Upper Tribunal
(Immigration and Asylum Chamber)

Imran (Section 117C(5); children, unduly harsh) [2020] UKUT 00083 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 February 2020	.....

Before

THE HON. MR JUSTICE CHAMBERLAIN

(sitting as a Judge of the Upper Tribunal)

and

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

MUHAMMAD IMRAN

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr Z. Raza, counsel, instructed by Marks & Marks Solicitors.

1. To bring a case within Exception 2 in s.117C(5) of the Nationality, Immigration and Asylum Act 2002, the 'unduly harsh' test will not be satisfied, in a case where a child has two parents, by either or both of the following, without more: (i) evidence of the particular importance of one parent in the lives of the children; and (ii) evidence of the emotional dependence of the children on that parent and of the emotional harm that would be likely to flow from separation.

2. Consideration as to what constitutes 'without more' is a fact sensitive assessment.

DECISION AND REASONS

1

This is the Secretary of State's appeal against a decision of F- t T Judge Talbot ('the judge') , promulgated on 21 October 2019, in which he allowed Mr Mohammed Imran's human rights appeal against a decision of the Secretary of State on 28 March 2019 to refuse his human rights claim following the making of a deportation order on 14 January 2019.

2
The appeal proceeds pursuant to the permission of F- tT Judge Osborne, given on 17 November 2019. He said this:

'In an otherwise careful decision it is nonetheless arguable that the judge made an inconsistent and ultimately arguably wrong finding in relation to whether the appellant represents a low or medium risk of reoffending (see paragraphs 21 and 33). The judge recognised that the appellant represents a medium risk of reoffending at [21] but arguably is then materially too generous to the appellant at [33].

This arguable error of law having been identified, all the grounds are arguable.'

Background

3
Mr Imran is a national of Pakistan. He was born on 16 April 1983. He entered the UK on 5 September 2010, with leave to enter valid to 10 November 2012. On 12 October 2012, he applied for indefinite leave to remain ('ILR'), which was granted on 14 February 2013.

4
On 12 September 2018, Mr Imran was convicted of assault occasioning actual bodily harm ('ABH'), for which he was sentenced to 18 months' imprisonment and made the subject of a restraining order.

5
Because he had been sentenced to a period of imprisonment of at least 12 months, the Secretary of S tate was obliged by s. 32(5) of the UK Borders Act 2007, subject to the exceptions specified in s. 33, to make a deportation order in respect of Mr Imran. The Secretary of State made such an order on 14 January 2019. In response, Mr Imran made a human rights claim, which the Secretary of State determined against him on 28 March 2019.

6
The Secretary of State accepted that Mr Imran had three children under the age of 18 from his relationship with NI . They were aged 8, 6 and 4 at the date of the judge's decision . NI and the children are all British citizens. Whilst the Secretary of State accepted that Mr Imran had previously had a genuine and subsisting relationship with the children, it was said that his offences and imprisonment had prevented him from maintaining direct and every day contact with them in a stable family unit. There was no evidence that NI had been unable to care for their day-to-day health and welfare needs in his absence. He had not submitted evidence to indicate that it would be unduly harsh for his children to accompany him to Pakistan. It was not accepted that it would be unduly harsh for them to remain in the UK in the care of their mother, who has a family network able to support her. As to s. 55 of the Borders, Citizenship and Immigration Act 2009, it was considered that, in the light of Mr Imran's conviction for ABH, his presence was actively detrimental to the children and his presence in the family home did not serve their best interests. As to his relationship with his British partner, it was not accepted that it would be unduly harsh for her to remain in the UK without him. As to his private life, it was not accepted that he had been lawfully resident in the UK for most of his life or that

he would be unable to return to Pakistan and re-integrate there. It was not accepted that they were ‘very c ompelling circumstances outweighing the public interest in his deportation ’ .

The decision of the First-tier Tribunal

7
The judge heard oral evidence from Mr Imran, NI and her sister TI . So far as concerns Mr Imran’s offending, he considered the PNC, the indictment, the Recorder’s sentencing remarks dated 16 October 2018, the restraining order of the same date, a pre-sentence report dated 19 September 2018, and OASys report dated 28 June 2019 and a letter from HM Prison Maidstone’s Kitchen Department, dated 21 June 2019.

