IMMIGRATION AND PUBLIC LAW

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Criminal Deportations:
"Unduly harsh" and other key concepts

Sara Anzani

Barrister, Goldsmith Chambers

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Statutory public interest considerations

Section 117C of the Nationality, Immigration and Asylum Act 2002:

- The deportation of foreign criminals is in the public interest.
- The more serious the offence committed, the greater the public interest in deportation.
- 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.

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Exception 2: Section 117C(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**.

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‘Unduly Harsh’: KO (Nigeria) [2018] UKSC 53

Lord Carnwath [23]:

- ‘Unduly harsh’ seems clearly intended to introduce a higher hurdle than that of ‘reasonableness’ under section 117B(6), taking account of the public interest in the deportation of foreign criminals.
- ‘Unduly’ implies an element of comparison.
- It assumes that there is a ‘due’ level of ‘harshness’, that is a level which may be acceptable or justifiable in the relevant context.
- ‘Unduly’ implies something going beyond that level.
- 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.

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Recent revisiting of ‘unduly harsh’

HA(Iraq)v SSHD [2020] EWCA Civ 1176 (4 September 2020)

- Previously RA (s.117C: ‘unduly harsh’; offence: seriousness) Iraq [2019] UKUT 00123
- Iraqi citizens with British children, sentences of 16 months (HA: for immigration offences) and 12 months (RA: ID document offence)
- Both won in FTT but SSHD appealed successfully to UT
- Underhill LJ granted permission so CoA could consider UT’s guidance on issues of general application
- Considers in detail SC’s approach to ‘unduly harsh’ test in KO (Nigeria) v SSHD [2018] UKSC 53

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What did Lord Carnwath mean?

"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"

Underhill LJ at §44:

"…Lord Carnwath's focus is not primarily on how to define the "acceptable" level of harshness. 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 (indeed one can imagine unusual cases where the deportation of a parent would not be "harsh" for the child at all, even where there was a genuine and subsisting relationship). The underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category."

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What is the correct test?

- The criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability [51]
- The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders) [51]
- The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest [51]
- However, there is no reason in principle why cases of 'undue' harshness may not occur quite commonly [56]

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Factors to consider

Underhill LJ at [56]: How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of 'ordinariness'

Factors that may impact upon the degree of harshness:

- *The child's age*
- *Whether the parent lives with them (though a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother)*
- *By the degree of the child's emotional dependence on the parent*
- *By the financial consequences of the parent's deportation*
- *By the availability of emotional and financial support from a remaining parent and other family members*
- *By the practicability of maintaining a relationship with the deported parent*
- *By all the various individual characteristics of the child.*

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Other important points

- Jackson LJ on the best interests of the child (see [151]-[163]), and particularly that there is no hierarchy as between physical and non-physical harm [159].
- In the proportionality balance that falls to be struck in a deportation case the seriousness of the relevant offending is established by the level of sentence: see SSHD v Suckoo [2016] EWCA Civ 39 at [94]
- However, it is inappropriate for a tribunal not to give credit for a reduced sentence because it was reduced as a result of a guilty plea (see [146]-[149])
- Reaffirms the importance of British citizenship in the best interests of the child calculation: [113]-[114]
- Mentions the limited utility of factual precedents [127]-[129]
- Confirms that rehabilitation can be relevant in the section 117(6) assessment [132]-[143]

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AA (Nigeria) v SSHD & KB (Jamaica) v SSHD

- COA applied HA (Iraq) in both AA (Nigeria) and KB (Jamaica)
- Both had won in FTT pre-KO, UT found an error of law, re-made and dismissed appeals
- AA (Nigeria): 4.5 years for conspiracy to supply cocaine and heroin, 2 British children.
- KB (Jamaica): ABH (domestic violence), act intended to pervert the course of justice (12 months and 6 months to run concurrently), 4 British children.
- Court critical of over-enthusiastic use of UT's error-of- law jurisdiction, restored FTT decision and appellant's won outright

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Takeaway Points

- Reiteration of danger of trying to identify some 'ordinary' level of harshness
- Broadly helpful comments on rehabilitation: AA *at [40]*
- The loss of a role model is a legitimate consideration which may contribute to deportation being deemed unduly harsh: KB at *[33]*
- The UT is not entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one: KB at *[16]*

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Citing relevant authorities

- Consider [9] of *AA (Nigeria)*.
- Lamenting the 'proliferation of case law' on the application of the 'unduly harsh' and 'very compelling circumstances' tests, Popplewell LJ attempted to distil the relevant authorities to the following:

  'Unduly harsh' = *KO (Nigeria)* and *HA (Iraq)*

  'Very compelling circumstances' = *R (oao Byndloss)* and *NA (Pakistan)*

- You may also want to cite *AA (Nigeria)* and *KB (Jamaica)* in respect of the application/restatements of *HA (Iraq)* if helpful or appropriate.

