ILPA information sheet

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"Qualifying Children," Parents and the Public Interest

This information sheet analyses the judgment of the Supreme Court in the linked cases of *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53. It considers how the judgment will affect the position of those parents facing removal from the United Kingdom who have a parental relationship with a 'qualifying child' who has lived continuously in the United Kingdom for a period of seven or more years.

The case before the Supreme Court

It was the Appellants' positions that when determining whether it is "*reasonable to expect*" a child to leave the UK with their parent, or whether the effects of a deportation order on one or both parents would be "*unduly harsh*", the Tribunal must focus purely on the position of the child. Therefore, it was their position that the conduct of the parents, or other wider public interest factors in favour of removal should not concern the Tribunal.

Lord Carnwath drafted the unanimous decision of the Supreme Court in all the matters raised in this case. He began from the position that the provisions of s.117 *Nationality, Immigration and Asylum Act 2002* "*produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment for the court to take account of public interest or other factors not directly reflected in the wording of the statute*." Furthermore, Lord Carnwath reaffirmed the principle that "'*a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.'*" The upshot of Lord Carnwath's reasoning is that the conduct of a parent, be it criminality or something short of that, is irrelevant in assessing whether removal of a child, or the break-up of a child's family, will be "*unduly harsh*" or "*unreasonable*."

KO

KO entered the UK unlawfully in 1986, married, has a step-daughter and 4 children with his wife. All of the children are either British Citizens of have Indefinite Leave to Remain. KO was convicted of conspiracy to defraud and sentenced to 20 months' imprisonment. The test to stop KO's deportation was whether or not his removal would be "*unduly harsh*" on the children.

The Supreme Court made clear that s.117C(5) of the 2002 Act "*requires regard to be had to all the circumstances including the criminal's immigration and criminal history*." Therefore, the more serious the criminality of the offender, the greater is the public interest in removing them. Lord Carnwath was at pains to stress that 'unduly harsh' must mean "*more than undesirable*." Therefore, whilst it would be distressing to KO's family for him to be deported, and may permanently break their family up, given all the circumstances, it would not be "unduly harsh" for the family to remain in the UK whilst KO is removed to Nigeria.

IT

IT was convicted of 4 counts of supplying class A drugs and sentenced to 42 months' imprisonment. He was deported to Jamaica in 2010. His (British) wife and child reside in the UK. In challenging the deportation order, the Court of Appeal had held that "*section 117C(2) [requires] that the nature of the offending is also to be taken into account*." IT's Counsel argued that the Court of Appeal had also introduced a "compelling reasons" test which was not to be found in s.117C of the 2002 Act.

Lord Carnwath held that the "*FTT could not be criticised for not applying a test which was not in the relevant provision… I also think it was wrong to proceed on the basis that section 117C(2) required the "nature of the offending" to be taken into account.*" It was noted that this case pre-dates the judgments that shed light on the "unduly harsh" test. As a result, provided the tribunals have applied the correct test, then even if the decision seems generous, it is not, of necessity, wrong in law.

NS

NS and AR entered the UK in 2004. NS and AR had children living in the UK, and sought to obtain leave with false postgraduate certificates from the Cambridge College of Learning. The certificates were found to be false, and NS and AR were refused leave to remain due to deception. As neither NS nor AR were offenders, this was not a deportation case. Therefore, the question pursuant to s.117B of the 2002 Act was whether NS and AR had a genuine parental relationship with their children, and whether it would be reasonable to expect the children to leave the UK. In this case Lord Carnwath agreed that it was in the best interests of the children for them to remain in the UK, however, "*where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable*."

What this means for Appellants

It is important to note that when assessing whether or not it would be "*unreasonable*" or "*unduly harsh*" to remove a child, the conduct of the parents (be it criminality or something short of this) is irrelevant. This is because the conduct of the parent will have been considered at earlier points in the assessment process. The principle that children cannot be blamed for that which they are not responsible for (including the conduct of their parents) is affirmed (see above).

Further Reading

For the full judgment of the Court, please see: https://www.supremecourt.uk/cases/docs/uksc-2016-0107-judgment.pdf