8
At [24], the judge referred to the decision of the Supreme Court in R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11, [2017] 1 WLR 823, in which Lord Reed noted at [47] that the Immigration Rules reflected the responsible Minister’s assessment at a general level of the relevant weight of the competing factors when striking a fair balance under Article 8. The judge then set out or accurately paraphrased the relevant provisions of paragraphs A398-399 of the Immigration Rules.

9
At [27], the judge noted that Mr Eaton, counsel who appeared for the Secretary of State, had not challenged the credibility of Mr Imran’s evidence or that of his family members. This, the judge said, reflected his own assessment of the evidence. He found Mr Imran and his family members to be ‘honest and straightforward witnesses’, whose credibility he had no reason to doubt.

10
At [28], the judge paid particular regard to the contents of the report from Hampshire Children’s Services, which had been commissioned by the Secretary of State to assess the quality of Mr Imran’s family life and the impact of separation from their father on his children. This report had been completed after a visit by the assessors to the family home on 12 March 2019. It included the following:

‘Both mother and the school are clear that father played the main parental role to the children before he went to prison, he spent more time with the children when mother was working. Mother says that the children are closer to their father than to her and they miss him very much…

The children are emotionally affected by their father’s absence from the family home. [One of the children] asked Father Christmas to get her dad back home. The children are now receiving support for their emotional well-being at school since father went to prison.’

The judge said:

‘Taking all the evidence into account, there can be no doubt that the appellant has a genuine and subsisting parental relationship with his three British children.’

11
At [29], the judge referred to the Supreme Court’s decision in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, [2018] 1 WLR 5273. He noted that the Supreme Court had referred with approval to the following dictum of the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223:

‘”unduly harsh” does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather it poses a considerably more elevated threshold. “Harsh” in this context, denotes something severe or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb “unduly” raises an already elevated standard still higher.’

The judge noted that it was necessary to look for ‘a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent’.

12
At [30], the judge noted that there was evidence that Mr Imran had a ‘particularly close relationship with his three young children’ and that ‘prior to his imprisonment he may have actually had more contact with them and the children’s mother’. There was, he said, ‘clear evidence that there are strong and reciprocal emotional ties between him and the children, perhaps stronger than in many families where the father traditionally has less contact than the children’s mother’. There was also ‘clear evidence that the children suffered emotionally from their father’s absence when he was in prison as well as suffering indirectly from the increased stress (financial and emotional) put on their mother and the enforced move to a new and smaller accommodation’. He accepted the evidence of the family that the children had been noticeably happier and more emotionally stable since he had left prison and returned to the family home. The judge was satisfied on the basis of the evidence before him that if Mr Imran were deported to Pakistan and the children and their mother remained in the UK, the consequences for them would meet the high threshold of being ‘unduly harsh’.

13
At [31], the judge considered the likely consequences if the whole family were to relocate with Mr Imran to Pakistan. He pointed out that all three children had been born in the UK and, although young, had ‘a very established life in the UK, involving not only their school/nursery and their friendships but also their close relationship with a large extended family on their mother’s side who live nearby and form an important part of their lives’. An enforced move to Pakistan would, the judge found, be deleterious for them on a number of levels. There would be disruption to their education, given their lack of fluency in Urdu or other local languages. They would suffer financial difficulties. The political and security situation prevailing in Mr Imran’s home area of Azad Kashmir was also insecure. Whilst the risks of serious harm did not reach the A rticle 3 threshold, the general insecurity would undoubtedly have ‘some adverse impact on the stability of life for the children’. Although the family could choose to live in another less insecure part of Pakistan the local connections of both parents were with Kashmir and the practical and economic difficulties of establishing a life in another part of the country without such connections would be considerable.

14
At [32], the judge recorded his conclusion that it would be ‘unduly harsh’ for Mr Imran’s children either to remain in the UK without their father or to relocate with their parents to Pakistan. The criteria in paragraph 399(a) of the Immigration Rules were therefore met. So far as paragraph 399(b) was concerned, the judge was satisfied that Mr Imran’s relationship with his wife was ‘genuine and subsisting’ and that it began at a time when he was in the UK lawfully. It was less clear to him, however, whether the ‘unduly harsh’ test could be met with respect to that relationship, given the need for ‘compelling circumstances over and above those described in paragraph EX.2 of Appendix FM’.

