Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: HU/19841/2018 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC	**Decision & Reasons Promulgated**
On 25 November 2020	**On 2 December 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

PAUL [H]

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Mr M Moksud, instructed by Metro Law Solicitors

For the Respondent: Mr A McVeety, Senior Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a national of Jamaica with date of birth given as 3.2.79, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 10.3.20 (Judge Ali), dismissing on all grounds his appeal against the decision of the Secretary of State, 13.9.18, to refuse his human rights claim. This followed the decision of 13.7.18, served on 14.8.18, to deport him from the UK as a foreign criminal.

2. The appellant first came to the UK in 2002 with leave to remain as a student until 2004. He was granted Indefinite Leave to Remain in 2007. He has 5 British citizen children, four of whom arise from his relationship with his ex-wife, whom he divorced in 2016. The eldest of those children is now 16 years of age. He also has a son, born in 2017, with his current partner, also British citizens. He claimed a genuine and subsisting relationship with all of his children, although contact with the four eldest is limited.

3. The appellant's antecedent record details a total of 7 convictions for 9 criminal offences between 2005 and 2018. He was indicted on two drug-dealing offences, possession with intent to supply a Class B controlled drugs, namely 30g of cannabis, and possession with intent to supply a Class A controlled drug, namely 26.5g of cocaine with a purity of 91% and a street value of approximately £2,000. Having originally pleaded not guilty, on the day of trial on 5.6.18 he changed his pleas to guilty and was subsequently sentenced on 6.7.18 to a total sentence of immediate imprisonment of 27 months.

4. The First-tier Tribunal concluded that the appellant was not as engaged with his family members in the UK as claim and that he is not socially or culturally integrated in the UK, despite living here for some 19 years. The judge found that there would not be very significant obstacles to his integration in Jamaica. At [45] of the decision, the judge accepted that the appellant had a genuine and subsisting relationship with his current partner and his youngest child. However, whilst he had a genuine relationship with the four older children, he only had regular contact with the two oldest children and very infrequent contact with the other two.

5. At [46] of the decision it was accepted that it would be unduly harsh to expect either his current partner or any of the five children to leave the UK. However at [47] of the decision, the judge was not satisfied that the criteria in paragraphs 399(a)(i)(b) or 399(b)(iii) were met. It was accepted that "the appellant and all of the family would be devastated if he was deported," but the judge was not satisfied that "the adverse impact on them by his removal would be any greater than any other young people." The judge pointed out that he was absent from their lives for at least 12 months when a non-molestation order was in force, and for at least 12 months when he was in prison.

6. At [49] of the decision the judge concluded, "The rules contemplate family separation and hardship. I am not satisfied that any of the individual factors or the cumulative set of factors in this family are not contemplated within the rules, or amount to compelling (let alone very compelling) circumstances over and above the factors described in [399 and 399A] such as to mean that the public interest in deporting the appellant is outweighed by the reasons for him being able to stay."

7. The poorly-drafted grounds of application for permission to appeal to the Upper Tribunal argue that the First-tier Tribunal failed to provide sufficient explanation for dismissing the appeal and applied the wrong standard of proof. It is also submitted that having found a genuine and subsisting relationship with his British citizen partner and British citizen children and that it would be unduly harsh for them to leave the UK, the judge should have found it would be unduly harsh for them to remain in the UK without the appellant. It is argued that the conclusion to the contrary is "arbitrary". Finally, the grounds argue that the judge failed to apply article 8 ECHR and to consider the best interests of the children.

8. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 28.4.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Coker granted permission on 20.7.20, considering it arguable that "having made a finding that it would be devastating for the children and the appellant to be separated, the judge has not provided reasons why that would not amount to it being unduly harsh although it is not clear what evidence was before the judge to reach that finding in any event."

9. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.

10. The complaint that the decision is inadequately reasoned is well-founded. It is not clear on what basis the judge concluded that separation of the appellant from his current partner and his five children would be devastating. More significantly, apart from the bare finding that it would not be unduly harsh for them to remain in the UK without him, this part of the decision is almost devoid of any cogent reasoning. It is not clear what evidence was considered or relied on to justify the finding. I take on board the point made by Mr McVeety that there was virtually no evidence from or about the children's best interests, what their wishes were, or what the effect of the appellant's removal might be on them. However, I am not satisfied that the judge adequately engaged with the test of unduly harsh, making no reference to the case authorities and little reference to the facts, other than as contained in [47] of the decision. Neither is

it clear why the judge accepted that the effect of his removal would be "devastating" on them.

11. The issue as to what is unduly harsh has recently been reconsidered by the Court of Appeal in KB (Jamaica) [2020] EWCA Civ 1385, where the following is set out:

> *"15. The meaning of "unduly harsh" in the test provided for by s.117C(5) has been authoritatively established by two recent decisions: that of the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] 1 WLR 5273; and the decision of this court in HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 117. It is sufficient to note the following without the need to quote the relevant passages:*
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> > *(1) The unduly harsh test is to be determined without reference to the criminality of the parent or the severity of the relevant offences: KO (Nigeria) para 23, reversing in this respect the Court of Appeal's decision in that case, reported under the name MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 617, in which at paragraph 26 Laws LJ expressed this court's conclusion that the unduly harsh test required regard to be had to all the circumstances including the criminal's immigration and criminal history.*
> >
> > *(2) "Unduly" harsh requires a degree of harshness which goes beyond what would necessarily be involved for any child faced with deportation of a parent: KO (Nigeria) para 23.*
> >
> > *(3) That is an elevated test, which carries a much stronger emphasis that mere undesirability or what is merely uncomfortable, inconvenient, or difficult; but the threshold is not as high as the very compelling circumstances test in s. 117C(6): KO (Nigeria) para 27; HA (Iraq) paras 51-52.*
> >
> > *(4) The formulation in para 23 of KO (Nigeria) does not posit some objectively measurable standard of harshness which is acceptable, and it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances; it is not possible to identify a base level of "ordinariness": HA (Iraq) paras 44, 50-53, 56 and 157, AA (Nigeria) v Secretary of State for the Home Department [2020] EWCA Civ 1296 at para 12.*
> >
> > *(5) Beyond this guidance, further exposition of the phrase will rarely be helpful; and tribunals will not err in law if they carefully evaluate the effect of the parent's deportation on the particular child and then decide whether the effect is not merely harsh but unduly harsh applying the above guidance: HA (Iraq) at paras 53 and 57. There is no substitute for the statutory wording (ibid at para 157)."*

12. Whilst the judge referenced MM at [18] of the decision, it is not clear that the First-tier Tribunal made any assessment of 'unduly harsh' that is consistent with the case guidance then extant, including the more recent decisions of the Supreme Court in KO or the Court of Appeal in HA.

13. In the circumstances and for the reasons set out above, I find such material error of law in the decision of the First-tier Tribunal as to require it to be set aside.

14. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal vitiate all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

15. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Decision

The decision of the First-tier Tribunal is set aside for error of law.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal sitting at Bradford, to be remade afresh with no preserved findings.

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 25 November 2020