Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20086/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th May 2019	**On 10th June 2019**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NIKOLIN [I]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Miss S Cunha, Home Office Presenting Officer
For the Respondent: Mr E Waheed, instructed by Ropemakers Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The Appellant's appeal against deportation was allowed on human rights grounds by First-tier Tribunal Judge Boyes on 7 February 2019.

2. The Secretary of State appealed on the grounds that the judge erred in finding that it would be unduly harsh for the Appellant's partner and children to live in the country to which he was to be deported and in finding that it would be unduly harsh for them to remain in the UK without the Appellant. In summary, the factors identified by the judge did not give

rise to unduly harsh consequences. The judge had erred in law in finding that the high threshold had been met.

3. Permission was granted by Designated First-tier Tribunal Judge McClure on 6 March 2019 on the following grounds:

> "It is arguable in the light of the guidance given in the case of KO (Nigeria) [2018] UKSC 53 that the judge has failed to give adequate reasons for finding that it would be unduly harsh for the Appellant's children and partner to remain in the United Kingdom whilst the Appellant was deported to Albania. The case law identifies that there have to be factors above and beyond the normal relationship between parent and child which render the deportation unduly harsh. It is arguable that the judge has failed to identify what those factors are [see paragraph 35]. In considering the issues paragraph 398 and 399 are applicable and it is arguable that the judge has failed to apply the provisions in accordance with the case law."

Submissions

4. Miss Cunha submitted that the Respondent challenged the judge's findings on whether there were unduly harsh consequences under paragraph 399, although the primary focus was on the judge's error of law in concluding that separation of the Appellant from his family would be unduly harsh. Miss Cunha relied on NA (Pakistan) [2016] EWCA Civ 662 and submitted that deportation ordinarily results in the separation of families. It was not enough to say that the separation would cause difficulties to family life continuing because that was the natural outcome and one required by the public interest. The Appellant had to show that such separation would be unduly harsh.

5. In this case the judge had taken into account matters which would cause discomfort or inconvenience. The factors relied on by the judge, namely the Appellant's close relationship with his children and their strong bond did not give rise to unduly harsh consequences. Further, the judge had failed to consider whether the Appellant's family could visit him if he was deported to Albania. In summary, the unduly harsh test was not properly considered and the judge had failed to take into all relevant matters. The failure to properly apply the test of whether it was unduly harsh was a material error of law.

6. Miss Cunha relied on paragraphs 20 to 23 of KO (Nigeria) and submitted the unduly harsh test was a higher threshold than reasonableness. The public interest required the Appellant's deportation because he had been sentenced to a term of imprisonment of over twelve months.

7. In considering the separation of the family it was not appropriate to consider whether it was unreasonable. Every separation would result in harsh consequences and the Appellant had to show consequences over and above the inconvenience of a child not being able to have family life

with his father in the UK. In this case the Appellant had supplied class A drugs. This was a serious offence and significant weight should be attached to the public interest. Although the judge acknowledged this at paragraph 29, when balancing it against the Appellant's relationship with his children he applied a test of reasonableness rather than unduly harsh.

8. The judge had failed to apply the high threshold test and the matters relied on at paragraph 35 of the decision were insufficient to reach that threshold. There was also a failure to consider alternative arguments and together this amounted to a material error of law in addition to the lack of reasons for the finding at paragraph 37.

9. Mr Waheed submitted that the grounds of appeal failed to appreciate the judge's more nuanced decision. The judge took into account the young age of the Appellant's children and their ability to adapt to a change in lifestyle. From paragraph 32 onwards the judge took into account the following factors:

   (i) The Appellant's partner and children could not speak Albanian.

   (ii) They had no concept of culture or society in Albania. This would be a significant disadvantage. Albania was a very poor country.

   (iii) The children had a loving relationship with their grandparents and it was in their best interests that this continued.

   (iv) It would be unduly harsh to expect the Appellant's partner to move to Albania because she was a British citizen and had lived in the UK all her life. She did not speak Albanian and knew very little of the culture and the likelihood of her being able to secure employment was slim.

10. The judge also had concerns over how a move to Albania would impinge and affect the Appellant's partner's mental health. He accepted that her mental health was stable at present but that there was a real and tangible risk that if either the Appellant was removed or she was compelled to join him in Albania this would result in a deterioration of her mental health.

11. Mr Waheed submitted that there was ample evidence at pages 95 to 99 of the Appellant's bundle which supported the judge's conclusion that the Appellant's deportation would result in a deterioration of his partner's mental health. At page 99 there was a report from Dr Helen Rogers which stated:

> "I wonder if you can review [RG]. She is struggling to cope with caring for her two children since her partner went to prison. Her mental health is suffering and from the consultation I could see the eldest child has faced some very challenging problems of behaviour."

12. The judge's conclusion that it would be unduly harsh for the Appellant's family to remain in the UK if he was deported to Albania was open to the judge on the evidence before him. The judge took into account all the

factors set out above in addition to the genuine and tangible bond between the Appellant and his children.