15

At [33], after reciting a number of decisions of the European Court of Human Rights and of domestic courts, the judge said this:

‘Although I accept that the appellant has learned from his experiences and the risk of reoffending are relatively low (has confirmed in the OASys report), his offence was a serious one, as i s made very clear in the judge ’ s sentencing remarks , and it was an offence involving violence. However, despite the seriousness of his offence, I am satisfied that, as the consequences of the Respondent’s decision would be unduly harsh on his three children, the public interest in his deportation is outweighed by the effect on his family life rights and the associated rights of his children. I therefore conclude that the Respondent’s decision violates his Convention rights.’

The Secretary of State’s grounds of appeal and submissions

16
The Secretary of State advances four grounds of appeal. First , she contends that the judge has failed to identify how this case meets the ‘unduly harsh’ threshold. She submits that the matters set out by the judge at [30] do not go beyond the ‘inevitable effects’ of deportation and so do not provide a proper evidential basis for concluding that the test is met. Reliance was placed on the decision of the Court of Appeal in Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213.

17
Second, it is submitted that, in the light of the approach adopted by the Court of Appeal in PG, the judge failed to provide adequate reasons for concluding that the ‘unduly harsh’ test was met. In particular, it is said that there was no evidence to suggest any involvement from social services other than for the purposes of the enquiries made by the Secretary of State. That being so, it is said that the findings failed adequately to explain why Mr Imran’s wife would not be in a position to cope in his absence, given that she has the benefit of an extensive family network.

18
Third, it is submitted that the judge also failed to provide sufficient reasons when concluding that it would be unduly harsh for Mr Imran’s children to live in Pakistan. In particular, it is said that there was no evidence to suggest that employment would not be available to Mr Imran and his wife and that no adequate reasons were given for the conclusion that there would be practical and economic difficulties in relocating to a different area of Kashmir.

19
Fourth, the Secretary of State alleges that the judge’s findings at [33], and therefore the determination as a whole, were vitiated by an error of fact in relation to the assessment of risk contained in the OASys report. At [33], the judge described the risks of reoffending as ‘relatively low’, whereas in fact the OASys report indicated that, although Mr Imran’s risk of general reoffending was low, ‘whilst there remains an ongoing dispute and hostilities with the current victim… the potential for future conflict is likely and therefore the risk of offending is in fact medium’.

Discussion

20
In PG (Jamaica) , the Court of Appeal set aside a decision of the First-tier Tribunal that deportation would be ‘unduly harsh’. The deportee in that case based his case mainly on the effect of deportation on his three sons with his partner SAT. By the time of the hearing before the Court of Appeal, the sons

were aged 15, 10 and 3: see at [5]. The First-tier Tribunal Judge found that PG was very involved in the day-to-day lives of SAT and the children and played an important part in their lives; that the eldest son, R, was going through a difficult time and the relationship between father and son had strengthened recently; that PG had expressed a wish to be a father figure who would prevent his sons from falling into a life of crime; and that SAT would be unable to cope without him, being dependent upon him for emotional and practical day to day support with the children and the running of the household' : see at [15]. The core reasoning of the First-tier Tribunal judge was set out by Holroyde LJ (with whom Hickinbottom and Floyd LJJ agreed) at [16]:

'66. I am satisfied that it is in the best interest of the children (and I include in this assessment [PG's] other children in the UK) for [PG] to remain in the UK to continue in his role as a father to them and to support his partner. [PG's] deportation would cause very serious disruption to and interference with family life with particular reference to [R], given his age and present difficulties. I find the consequences of [PG's] removal for his children would be unduly harsh.

67. If removed [SAT] would be left alone with three boys to look after and taking into account the present difficulties that [R] is facing, I find the consequence of [PG's] removal would be unduly harsh for her. I accept that she might be able to obtain practical help either through social services or by paying privately, but I am more concerned about the emotional and behavioural "fallout" that she would have to deal with arising from the impact of separation on [R], leaving aside the disruption it would have to her own education and employment prospects. She has no family in Jamaica and has not been there since 2002. I find it would be unduly harsh to expect her to relocate there.'

