Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21713/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House, Video Hearing by Skype	**Decision & Reasons Promulgated**
On 9th October 2020	**On 2nd November 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR P N
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Ms D Daykin, Counsel instructed by Rashid & Rashid Solicitors (Merton High Street)

DECISION AND REASONS

The Secretary of State appealed against the First-tier Tribunal decision of Judge S L Farmer dated 5th December 2019 whereby she allowed this Albanian national's appeal against the Secretary of State's decision to refuse his human rights claim against deportation. Hereinafter I shall refer to the parties as they were described before the First-tier Tribunal. The appellant previously claimed to be a Kosovan national with a different date of birth and a different name. His date of birth was corrected from 19th February

1983 to 19th February 1980 at the commencement of the hearing before Judge Farmer.

The appellant illegally entered the United Kingdom on 18th January 2000 and his asylum claim was refused on 8th March 2000 as was his appeal against that refusal. He became appeal rights exhausted on 18th December 2001 and in June 2005 was removed to Albania but re-entered the UK clandestinely on 5th July 2005. In February 2009 he applied for leave to remain in line with that of his partner and child.

The appellant has a history of criminal offending and on 27th October 2011 was convicted of the use/possession of a false instrument (false passport) at Blackfriars Crown Court and sentenced to six months' imprisonment. On 6th February 2015 he was convicted at Southwark Crown Court of money laundering for which he pleaded guilty and was sentenced to eighteen months' imprisonment. At this point his appeal against the refusal of his human rights claim was refused on 6th October 2015 and his appeal dismissed on 31st March 2017.

On 12th October 2017 he was convicted of handling stolen property, driving otherwise than with a licence and driving whilst uninsured and was again sentenced to eighteen months' imprisonment suspended for eighteen months subject to a rehabilitation requirement.

On 19th May 2017 he submitted representations that he was not from Kosovo but an Albanian national and was notified on 19th February 2018 of a decision to deport him. His representations were refused on 30th May 2019, which the appellant appealed, and which challenge is the subject of the appeal before me.

The judge found that the appellant's partner, who was also Albanian and had been granted refugee status, and had lied at the hearing because she denied she had visited her mother when the appellant confirmed she had in fact visited her mother in October 2019 in Albania. Nonetheless the judge accepted the partner's evidence in relation to the family, particularly stating at paragraph 38:

> *"It is clear that the appellant is a loving and involved father who plays a significant caring role in the family dynamic. I accept her evidence about who (sic) the school reported noticeable changes in her daughter's behaviour. I also accept that as the appellant cannot work she has taken on the role of provider and he the caring role although no doubt should he be given permission to work, the emphasis might shift back."*

It was accepted by the Secretary of State that the appellant had a genuine relationship with both children and as the partner was stated to be a refugee it would be unduly harsh for her to live in Albania under paragraph 399(b) of the immigration rules.

The judge then turned to the question of whether it was unduly harsh for the children and his partner to remain in the UK without the appellant and

cited **RA (s117C "unduly harsh"; offence; seriousness) Iraq** [2019] UKUT 00123, which held that one was looking for a degree of harshness going beyond what would necessarily be involved with any child faced with the deportation of a parent, and **MK (Sierra Leone) [2015] UKUT 233**, which held unduly harsh did not equate with uncomfortable inconvenient or merely difficult. The judge noted the considerable public interest in deporting foreign criminals and then proceeded to state as follows:

> *"41. When considering whether the separation of the appellant and his family and in particular his children is unduly harsh I find as a fact that they would be able to visit him. I find this because it is accepted that the appellant's partner took the children in October 2019 for a few days to visit her mother. I accept that this was only for a few days and I also find that given her refugee status it is not realistic for her to be expected to spend prolonged periods of time there. The reality therefore is that the children would be brought up without their father.*
>
> *42. I find that this would have a very negative impact on the well being and best interests of AT (dob 30/11/2009). I find this because of the difficulties that she went through when she was separated from him aged 2 years and 5 years. I accept Ms Daykin's submission that the reality would be that although there could be some limited visits to him, the result of the deportation would be a severance of that relationship. I respect of the younger child, A (dob 27/11/2017), I find that she would not fully understand the separation. However although I do not doubt that she looks to the appellant for her daily are needs, these could be met by her mother. In her case however I find that the effect of the separation would be to severe the relationship completely as she could not be expected to participate in any meaningful way on telephone or video calls. For different reasons therefore I find that the effect of the appellant's deportation would be to sever the children's relationship with their father.*
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> *43. Based on these findings, I accept that under paragraph 399(a)(ii)(b) it would be unduly harsh for the children to remain in the UK without their father. Although the respondent relies on the fact that the family lived independently whilst the appellant was in prison, this ignores the impact that this had on the eldest child when this happened and I find that his absence would be unduly harsh, even when considering the high elevated test that I must apply."*

At the hearing before me Mr Jarvis specifically submitted that he did not rely on three out of the four written grounds of appeal made by the Secretary of State. He did not rely on ground 1 that the judge had not provided

adequate reasons on the appellant's separation from his children being unduly harsh upon them as per paragraph 399(a)(ii)(b) of the Immigration Rules.

