paragraph 38 where it is suggested that the appellant's offending history was sufficiently serious to justify "a rupture of family relationships". I was referred to page 7 of the judge's decision where he refers to the appellant as a serious offender and the Home Office's own publication on criminality and article 8. Again, I was referred in this context to the ISW's comments. It was submitted that the judge had been wrong to attach no, or no sufficient, importance or weight to the IFW's evidence. I was referred to paragraph 35 of the decision and to paragraph 36, where the judge had cited the leading case of **KO Nigeria [2018] UKSC 53**. It was submitted that the appellant's offending behaviour was relevant to the public good, but this could not be at the expense of the unification or, where appropriate, keeping families together. If the FTT decided the case on the basis that the offending history was the paramount consideration, what happened to the appellant's children? It was submitted that the appellant's offending history is largely irrelevant, and the balancing exercise required by article 8 was clearly tipped in his favour. It was the effect on others that was crucial, not the effect on the appellant. The appellant's offending history was but one factor but the effect on the qualifying children was much more important.

Grounds 6 and 7

14. Mr O' Caellaigh dealt with these grounds together notwithstanding the appellant had been refused permission on ground 7. He said that the effect of the appellant's removal on "the children" would be particularly harsh because his client was "effectively being sentenced to death". The judge had failed to deal with this aspect, however. The FTT apparently thought it was not unduly harsh to return the appellant to Jamaica.

15. At the conclusion of the above submissions, I was invited to either remit the case to the FTT for a *de novo* hearing before a judge other than Judge Hussain or to re-make the decision having heard updated evidence of the family relationship, which would establish the damaging effect of the appellant's removal from the UK on family life.

16. In reply Mr Lindsay, on behalf of the respondent, submitted that the judge had referred both to the correct law and had made detailed findings to

support his decision. The respondent's view was that **Re - N** was an authority which bound the FTT but for the purposes of the hearing before me this matter was not taken any further. The judge had taken the view that some of what the ISW had found strayed into the territory of being a medical expert and the judge was entitled to take that view. The judge had been entitled to reach the view that medical issues were more appropriately dealt with by a medical expert rather than a social worker. I was then referred to paragraph 39, where the judge had made findings that the children would remain in a familiar environment produced by their mother in the UK and, in the case of [D], he also had a biological father to whom he was very close. Time would tend to heal, and they were outside agencies who could help in the event that the children were particularly upset by their step father/father's removal. The judge had full regard to the contents of **KO Nigeria**. The relationship between the appellant and [MW] had been formed at a time when the appellant had been in the UK precariously and therefore was a relationship to which less weight should attach. In the circumstances ground 4, which criticises the judge's treatment of the evidence from the ISW, had been the subject of the grant of permission by Upper Tribunal Judge Freeman, was not made out.

17. Mr Lindsay then turned to ground 5. He said the judge was plainly entitled have regard to the appellant's offending history in ultimate disposal of the appeal under section 117C of the Nationality, immigration and Asylum act 2002 (2002 Act). A foreign criminal such as the appellant can cause serious physical or psychological harm to victims or to the wider community and was in most cases within the public interest considerations of that part of the 2002 Act. Subsection (2) emphasised that the more serious the offence committed by the foreign criminal the greater the public interest in deportation. Key reasons were given for the judge's decision were at paragraph 38. It was submitted on the respondent's behalf that he had not set the bar too high. He correctly applied the law to the facts and reached a decision that was sustainable in all circumstances.

18. The judge had been selective in his reference to Judge Grimmett's decision and had correctly directed himself as the weight to be attached to the evidence before the judge on that occasion. In particular, I was referred to paragraph 38 of the judge's decision. The judge had full regard to the most recent case law, including **KO Nigeria**, and he was plainly in entitled to reach the decision he came to. The judge had effectively recited all the evidence in the case but all that was required for the purposes of this appeal was to consider whether the judge had proper regard to the evidence and applied the correct legal test. He had done so.