21
Holroyde LJ held at [43] that this was insufficient to enable the judge properly to conclude that the 'unduly harsh' test was met. This was because:

'The evidence certainly showed that what might be regarded as the necessary and expected consequences of deportation would be suffered by PG's family, but it cannot be said to have revealed harshness going beyond that level.'

22
Hickinbottom LJ agreed with Holroyde LJ's reasons and added this at [45]:

'When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with their other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are "unduly harsh" will deportation be constrained. That is entirely consistent with article 8 of the ECHR . It is important that decision-makers and, when their decisions are challenged, tribunals and courts honour that expression of Parliamentary will. In this case, in agreement with Holroyde LJ, I consider the evidence only admitted one conclusion: that, unfortunate as PG's deportation will be for his children, for none of them will it result in undue harshness.'

23
Even more recently, in Secretary of State for the Home Department v KF (Nigeria) [2019] EWCA Civ 2051, Baker LJ (with whom the Senior President of Tribunals agreed) allowed an appeal by the Secretary of State, again setting aside a decision of the First-tier Tribunal that deportation would be 'unduly harsh'. Baker LJ set out at [18] the relevant part of the judge's decision dealing with the effect of deportation on the child:

‘For [their son], the adverse consequences remaining in the UK are likely to be that he would be deprived of a proper relationship with his father. I do not accept that maintaining a relationship, while living on different continents, via modern means of communication is in any way a substitute for growing up with a parent. The [respondent’ s] son is very young. This is the time when he would normally be bonding with his father. I think I am entitled to take judicial notice of the fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child. I take into account that in this case the [respondent's] son has limited knowledge of his father and has the benefit of a supportive extended family. However in my view that is no substitute for the emotional and developmental benefits for a 3 year old child that are associated with being brought up by both parents during its formative years. These benefits have been recognised by the courts on numerous occasions and the consequences of losing them should not be minimised.’

24
This, Baker LJ said at [30], was not enough:

‘Looking at the facts as found by the First-tier Tribunal that led to the conclusion that family would suffer adverse consequences as a result of the deportation, and in particular the consequences for the respondent's son separated from his father, it is difficult to identify anything which distinguishes this case from other cases where a family is separated. The First-tier Tribunal judge found that the respondent's son would be deprived of his father at a crucial time in his life. His view that “there is no substitute for the emotional and developmental benefits for a three-year-old child that are associated with being brought up by both parents during its formative years” is indisputable. But those benefits are enjoyed by all three-year-old children in the care of both parents. The judge observed that it was a “fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child” and that he was entitled to take judicial notice of that fact. But the “fact” of which he was taking “judicial notice” is likely to arise in every case where a child is deprived of a parent. All children should, where possible, be brought up with a close relationship with both parents. Al l children deprived of a parent’ s company during their formative years will be at risk of suffering harm. Given the changes to the law introduced by the amendments to 2002 Act, as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances.’

Baker LJ noted at [31] that, as a judge with experience of sitting in the family jurisdiction, the result was ‘uncomfortable’, but it flowed from what Parliament had decided, citing Hickinbottom LJ’s remarks at [45] of PG .

25
Like F- tT Judge Osborn, we pay tribute to the care taken by the judge in this decision. The reasons he gave indicate an impressively meticulous approach to the assessment of the documentary materials and the oral evidence before him. The discussion at [29] mak e clear that he correctly directed himself that the test to be applied was an exacting one. The reasons at [30] explain why he reached the conclusion that the test was satisfied.

26
It will be a rare case in which it will be appropriate to interfere with a decision of the First-tier Tribunal in which (i) it is clear that the correct test has been applied and (ii) the reasons properly explain the factors which led the tribunal to conclude that it was satisfied. But, rare though they may

be, there are cases in which a court or tribunal hearing an appeal on the ground of error of law can properly conclude that, on the facts found by the first-instance decision-maker, it was not open to him or her to conclude that the relevant test was satisfied. PG was such a case.

