Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-000462
On appeal from HU/02587/2018

THE IMMIGRATION ACTS

Heard at Field House
On the 02nd August 2022

Decision & Reasons Promulgated
On the 25 October 2022

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

MR SANJEEV SHARMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Paramjorthy, Counsel, instructed on a direct access basis
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born on the 18 July 1980. On the 16 August 2021 his appeal against the refusal of his human rights claim was dismissed by the First Tier Tribunal (the 'FTT').

The appeal

2. The appellant was convicted on 19 November 2015 for conspiracy to steal and money laundering, and was sentenced to two years and four months imprisonment on 11 December 2015.

3. On 25 January 2017 the respondent made a decision refusing the appellant's human rights claim and decided to deport him to India. He appealed and his appeal was dismissed by the First Tier Tribunal, the appealed and the Upper Tribunal set the decision aside and remitted the matter to the FTT to be heard.

4. The appeal was heard on 16 August 2021 before First Tier Tribunal Judge Black and subsequently dismissed. The appellant appeals against her decision.

5. Judge Black's decision found as follows:

   (i) The appellant and his wife were both born and raised in India. They both have family living there who would be able to support them were they to return. The appellant has health problems due to his diabetes, which is poorly controlled, however it was not so serious as to be life threatening. Both his children are now attending school where their progression has been reasonably good.

   (ii) She accepted the opinions of two experts the best interest of the appellant's children lay in remaining in the UK. The children are settled in school and both parents are able to financially support and care for them. Both children have faced some disruption whilst the appellant was in prison, followed by the impact of the pandemic and this has led to some negative impact on their educational achievements. The separation of the children from their father will have a short term impact on their emotional and educational development, but the impact is not to any significant degree that would be irrevocable. The appellant cared for the children since his release since his wife is employed, whilst he was in prison however his wife had primary responsibility for them and she was the sole carer. There was no strong evidence of a special bond with the appellant above their mother.

   (iii) If the appellant were to be deported and separated from the children they will be able to continue to benefit from their British Citizenship. Their mother will remain with them in the UK and be able to work, should she be able to secure suitable child care. They could remain in contact with their father through social media and visits to India. Any separation would be harsh but not unduly harsh. The Judge found no factors that would render the impact on the appellant's children as unduly harsh were he to be deported. The children have experienced separation whilst he was in prison and whilst there was a negative impact, his son has regained his academic levels.

(iv) There would be no major detrimental impact on either child's emotional or educational circumstances having regard to their particular characteristics and needs. Whilst his daughter is experiencing some difficulties at the moment and would be likely to in the event of further change, the effects were said to be not unduly harsh.

(v) The appellant had not reoffended, however his offence was very serious involving substantial sums of money, and he was found to be at the heart of the operation. The appellant committed the crime at a time when he had ILR, which was a negative factor. It was accepted that there was a very low risk of reoffending, however he appears not to have shown full remorse for his actions. The sentencing remarks show that the appellant was at the heart of the laundering operation and that he had lied about it. The Judge accepted that he had endeavoured to take responsibility for his actions. The Judge also took into account that it had been 6 years since his offending.

(vi) For the above reasons it was found that he did not meet either Exceptions 1 or 2 of section 117C of the Nationality, Immigration and Asylum Act 2002.

(vii) Turning the matter outside of the Immigration Rules ('the Rules'), the Judge considered that there was nothing that amounted to very exceptional circumstances beyond those already identified and his deportation was proportionate.

6. For the above reasons the Judge dismissed the appeal.

The grounds of appeal

7. The appellant appealed against the FTT's decision. Initially permission was refused by the FTT, however following renewed grounds, permission was granted by Upper Tribunal Judge Stephen Smith.

8. The appellant's grounds of appeal are lengthy. Judge Smith in granting permission summarised the key points as:

(i) The Judge had extensive evidence concerning the breadth and depth of the relationship enjoyed by the appellant with his primary school aged children, and their overall family life, including with his wife. Arguably the best interests assessment in the event of a 'stay without' scenario was glib and insufficiently reasoned.

