24 October 2018

THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellants who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellants or of any member of their families in connection with these proceedings.

PRESS SUMMARY

KO (Nigeria) (Appellant) v Secretary of State for the Home Department (Respondent)
IT (Jamaica) (Appellant) v Secretary of State for the Home Department (Respondent)
NS (Sri Lanka) and others (Appellants) v Secretary of State for the Home Department (Respondent)
Pereira (Appellant) v Secretary of State for the Home Department (Respondent)
[2018] UKSC 53
On appeals from: [2016] EWCA Civ 617; [2016] EWCA Civ 932; [2016] EWCA Civ 705

JUSTICES: Lord Kerr, Lord Wilson, Lord Reed, Lord Carnwath, Lord Briggs

BACKGROUND TO THE APPEALS

Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') is headed "Article 8 ECHR: Public Interest Considerations". Section 117A applies where a court or tribunal needs to determine whether an immigration decision breaches a person's right to respect for private and family life. In considering the "public interest question" – whether an interference is justified under Article 8(2) – the court must have regard to the considerations listed in section 117B and, in cases concerning the deportation of foreign criminals, to the considerations in section 117C.

A "foreign criminal" is a person who is not a British citizen and who is convicted of an offence in the UK that attracted a sentence of at least 12 months, caused serious harm, or is a persistent offender. Section 117B includes a provision that where a person is not liable to deportation as a foreign criminal, the public interest does not require the person's removal if that person has a genuine and subsisting relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. A "qualifying child" is a person under 18 and is a British citizen or has lived in the UK for a continuous period of seven years or more. Section 117C provides that deportation of foreign criminals is in the public interest but, if sentenced to less than four years' imprisonment, there is an exception where there is a genuine and subsisting parental relationship with a qualifying child, and the effect of deporting the person would be unduly harsh on the child.

Three appellants (*KO, IT* and *NS*) argue that when determining whether it is "reasonable to expect" a child to leave the UK, or whether the effect of deportation of a person would be "unduly harsh" on their child, the tribunal is only concerned with the position of the child and not with the conduct of the parents. The respondent argued that both provisions require a balancing exercise, weighing the impact on the child against the wider public interest. The fourth appeal (*Pereira*, regarding 'AP') concerns immigration rule 276ADE(1)(iv), which provides that leave to remain on the grounds of private life should be granted to an applicant who is under 18, has lived continuously in the UK for seven years, and whom it would not be reasonable to expect to leave the UK. AP's application was refused on the basis that it was reasonable for him to accompany his parents to their country of origin.

JUDGMENT

The Supreme Court unanimously dismisses the appeals. Lord Carnwath gives the sole judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

General approach

The purpose of Part 5A of the 2002 Act is to produce a straightforward set of rules and to reduce the need for discretionary judgement when taking account of public interest or other factors not directly reflected in the wording of the statute. It also presumed that those rules are intended to be consistent with the general principles relating to the "best interests" of children **[15]**.

The specific provisions

Rule 276ADE(1)(iv) contains no requirement to consider the criminality or misconduct of a parent as a balancing factor and such a requirement cannot be read in by implication **[16]**. Section 117B of the 2002 Act does not include criminality as a consideration **[17]**. However, it is inevitably relevant to consider where the parents, apart from the relevant provision, are expected to be, as it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material if it leads to them having to leave the UK. It is only if it would not be reasonable for the child to leave with them that the provision may give the parents a right to remain **[18]**.

In section 117C of the 2002 Act, "unduly harsh" introduces a higher hurdle than that of "reasonableness" under section 117B. "Unduly" goes beyond a level of "harshness" that may be acceptable or justifiable in the relevant context. It does not require a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself regarding length of sentence, and it does not require "very compelling reasons" **[23]**.

The cases

KO and *IT* concerned section 117C of the 2002 Act. In *KO* the Upper Tribunal judge was wrong to decide that he should take account of the criminality of the parent in applying the "unduly harsh" test **[26, 32]**. However, this did not affect the correctness of his conclusion, as his overall approach seemed no different to that which the Supreme Court accepts as correct **[33-36]**.

In *IT* the Court of Appeal was wrong to introduce a "compelling reasons" test and to proceed on the basis that the assessment of harshness required the "nature of offending" to be considered **[42]**. However, the First-tier Tribunal had erred in proceeding on the basis, unsupported by the evidence, that IT's child, as a British citizen, could not be expected to relocate outside the UK **[44]**. The Supreme Court confirms the order of the Court of Appeal for remittal to the Upper Tribunal **[45]**.

NS concerned section 117B of the 2002 Act. The parents had falsely claimed to have completed a postgraduate course in order to obtain leave to remain **[46]**. The Upper Tribunal judge's conclusion, read in its full context, did not involve any error of approach. He was entitled to regard the parents' conduct as relevant to the extent that it meant they had to leave the country, and to consider the position of the child on that basis **[51]**.

Pereira concerned rule 276ADE(1)(iv). The Court of Appeal ordered that the case should be remitted to the Upper Tribunal for a fresh determination and it did not limit the issues before the tribunal. As AP is now aged 19 he is in principle qualified for leave to remain under rule 276ADE(1)(v) and so the appeal may be disposed of by agreement. If not, it will fall to be considered in accordance with the law stated in this judgment. No further order is required **[54-56]**.

References in square brackets are to paragraphs in the judgment