27
The judge did not refer to PG . That itself may not be surprising, as the judgment in PG was handed down on 11 July 2019 and the decision under challenge here was dated 21 October 2019. There is no indication that PG was cited to the judge by either side. We, however, must apply the ratio of that judgment. In order to identify that ratio , we have set out above, in some detail, the facts of the case. In the light of those facts, we consider that PG is authority for the proposition that the 'unduly harsh' test will not be satisfied in a case where a child has two parents by either or both of the following, without more: (i) evidence of the particular importance of one parent in the lives of the children; and (ii) evidence of the emotional dependence of the children on that parent and (therefore) of the emotional harm that would be likely to flow from separation . We emphasise the words 'without more' in the foregoing formulation. It would not be sensible to attempt to set out in advance the kind of factors whose presence would support a conclusion that the test was met. It will remain important to consider carefully the facts of each individual case.

28
Against that background, we have carefully considered the factors set out by the judge at [30] as supporting the conclusion that the test was met in this case. We accept that there was evidence that there were 'strong and reciprocal ties between him and the children'. We accept that the ties were stronger in this case than in many others. But we do not consider that this served materially to distinguish this case from PG , where there was also an express finding that the father played an important part in the children's lives.

29
We accept also that there was a proper basis for concluding that the children would suffer emotionally if Mr Imran were deported. In this case, the conclusion was not merely an inference from the observed strength of the emotional ties. The fact that the children were receiving emotional support at school when Mr Imran was away serving his custodial sentence was concrete evidence of the effect of separation on them. That, taken together with the improvement in their emotional state when he returned to the family home, was a sound basis on which to conclude that they would indeed suffer emotional harm if Mr Imran was deported and they remained in the UK with their mother. But although there was a firmer evidential basis than in PG for the conclusion that emotional harm was likely to be suffered, the harm in question was not in our view qualitatively different from that in PG . There was, for example, no evidence that it would rise to the level of causing any diagnosable psychiatric injury.

30
Finally, we have considered the finding that the separation whilst Mr Imran was in prison put 'increased stress (financial and emotional)… on their mother'. Again, we do not doubt the basis for this finding, but – having considered the observations in PG and KF – we do not regard this increased stress as capable, whether on its own or taken together with the likely emotional harm to the children, of supporting a finding that deportation would be 'unduly harsh'.

31
In the circumstances, we consider that – in the light of the approach taken by the C ourt of Appeal in PG and KF – this is one of the rare cases where, despite the careful reasons given by the judge, it was

not rationally open to him to conclude that the ‘unduly harsh’ test was met. His decision that it was met was, therefore, a material error of law.

32
We have considered whether it is necessary to make further findings of fact. As we have said, we detect no flaw in the findings the judge made. We were referred by Mr Raza to the key parts of the underlying materials and we cannot identify any other relevant finding that the judge could have made in Mr Imran’s favour. It is not therefore necessary or appropriate to remit the case to the First-tier Tribunal or to direct a further hearing in this Tribunal. Given the law as declared by the Court of Appeal in PG and KF , there is only one decision open: the effect of Mr Imran’s deportation on his partner and children (assuming that they remain in the UK without him) would not be ‘unduly harsh’. Neither of the exceptions in s. 117C applies. We shall therefore remake the decision, dismissing the human rights appeal.

33
This means that it is not necessary for us to consider grounds 3 and 4. We doubt, however, whether either of those grounds would have succeeded had the first ground failed. The reasons given for concluding that it would be ‘unduly harsh’ for Mr Imran’s partner and three children (who do not speak Urdu) to have to uproot themselves and go to Pakistan seem to us to be adequate. We are far from sure that there was any error at [33] in relation to the assessment of the risk posed by Mr Imran as ‘relatively low’ , given the equivocal nature of the OASys report and judge’s own assessment at [27] of Mr Imran’s own account of the causes of his offending behaviour.

Notice of Decision

The First-tier Tribunal’s decision involved the making of an error on a point of law and is set aside.

We re-make the decision by dismissing the human rights appeal.

Signed: Martin D. Chamberlain

The Hon. Mr Justice Chamberlain

Dated: 7 February 2020