Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04039/2019

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 13 September 2019	**On 18 September 2019**

Before
UPPER TRIBUNAL JUDGE PLIMMER

Between
TD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Muman, Counsel
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant has appealed against a decision of First-tier Tribunal ('FtT') Judge N Lodge promulgated on 18 June 2019 dismissing his appeal on human rights grounds.

2. The appellant has a British citizen partner and three British citizen children born in 2008, 2009 and 2012 respectively. I have made an anonymity order because this decision refers to sensitive matters relevant to the appellant's children.

Background

3. The appellant is a citizen of Albania. He arrived in the United Kingdom ('UK') as a minor in 2002 and has remained here ever since.

4. He has a lengthy history of offending which has resulted in sentences of imprisonment, including *inter alia*: 23 weeks imprisonment for theft in 2012; eight months imprisonment for theft in 2013; ten months imprisonment for a fraud related offence in 2014; eight months imprisonment for dangerous driving and driving whilst disqualified on 23 July 2018.

5. On 31 July 2018 the appellant was served with a decision to deport letter. In a decision dated 19 February 2019 the respondent refused his human rights claim. The appellant's appeal to the FTT against this decision was unsuccessful and he now appeals with permission to the Upper Tribunal ('UT').

Legal framework

6. S. 117C of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') states as follows:

> "Article 8: additional considerations in cases involving foreign criminals
>
> (1) The deportation of foreign criminals is in the public interest.
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
> (4) Exception 1 applies where—
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
> (b) C is socially and culturally integrated in the United Kingdom, and
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

7. S. 117D(2) of the 2002 Act defines a foreign criminal as a person "*(a) who is not a British citizen, (b) who has been convicted in the United Kingdom of an offence, and (c) who… (iii) is a persistent offender.*"

8. The Immigration Rules, applicable to both courts and tribunals but also applicable to the Secretary of State, reflect the contents of the 2002 Act but in somewhat different form. However, the 2002 Act and the Rules are to be interpreted in a manner consistent with each other - see [17] of Chege ("is a persistent offender") [2016] UKUT 187 (IAC) (Andrews J and Southern UTJ). The Rules deal with "Deportation and Article 8" in the following manner:

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or…"

9. It is to be noted that the question whether "the effect" of C's deportation would be "unduly harsh" on a qualifying child (s. 117C(5)) is broken down into two parts in paragraph 399(ii). It is also noteworthy that the phrase "in the view of the Secretary of State" in paragraph 398(c) of the Rules is omitted from s. 117D(2)(c)(ii).

10. In KO (Nigeria) and others v the SSHD [2018] UKSC 53 (24 October 2018) the Supreme Court concluded that the statutory consideration "unduly harsh" in s. 117C was confined to focussing on the position of the child, which did not involve a wider consideration of the public interest in removing foreign offenders and others. In the only judgment Lord Carnwath said this regarding the test of "unduly harsh" at [23]:

> "One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to the length of sentence."

11. In SC (Zimbabwe) v the SSHD [2018] 1 WLR 4474; [2018] EWCA Civ 929, the Court of Appeal gave consideration to the nature of the discretion exercised by the Secretary of State. In doing so, it disagreed with its own decision in LT (Kosovo) and another v the SSHD [2016] EWCA Civ 1246 in which Laws LJ had suggested that the tribunal should afford significant weight to the Secretary of State's views and this remained unaffected by Part 5A of the 2002 Act. In SC (Zimbabwe) McCombe LJ (with whom Lindblom and Leggett LJJ agreed) said this at [19]:

> "The LT case was concerned solely with the application of 398(c) of the Rules. With respect to the short obiter dictum in the last sentence of the passage quoted, I do not agree. It seems to me to be quite clear that once the matter comes before a tribunal or a court, what has to be applied is section 117D(c) of the Act. The words of that provision are the words which Parliament has chosen to enact, without more. The three elements of that paragraph of the subsection are in clear terms and do not require any gloss to be put upon them by the reference to the Rules. The view of the Secretary of State or indeed of a judge in sentencing remarks may be of assistance to a tribunal or court in deciding whether an offence has caused serious harm or whether an offender is a persistent offender, but I do not see that the statutory words compel any particular weight to be given to the Secretary of State's view on either in the assessment."

Error of law discussion

12. Mr Muman relied upon the three written grounds of appeal. I address each ground in turn below.

Ground 1 – definition of persistent offender

13. Significantly, the FTT recorded at [24] that Mr Muman conceded that the appellant fell within the definition of a persistent offender. Given this it is unsurprising that the FTT did not explore the issue of whether the appellant met the definition of a persistent offender any further. Having conceded that the appellant is a persistent offender, he fell to be treated as a foreign criminal – see s. 117D(2) of the 2002 Act.