13. Mr Waheed referred to RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC) at paragraph 12 which refers to MK (Sierra Leone) v The Secretary of State for the Home Department [2015] UKUT 223 (IAC). He submitted that the conditions in the country to which the Appellant is to be deported is a relevant factor and the important role the Appellant played in the lives of his children was something the judge was entitled to take into account. In the case of MK, the severity of the impact of the Appellant's abrupt exit on the children's lives would be unduly harsh.

14. Mr Waheed submitted the matters relied on by the judge went beyond the mere separation of the family. The effect the Appellant's imprisonment had on his partner's mental health and the behaviour of his children was something that the judge took into account in assessing whether it was unduly harsh. The judge had not been speculative as suggested in the grounds. There was evidence before him that the Appellant's partner was struggling to cope with the children and the children were exhibiting difficult behaviour when the Appellant was imprisoned. Mr Waheed submitted that, given the undisputed findings of fact, the judge was entitled to come to the decision he did. He was not obliged to consider whether the Appellant's family could visit him in Albania since this was not relied on by the Respondent in the appeal. In this case there was something more than mere separation, there was the Appellant's partner's mental health.

15. The judge referred to thirteen factors which would make the Appellant's deportation unduly harsh and they were all relevant to that assessment, although Mr Waheed accepted that some elements would be given more weight than others. The absence of the Appellant's support in caring and bringing up his children and his partner's mental health justified the judge's finding that it would be unduly harsh for the Appellant's partner and children to remain in the UK if he was deported to Albania. Paragraph 34 was sufficient to support this finding and the judge had given a fully rounded decision and properly considered proportionality at paragraph 38.

16. Miss Cunha submitted that the Respondent considered the mental health of the Appellant's partner and having accepted that she may have some problems in caring for the children, the Respondent concluded that those problems would not result in unduly harsh consequences. The judge's finding at paragraph 34 did not fully explain why it would be unduly harsh for the children to be without their father. The judge failed to give reasons for how the Appellant's partner's mental health would render the separation of the family unduly harsh. The children's grandparents could assist the Appellant's partner and the judge failed to consider the family's ability to be together in the future.

Conclusions and reasons

17. I am satisfied, on reading the decision as a whole, that the judge was aware of the relevant legal provisions and of the test which he had to apply. The judge stated at paragraph 27:

> "The real and true issue for me to decide was whether it would be unduly harsh for the children to live in Albania and whether it would be unduly harsh for the children to remain in the UK without the person who is to be deported."

18. The judge acknowledged at paragraph 28 that the children were of a young age and would be able to adapt to certain aspects of life as they grew older. He also attached significant weight to the public interest given the seriousness and gravity of the offence.

19. The judge then considered the best interests of the children and his findings that it would be in the children's best interests to remain in the UK and continue their relationship with their grandparents was open to him on the evidence before him. There was no challenge to the judge's findings that it was not in the children's best interests to live in Albania or for them to remain in the UK whilst the Appellant was deported. The issue was whether the Appellant's deportation would be unduly harsh.

20. At paragraphs 32 to 35 the judge set out the factors which he had taken into account, namely the children do not speak Albanian, they have no concept or culture of society in Albania, and although they were of a young age they would be at a significant disadvantage having to adapt to life in a very poor country. The opportunities for advancement were less frequent than in the UK. The children had loving relationships with their grandparents and the judge had grave concerns for how the Appellant's deportation would affect the mental health of the Appellant's partner, the children's mother. His finding that there was a real and tangible risk that her mental health would deteriorate if the Appellant was deported was open to the judge given the evidence at page 99 of the Appellant's bundle.

21. I am persuaded by Mr Waheed's submission that the judge did not rely merely on the separation of the family but took into account the effect of the Appellant's deportation on the mental health of his partner and also the genuine and tangible bond between the Appellant and his children. The factors referred to at paragraphs 34 and 35 were sufficient to support the judge's finding that it would be unduly harsh for the Appellant's partner and children to remain in the UK without him.

22. The judge identified factors which are over and above separation of the family. Applying MK (Sierra Leone), the severity of the impact of the Appellant's deportation on the children's lives is a factor which the judge could take into account. Given the likely deterioration of his partner's mental health and the evidence that the eldest child displayed challenging forms of behaviour when separated from his father, that was sufficient to

support the judge's finding that there was something more than mere separation of the family.

23. The judge's findings at 30 to 34 also support the conclusion at paragraph 36 that it would be unduly harsh for the Appellant's family to live in Albania. This finding was open to the judge on the evidence before him and he gave adequate reasons for coming to that conclusion.

24. I find the judge's conclusion that the Appellant's deportation would have unduly harsh consequences for the Appellant and his family was a conclusion which was open to the judge on the evidence before him. He applied the correct threshold test and the factors referred to were capable of satisfying that test. Another judge may well have come to a different conclusion on that evidence, but that does not amount to an error of law.

25. I find there was no error of law in the judge's finding that the Appellant's deportation would be disproportionate. Accordingly, I dismiss the Respondent's appeal.

Notice of Decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed Date: 7 June 2019

Upper Tribunal Judge Frances