19. Ground 6 alleges that undue harshness would result to the children following the appellant's deportation. This was a ground on which permission was given by Judge Kelly. It was submitted that any difficulty the appellant may have had in reintegrating into Jamaican society had not been made out. Section 117C of the 2002 Act made as its starting point that the appellant should be deported. The appellant's offending was

serious, and the judge was entitled to regard it as the overriding factor. The public interest required confidence in the administration of justice including the enforcement of the Immigration Rules. The respondent could not be expected to weigh to a nicety the appellant's human rights faced with such serious offending.

20. In reply, Mr O'Caellaigh repeated the submission that the medication that his client took in the UK was not available in Jamaica and the substitute medication suggested was not effective. The emotional impact of his children was a wider issue which had to be considered. The social worker, who had produced the statement, was objective and the judge therefore ought to attach weight to that evidence. It was right for the judge to take account of the appellant's offending history but not without looking at the wider human rights implications. He said that the appellant's deportation was liable to result in a collapse in his state of health.

21. The respondent said there was not enough evidence to establish that it was unduly harsh to remove the appellant from the UK.

22. At the end of the hearing I reserved my decision as to whether there was an error of law and if so what steps should be taken to rectify that if so.

Discussion

23. It was essentially conceded that the appellant had formed a private and family life in the UK, having been in the UK for a long period of time (15 years at the time of the FTT hearing). The appellant had one natural child and one child with whom he had a close relationship in the UK. He also had a partner who was a British citizen and the FTT accepted he had a genuine and subsisting relationship with these family members.

24. However, the appellant's private and family life needed to be seen within the framework set by the 2002 Act and in particular section 117C – D of that Act. Paragraphs 399 and 399A of the Immigration Rules essentially echo these sections of the 2002 Act.

25. Section 117B, which applies to all cases, provides that the maintenance of effective immigration controls is in the public interest but goes on to provide that the public interest does not require the removal of the appellant in cases <u>other than deportation</u> if the appellant has a genuine and subsisting relationship with a qualifying child and it would not be reasonable to expect that child to leave the UK.

26. Section 117C set out additional considerations in cases involving foreign criminals and for these purposes a "foreign criminal" is any non-British citizen who has been convicted of an offence which attracted a sentence of at least twelve months imprisonment. This appellant is clearly within that definition. The public interest requires the appellant's deportation

unless exceptions 1 or 2 in subsections (4) or (5) apply. The first exception as “very significant obstacles” to his integration into the country to which he would be deported (Jamaica). The second exception was where he has established a genuine and subsisting relationship with a qualifying partner or genuine subsisting relationship with a qualifying child and the effect of his deportation would be “unduly harsh”. There was a debate as to the extent to which a tribunal could balance a decision to deport against the interests of a qualifying child but **KO** resolves that debate in favour of the child and says that the provision is, so to speak, child centric- it looks at the child’s position not the public interest. A child is not to be blamed (that is suffer the unduly harsh consequences) of his parent’s offending behaviour. As the judge indicated, by reference to **KO**, at paragraph 36, the undue harshness test is intended to be a more difficult one to surmount than unreasonableness.

27. The appellant’s integration in UK society needed to be looked at in the context of his commission of a serious criminal offence in 2004. The public interest required the appellant’s deportation unless there were “very compelling circumstances” why his deportation was not required. His offending was seen in the context of his other negative credibility factors set out in the FTT’s decision. These include the appellant’s use of a false identity in 2013. It was for the judge to decide what weight to attach to a particular piece of evidence or to prefer one evidence over another piece of evidence. This included looking at the qualifications and experience of any expert or quasi-expert.

Conclusions

28. The issues as I see them therefore are:

    1) What was the extent of the appellant’s private and family life in the UK?

    2) What would the effect of the appellant’s deportation be on the family?

    3) What was the effect of the appellant’s removal on his health?

    4) In the light of the above was the judge justified in his conclusions?

1) Extent or private and family life

29. The appellant has been in a relationship with [MW] since 2009 and they have one child together, [W], who was born in 2010. Also, the appellant has a relationship with [W]’s half-brother, [D]. However, the appellant’s relationship with [D], although genuine, did not displace [D]’s relationship with his natural father, [CJ]. [CJ] also provides financial support for his son.