14. Mr Muman was unable to take me to anything to support his submission that it was necessary for the FTT to also be satisfied that the appellant showed a particular disregard for the law. Mr Muman did not rely upon or refer to any authority until I invited him to address me on Chege, which had been submitted by Mr Tan. As observed in SC (supra), it is the statutory wording that must apply. In any event in this case notwithstanding the FTT's observations that offending has been at the lower end of the scale and the appellant has been cooperating with his probation officer, he

is a persistent offender who shows a particular disregard for the law. It is noteworthy that his most recent offending in July 2018 was so serious that he was sentenced to imprisonment. In February 2018 he was convicted of driving under the influence of a controlled drug and received a 12 month disqualification. The appellant continued to drive in breach of this. When these matters were pointed out to Mr Muman he was unable to address them and moved on to his ground 2, to which I now turn.

Ground 2 -failure to address nature of offending

15. Having properly accepted the concession that the appellant is a persistent offender and therefore a foreign criminal, the FTT was obliged to address each of the self-contained provisions within s. 117C. The FTT completed this task fully albeit with admirable brevity. The FTT considered in turn all the possible categories the appellant could potentially meet, by reference to s. 117C. The FTT addressed Exception 2 vis a vis the impact upon the children before turning to the impact upon the partner (s. 117C(5)). The FTT then turned to Exception 1 regarding the appellant's private life (s. 117C(4) before finally addressing whether there were any very compelling circumstances for the purposes of s. 117C(6).

16. It matters not that the appellant's offending fell at the lower end of the scale for the purposes of Exceptions 1 and 2 – see KO (supra). As a foreign criminal he could only succeed if he met the self-contained tests set out within s.117C. Mr Muman was unable to explain why the nature of the appellant's offending was relevant to the assessment of the Exceptions in s. 117C of the 2002 Act. Mr Muman made no reference to s. 117C(6). Although the seriousness of offending would be a relevant consideration when undertaking this more wide-ranging assessment, this was not relied upon. The reason for this is likely to be the absence of any evidence of very compelling circumstances over and above the Exceptions. When the FTT addressed this at [44], there is no reason to consider that it would not have taken into account all the evidence including its own findings at [32].

Ground 3 – approach to the unduly harsh test

17. It is clear from reading the FTT's decision as a whole that the judge was fully aware of the evidence provided by the appellant and his partner. Their evidence is summarised in considerable detail at [6] to [20]. The FTT accepted that impact on the children would be "*significant*" and they would be "*very upset*", but was entitled to find that there was no reliable evidence that there will be a "*psychologically significant impact*" upon them. When the decision is read as a whole, the following is tolerably clear:

- Although the FTT accepted that there would be a significant impact on the children, this did not reach the threshold of unduly harsh.
- Whilst the children's mother described some of the difficulties she and the children faced when the appellant was imprisoned, this was insufficient to meet the unduly harsh test.

- The FTT was not requiring expert evidence for the threshold to be met but did not regard the mother's own assessment of likely psychological damage to be reliable.
- The FTT considered the evidence from the children's headteacher in the form of a letter dated 20 May 2019 in which there is a summary of reports and concerns regarding the children from various sources. The FTT was entitled to regard this letter as nebulous. Although this described various issues of concern regarding the children, it also highlighted positive matters. In addition, the headteacher did not attribute any of the issues of concern to the appellant having been 'away' (when he was imprisoned). Indeed the reference to the eldest child indicating a desire to kill herself seems to have been a remark made in the aftermath of feeling left out by the other girls in her class and was not directly related to the appellant. Rather, she described being upset that her father had not walked her to school but had stayed in bed and that she did not see him very often.

18. I do not accept that the FTT applied a test that was too high. The test is a demanding one. The parents provided evidence that the children would be very upset. However, most children would be very upset to lose their father to another country. As KO emphasises, one is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. Although the parents asserted that there may be significant psychological damage, the FTT was entitled to find that to be unreliable. The letter from the school outlined incidents and concerns but in no cogent manner linked these to the appellant's absence.

19. There is no reason to believe that the FTT was unaware of the guidance in KO even though it was not specifically referred to. The FTT was well aware that family life between the appellant and his children would terminate but was entitled to find that the effect upon the children would not reach the high threshold required by the unduly harsh test.

Conclusion

20. For those reasons the grounds of appeal are not made out.

Notice of decision

21. The FTT decision does not contain an error of law and I do not set it aside.

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.

Signed: *UTJ Plimmer* Date: 13 September 2019

Upper Tribunal Judge Plimmer