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“HOME GROWN” CRIMINALS?: Deporting our own

Jamil Dhanji
Barrister, Goldsmith Chambers

25th February 2021

Question

- **What is the relevance of the fact that a potential deportee has lived in the UK since childhood to the proportionality of his/her deportation?**

- Will explore the answer to that question by looking at some recent cases.

“Home grown” criminals (1)

***Binbuga (Turkey) v Secretary of State for the Home Department* [2019] EWCA Civ 551)**

- Hamblen LJ rejected the finding of the FTT that:

  "….where a person has spent a good deal or most of their life in the UK since childhood they are, in reality, home grown criminals and their long residence as a child can outweigh even the most serious kinds of offences including causing grievous bodily harm and dealing in class A drugs".

“Home grown” criminals (2)

- Hamblen LJ held, at paragraph 68 of his judgment:

  “…the description “home grown” criminal or offender cannot withstand analysis. It is an unhelpful description and is liable to mislead.”

- He endorsed what Gross LJ stated in ***LW (Jamaica) v SSHD* [2016] EWCA Civ 369**:

  "…the FTT's unhappy reference to LW as a "home-grown offender" (at para 54) is itself revealing. Although, at first blush, there is an attractive ring to this description, it cannot survive analysis. Consider, for instance, the example of a foreign national who first comes to this country at 16 and is then of good character. Over the next 10 years, he commits a string of serious offences in this country. That he is a "home-grown offender" would not for a moment stand in the way of his deportation, absent other and compelling reasons. It is the offending in this country which makes the person in question a "foreign criminal"; such offending, in this country rather than elsewhere, is the reason for deporting him, not a reason for not doing so."

“Home grown” criminals (3)

- In ***HK Turkey v SSHD* [2010] EWCA Civ 583**, Sedley LJ had held:

  "….The number of years a potential deportee has been here is always likely to be relevant; but what is likely to be more relevant is the age at which those years began to run. Fifteen years spent here as an adult are not the same as fifteen years spent here as a child. **The difference between the two may amount to the difference between enforced return and exile**. Both are permissible by way of deportation, but the necessary level of compulsion".

- Hamblen LJ distanced the Court from these observations, stating at paragraph 72 of his judgment:

  “Caution therefore has to be exercised in placing reliance on cases which pre-date the statutory regime, such as HK (Turkey). On any view it is not appropriate to refer to or rely upon the individual being a "home grown" criminal or offender.”

“Exile from the only country the appellant can call home” (1)

Akinyemi v SSHD (No 2) [2019] EWCA Civ 2098

- The appellant’s case was as follows:

“33. The context of this case…is that the appellant has lived his entire life in the UK. That is materially different from the paradigm foreign criminal who arrives in the UK from another state and then commits crimes: a circumstance where the need for foreign nationals to appreciate the consequence of criminal conduct in terms of expulsion is much more obvious.

34. The appellant submits that the facts of this case should have led the tribunal to reduce the weight of the public interest in deportation rather than to increase it or describe it as being significant. This flawed view altered the balance struck by the tribunal and also its assessment of the consequences of deportation: **this would not be a return to a home state for the appellant but "an exile from the only country the appellant can call home".**

"Exile from the only country the appellant can call home" (2)

- The Court agreed with the appellant's submissions, concluding, at paragraph 39:

  "that the public interest in the deportation of foreign criminals has a moveable rather than fixed quality. It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal. The number of these cases will necessarily be very few i.e. they will be exceptional having regard to the legislation and the Rules."