Nor did Mr Jarvis rely on ground 2, a failure to resolve conflict or inadequate reasoning. It had been asserted in the grounds of challenge that the finding "the reality therefore is that the children will be brought up without their father" was wholly unjustified and that there was nothing in the behaviour or emotional welfare of the older child that was unusual given the circumstances of the appellant's imprisonment. Ground 2 elaborated that the judge did not afford the requisite anxious scrutiny to the partner's claims in the context of her poor credibility, and given the partner's deception, which the judge accepted, the judge failed to consider that the partner may have been exaggerating the effect on the children, in respect of the youngest child. Further, the judge, it was said, made the woefully inadequately reasoned finding that she would not fully understand the separation and despite the fact that her mother could meet her daily needs, the effect of the separation would be to sever the relationship with the father completely. That was entirely speculative.

Ground 4 maintained a misdirection in law in relation to the very compelling circumstances test.

These challenges to the decision were specifically abandoned by Mr Jarvis and he relied on ground 3 such that the judge had misdirected himself/herself in relation to **Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA**, where the Court of Appeal, at paragraph 39, found that consequences of deporting a foreign criminal were commonplace and said to be expected and certainly could not meet the unduly harsh threshold.

> *"39. Formulating the issue in that way, there is in my view only one answer to the question. I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or children in this country. I accept Mr Lewis's submission that if PG is deported, the effect on SAT and/or their three children will not go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported. That is so, notwithstanding that the passage of time has provided an opportunity for the family ties between PG, SAT and their three children to become stronger than they were at an earlier stage. Although no detail was provided to this court of the circumstances of what I have referred to as the knife incident, there seems no reason to doubt that it was both a comfort and an advantage for SAT and the children,*

> *in particular R, that PG was available to intervene when his son was a victim of crime. I agree, however, with Mr Lewis's submission that the knife incident, serious though it may have been, cannot of itself elevate this case above the norm. Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another, and have 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 is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children. Nor can the difficulties which SAT will inevitably face, increased as they are by her laudable ongoing efforts to further her education and so to improve her earning capacity, elevate the case above the commonplace so far as the effects of PG's deportation on her are concerned. In this regard, I think it significant that Judge Griffith at paragraph 67 of her judgment referred to the 'emotional and behavioural fallout' with which SAT would have to deal: a phrase which, to my mind, accurately summarises the effect on SAT of PG's deportation, <u>but at the same time reflects its commonplace nature</u>." [my underlining]*

Subsequent to the decision in **<u>PG</u> (Jamaica)** Underhill LJ, however, stated at paragraph 44 of **<u>HA (Iraq) & Ors v Secretary of State</u> [2020] EWCA Civ 1176** with reference to **<u>KO</u> (Nigeria):**

> *"It is true that he refers to a degree of harshness 'going beyond what would necessarily be involved for any child faced with the deportation of a parent', but that cannot be read entirely literally: it is hard to see how one would define the level of harshness that would 'necessarily' be suffered by 'any' child."*

Underhill LJ acknowledges that there is an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category but warned of the dangers of references to the word "ordinary" as being capable of being understood as meaning anything which is not exceptional, or in any event rare and particularly:

> "*There is no reason in principle why cases of 'undue' harshness may not occur quite commonly."*

It was not the correct approach to ask whether the level of harshness was out of the ordinary. Just because it fitted into the commonly encountered pattern did not mean to say that it was not unduly harsh. How a child would be affected by a parent's deportation would depend on an almost infinitely variable range of circumstances and it was "not possible to identify a baseline of 'ordinariness'."

There was an importance in maintaining the focus on the child. Factors such as the child's age, whether the child lives with the parent, the degree of the child's emotional dependence on the parent, the financial consequences of his deportation, the availability of emotional and financial support from a remaining parent and other family members, the practicability of maintaining a relationship with a deported parent and of course all the individual characteristics of the child were all relevant factors identified in the assessment pertaining to whether the separation would be 'unduly harsh'.