30. [MW] is a British citizen who has not lived in Jamaica made it clear at the hearing in the FTT that she would not go to live in Jamaica. Her children have been born in the UK.

2) Effect of deportation on the family

31. Mr O'Ceallaigh submitted that the removal of the appellant from the family unit would be "devastating" particularly following the death of [S], [MW]'s sister. He said much support was derived from the appellant in difficult times, their house having burned down earlier in 2018. This submission derived support from the ISW report. The wider effects of deportation were therefore clearly before the judge. The effect on [MW] is said to be especially harsh, according to ground 7 of the grounds of appeal. The appellant was said to have an especially important role in the lives of the family members. All this was said to be supported by the ISW. It was said that the public interest in deporting the appellant did not trump the welfare needs of the family.

32. As Judge Freeman indicated, when granting permission on ground 4, the judge was entitled to reject ISW insofar as it fell out-with the competence of a social worker as opposed to a medical expert. The appellant's representatives have raised the spectre of an "emotional trajectory" on the part of [MW] or her children which borders on a psychiatric or psychological condition. In so far as the judge did seek to rule out evidence from the ISW on the basis that it was medical evidence, I am satisfied he was entitled to do so. I do not find the judge attached insufficient weight to the ISW report in the overall context of the case and his findings. In any event, the judge was entitled to decide how much weight to attach to this evidence.

33. Although the relationships between family members had been established, the judge had to apply the test in **KO Nigeria**. He also looked at the dictionary definition of "undue harshness" but concluded that in all probability the family continued to live in the UK in their present relatively settled environment and, given Miss Weight's opposition to living in Jamaica, the appellant would have to return there leaving the family in the UK. The judge made adequate findings that the removal of the appellant from the family unit would not constitute an unduly harsh result in all the circumstances.

3) Effect of deportation on the appellant's health

34. Mr O'Ceallaigh submitted more than once that the appellant, who suffers from Leukaemia, would be "dead within two years" of being deported to Jamaica. He said that the appellant would be forced to give up his present medication (Dasitinib) to take a less effective medication (Imatinib) instead. This constituted a potential breach of articles 3 and 8 of the ECHR. He submitted the judge had failed to consider article 8 and had applied too high a threshold to the former article.

35. As far as the test under article 3 is concerned, the facts of **Paposhvili** are said to be strikingly similar to those in this case. However, the judge dealt fully with that case and other cases under article 3 of the ECHR referring

to the other case of **A M Zimbabwe**. The appellant carefully considered the medical evidence here, including the availability of comparative treatment in Jamaica. At 20– 21 of his decision the judge carefully set out the comparative evidence and the different potential drug treatment available for the appellant. It is clear reading the whole decision that the judge did not accept the appellant would be effectively sentenced to death within two years of his departure from the UK. He fully dealt with this issue but concluded that the availability available medication was primarily a financial issue and not one that raised this case beyond the high threshold set for article 3 claims based on medical issues. In my view he fully dealt with this issue and reached a conclusion he was entitled to reach.

36. In fact, the judge also considered whether the appellant qualified under article 8 on medical grounds at para’s 23-25 but concluded that “the unavailability of the best treatment (in Jamaica)” was but one factor to consider when the overall assessment is made under article 8 of the ECHR.

4) Was the judge justified in his conclusions?

37. The judge had to apply a difficult balancing exercise to the appellant’s human rights and the wider public interest in enforcing the deportation requirements against a foreign criminal. He was entitled to conclude that the public interest outweighed all other factors. The qualifying children were in a separate category as far as the Immigration Rules and public interest requirements were concerned but the test of undue harshness had not been met, in the judge’s view. The judge was entitled to come to these conclusions on the evidence and there is therefore no material error of law.

Notice of Decision

The appeal against the decision of the FTT is dismissed. Accordingly, the decision to dismiss the appeal on asylum grounds/ humanitarian protection grounds / human rights grounds/ under the immigration rules stands.

No anonymity direction is made.

Signed Date 9 August 2019

Judge W.E. HANBURY

Judge of the First-tier Tribunal

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date 9 August 2019

Judge Hanbury

Judge of the First-tier Tribunal