- Of particular note, Sir Ernest Ryder held, at paragraph 53:

  "53. The UT's approach to the public interest and the proportionality balance that is to be undertaken were accordingly flawed. The exercise of considering the strength of the public interest by assessing the factors in the case has not been undertaken. **In particular, the extent to which a foreign criminal who was born in the UK and has lived here all his life must be considered alongside all the other factors that relate to the public interest in deportation before that is balanced against an assessment of the article 8 factors."**

Deportation "to a country…which…is as foreign to [him] as China"

CI (Nigeria) v SSHD [2019] EWCA Civ 2027

- At paragraph 117, Leggatt LJ observed:

  "117…There is a material difference between returning an immigrant to a country with which he retains some social and cultural ties and deporting him to a country with which he has none and which, in the words of CI's sister in this case, "is as foreign to us as China"…"

- *Maslov* principles are applicable, whether or not the person being expelled has been in the UK lawfully for more than half their life (although there will be a difference of weight and degree, as part of the article 8 proportionality balancing exercise): paragraphs 111-112, ***CI (Nigeria).***

“…dumped in Jamaica at the end of the prison term”

Lowe v SSHD [2021] EWCA Civ 62

- McCombe LJ found at paragraph 32 of his judgment:

  “32. It was, in my view, quite open to the FTT judge to find that there were the necessary very significant obstacles based on the impression made upon him as **to the effect of the "exile" of this young man, with all his characteristics, attributes, qualities and defects that were disclosed by the evidence.** Not every healthy young man, in a case such as this, would make the same impression. However, this was a 19 year old with a conviction, when he appeared before the FTT. He had lived for all but the first three years of his life in the UK and **had no connection to Jamaica whatsoever other than a residual nationality**. The judge found that he had a specific dependency on his parents. The judge was entitled to form his own impression of the obstacles he would face **on being dumped in Jamaica at the end of the prison term.** He was not an adult foreign criminal, like some whose cases come before the courts, with a significant foundation of knowledge of the country of his birth from an earlier time in life, and who is being returned to a country with which he has some acquaintance. It is not surprising to me that a judge (if not all judges) would find, as this judge did, that there were very significant obstacles to integration. Others might have made a different decision, but this was very much a case on its own facts to be assessed on the evidence.” (Emphasis added)

"…not a country that is entirely unfamiliar to him."

***Zulfiqar ('Foreign criminal'; British citizen)* [2020] UKUT 312 (IAC)**

"104. In this matter, the Judge acknowledged that though the appellant has spent very little time in Pakistan, it is not a country that is entirely unfamiliar to him. She found that the appellant was desirous of being transferred to a prison in Pakistan to enjoy greater contact with his father and this motivated his decision to renounce his citizenship. Unlike the appellants in CI (Nigeria) and Akinyemi (No. 2), the appellant has sought over time to relocate to Pakistan.

105. In our judgment the Judge undoubtedly considered all relevant matters in the round. The public interest in the deportation of a foreign criminal is not set in stone and must be approached flexibly. The Judge had proper regard, inter alia, to the appellant's length of residence in the United Kingdom, the ties that he retains with his family in this country, his immigration and offending history, and his family circumstances. In adopting the balance sheet approach, at paras [32] and [33], the Judge carefully considered the matters that weighed in favour of, and against, the appellant. In addition to his only having ever lived in this country she noted that the appellant is remorseful, has accepted responsibility for his previous convictions and that there is extensive evidence in the appeal bundle as to rehabilitation. The Judge gave substantial weight to the personal ties the appellant enjoys in this country through his long enjoyment of British citizenship. She also gave appropriate weight to the appellant's ability to establish his life in Pakistan and to integrate into the community."

Answer

- Whatever terms are used, the principles established in cases like *Maslov* & *HK (Turkey)* (to name a few), still apply.
- The fact that a potential deportee has lived in the UK for many years, particularly if from a young age, is a relevant consideration when the proportionality of a deportation decision is being assessed.
- Focus needs to be on reasons why lack of ties to country of nationality create obstacles to integration and on strength of ties to the UK.
- Whether the time spent in the UK has been lawful will have a bearing on the weight to be attached, but to what extent will be a matter of for a judge to determine on the facts of a particular case.
- Each case will be fact-specific and judges have wide discretion when it comes to determining how the fact that a potential deportee has been in the UK since a young age 'moves' the public interest in his/her deportation.

Contact Details

Any Questions?

Sara Anzani & Jamil Dhanji, Immigration and Public Law Team

E-mail: s.anzani@goldsmithchambers.com & j.dhanji@

Clerks: immpublic@goldsmithchambers.com

Tel: 0207 353 6802

@saraanzani; @jamildhanji

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