The observation that the authorities of **PG (Jamaica),** on which the Secretary of State relied in this challenge, and **HA (Iraq)** are inconsistent, was dismissed by Underhill LJ in **HA (Iraq)** at paragraph 61 on the following reasoning

> *"61. I should say, finally, that Mr Pilgerstorfer referred us to a number of decisions of this Court in which KO has been applied – Secretary of State for the Home Department v JG (Jamaica) [2019] EWCA Civ 982; Secretary of State for the Home Department v PF (Nigeria) [2019] EWCA Civ 1139; Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213; CI (Nigeria) Secretary of State for the Home Department [2019] EWCA Civ 2027; and Secretary of State for the Home Department v KF (Nigeria) [2019] EWCA Civ 2051. These have mostly turned on issues peculiar to the particular case and none has called for the kind of analysis required by the grounds of appeal argued before us. I have found nothing in any of them inconsistent with what I have said above".*

Both **PG (Jamaica)** and **HA (Iraq)** accept that the best interests of any child must be analysed. The relevant and various factors pertaining to harshness and particularly undue harshness should be factored into any assessment. In **AA (Nigeria)** [2020] EWCA Civ 1296**,** Popplewell LJ (who also was on the panel in **HA (Iraq)**) described the gamut of authorities relating to deportation as follows:

> "*It should usually be unnecessary to refer to anything outside the four authorities identified below, namely KO (Nigeria) v Secretary of State for the Home Department [2018] 1 WLR 5273; R (on the application of Byndloss) v Secretary of State for the Home Department [2017] 1 WLR 2380; NA (Pakistan) v Secretary of State for the Home Department [2017] 1WLR 207; HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 117. It will usually be unhelpful to refer first instance judges to other examples of their application to the particular facts of other cases and seek to draw factual comparisons by way of similarities or differences. Decisions in this area will involve an examination of the many circumstances making up private or family life, which are infinitely variable, and will require a close focus on the particular individual private and family lives in question, judged cumulatively on their own terms".*

The gamut did not include **PG (Jamaica).**

The Secretary of State, having abandoned three of the grounds of appeal, particularly that of the resolution of the effect as to the severing of the relationship with the parent and the lack of maintenance of the relationship with the deported parent, is left with the factual findings of the judge which must stand.

In this instance the judge accepted (despite the credibility concerns of the mother) that there was a close parental bond between the father and the children and that the father played a significant caring role in the family dynamic. The judge at [38] specifically accepted the mother's evidence in relation to the children such that the appellant was the one taking the older child to and from school. The mother's evidence was that the effect of the appellant's absence whilst in prison was that the older child was 'always on her own instead of with friends' and it 'impacted on the family as it was hard to manage continuing to work and the school drop offs' [20]. Additionally, the second child was closer to her father than her mother [20].

There was a sparsity by way of analysis of the individual characteristics of the children and in relation to the impact of the previous imprisonment of the father after the older child had been born but the reasoning was adequate. Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge, **Shizad (sufficiency of reasons: set aside)** [2013] UKUT 00085 (IAC).

The judge recorded the difficulties the older child had when she was separated from him aged 2 – 5 years and the judge did not 'doubt that the younger child looks to the appellant for her daily needs'. The father was found to play a significant caring role in the family dynamic and the school had reported noticeable changed in the elder daughter's behaviour when he was in prison. The judge accepted that 'as the appellant cannot work she [the wife] has taken on the role of provider and he [the appellant] the caring role'. The separation would have a 'very negative impact on the well-being and best interests of AT (the older daughter)". Overall the judge concluded that the effect would be to sever the relationship completely which would be unduly harsh on the children even with the 'elevated test' in mind [43].

The First-tier Tribunal decision was generous, but the Upper Tribunal should be cautious about setting aside decisions of the First-tier Tribunal and guard against remaking a decision merely because on those facts there might have been a different decision. I did not hear oral evidence from the various witnesses, nor did I assess their evidence live. **UT (Sri Lanka) [2019] EWCA Civ 1095**, at paragraph 26 cited **R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority [2013] UKSC 19** whereby Lord Hope stated:

> *"It is well-established, as an aspect of Tribunal law and practice, that judicial restraint should be exercised when the reasons that a Tribunal gives for its decision are being examined. The Appellate Court should not assume too readily that the Tribunal misdirected itself just because not every step in its reasoning is fully set out in it."*

The decision may have been generous and was bordering on meagre in reasoning but against the backdrop of the extant authorities in the Court of Appeal in relation to undue harshness it must stand.

Notice of Decision

For the above reasons I find no material error of law and the First-tier Tribunal decision will stand.

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 his 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. This is because minors are involved.

Signed Helen Rimington Date 26th October 2020

Upper Tribunal Judge Rimington