(ii) Arguably when addressing the prospective long term separation between a father and his children, further reasoning by reference to the required careful consideration of all the circumstances was necessary. It was arguable there was no evidence before the Judge to support such an arguably unreasoned assertion.

(iii) It was also arguable that the analysis of the 'go with' scenario was also flawed for the reasons identified in the grounds of appeal.

(iv) Arguably the proportionality assessment factored in his settled status as a negative assessment rather than a positive one.

Discussion

9. We have no hesitation in finding that Judge Black materially erred in law. We fully endorse brevity over unnecessary and lengthy decisions. However, the brief reasoning exhibits a failure to undertake adequate and lawful analysis as to whether the evidence relied upon by the appellant establishes unduly harsh circumstances

10. As the grant of permission identifies, the conclusions reached on the questions of ‘stay without’ and ‘go with’ fail to explain why the evidence does not meet those tests. In particular we note that the evidence of the independent social worker, across 3 reports spanning almost 3 years of assessment, assesses in some detail the impact of the appellant’s deportation on the two children. The Judge fails to engage with this evidence at all, and as Judge Smith described, appears to glibly find that separation “their emotional and educational development may suffer in the short term but that is not to any significant degree that would be irrecoverable”.

11. We observe that though she accepted the conclusions of the independent social worker, we find that the Judge failed to adequately analysis it in respect of the children's personal circumstances'

12. The Judge was required to consider the evidence of the impact upon the children and give a reasoned analysis as to why the impact would, or would not, lead to unduly harsh circumstances were they to be separated from their father. The Judge simply did not undertake the required analysis. We consider such failure to be material in circumstances where experts opined that the children would be adversely impacted by separation.

13. The reports identify issues the children have struggled with whilst the appellant has been in prison, noting the older child found it difficult moving home in the UK, the impact of separation would lead to a significant risk of regression and that change would be detrimental to both children. The reports identify the considerable impact of separation on them, and that it would stymie their progress. It is unclear from this assessment how the Judge concluded that the effect would be “short term”.

14. There is limited, if any, analysis in the assessment of the children going to India with their father. The expert evidence was clear in identifying the adverse impact on the children of uprooting their lives and moving to India, The Judge did not have to accept that assessment, but given that she accepted the overall conclusions of the expert, she was required to

give clear reasons why in the face of that evidence it did not amount to unduly harsh circumstances. In our judgment she simply did not undertake this exercise and as a result her decision fell into error.

15. Secondly, within the assessment, limited as it is, of the Exceptions 1 and 2 criteria, is an entire paragraph dedicated to the public interest, the seriousness of his crime and the appellant's risk of reoffending. This is plainly an error of law. Following KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53 it is now well established that the assessment of unduly harsh under Exception 2 found in section 117C does not represent a balancing exercise of any kind. What is required is an analysis of the impact of deportation on family members. That assessment is detached from the seriousness of the crime and the public interest, and is entirely focussed on the impact on those family members. By incorporating such an assessment into her Exception 1 and 2 analysis Judge Black materially erred.

16. For the above reasons we conclude that the Judge's assessment that Exception 2 could not be met has fallen into error and has to be set aside. Nothing in the assessment outside of the Rules can save the findings previously made, the consideration outside the Rules advances on the basis of the previous findings and it is clear that that assessment has been infected by the errors identified above.

17. We have considered the appropriate forum for the remaking of the decision. We consider that as there are no preserved findings, the appeal is in effect a *de novo* hearing. The fact finding is likely to be significant, in particular, as to the impact the appellant's deportation will have on his children. In those circumstances it is appropriate to remit the appeal to the FTT.

Notice of Decision

The decision of the First Tier Tribunal of 16 August 2021 fell into legal error and is set aside in its entirety.

The appeal is remitted to the First Tier Tribunal to be heard afresh.

No anonymity direction is made.

T.S. Wilding

Date 22nd September 2022

Deputy Upper Tribunal Judge Wilding