IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01803/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 28 May 2015	**On 1 June 2015**
Oral judgment	

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MR MALEKO BOGONDO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Mak of MKM Solicitors
For the Respondent: Mr R Hopkin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by a Judge of the First-tier Tribunal, First-tier Judge Davidson, promulgated on 27 January 2015 following a hearing at Taylor House on 18 December 2014 in which the judge dismissed the appellant's appeal against the order for his deportation from the United Kingdom.

2. The appellant was born on 1 January 1985 and is a national of the Democratic Republic of Congo. Before the judge he and the Secretary of

State were both represented, Mr Bogondo by Mr Mak, who has helpfully appeared to assist the Tribunal this morning.

3. The reason for the deportation order was the appellant's conviction and sentence on 30 April 2013 at the Crown Court at Snaresbrook. The judge in his sentencing remarks made the following comments:

> "Mr Bogondo you were found guilty by a jury of these two offences of sexual activity with a child. They both took place on 9 May 2012. You in very serious breach of trust and using a certain amount of deceit had sex with a girl who was 15 years and 7 months old at the flat of her aunt and uncle, who were your very good friends. And you had just had a child yourself, and as I say, used some deceit and very serious breach of trust to achieve that.
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> You are charged first of all with Count 1 relates to having full sexual intercourse with her. Count 2 relates to penetrating her vagina with your fingers, which happened before that. So far as Count 2 is concerned she said in her interview with the police that she agreed to that. She said she did not agree to Count 1, but I am not here sentencing you for rape. You were not charged with that. The jury did not consider it. And in fact the only issue at trial was whether you knew that she was under 16 and the jury were clearly satisfied you did, although you protested otherwise.
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> The guidelines indicate that the right sentence for this offence starts at four years' custody and the range is three to seven. In your favour Mr Walker points out that first of all the age of consent in the Congo is apparently 14. I am afraid that has no influence on me at all. I am afraid you are taken to know the law and I suspect you did perfectly well know the law, that you have not to have sex with people under 16 in this country, and the issue, as I said, at trial was whether you knew she was under 16. The only other point in your favour apart from the fact that she agreed that the fingering was consensual was that she was very nearly 16, as I say she was 15 years and 7 months, you were 26, or 25 at the time, which is also a relevant factor.
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> It seems to me, taking all that into account, this is at the bottom of the sentencing range, but not below the bottom by any means, and the sentences I pass are three years on both counts concurrent."

4. As a result of that conviction the Secretary of State made a deportation order pursuant to the provisions of the UK Borders Act 2007. An automatic deportation order.

5. The judge in the determination notes the immigration history including that relating to a previous asylum claim which was dismissed on appeal, an appeal that the appellant failed to attend, and that he became appeal rights exhausted on 9 December 2004.

6. The judge sets out the correct burden and standard of proof and the documentation considered. Indeed Mr Mak confirmed in his oral submissions today that the information to be found in the bundle submitted on the appellant's behalf was all that was being relied on by the appellant in relation to the issues in the appeal. The judge records that oral evidence was given both by the appellant and his partner, who was cross-examined and re-examined, and that submissions were made.

Findings on credibility commence at paragraph 16 of the determination in which the position of the appellant, his various children, his partner Julia and others, together with the core points raised in evidence are set out and taken into account.

7. There are two separate heads on which the appellant sought to oppose his deportation. The first related to the protection element. In paragraph 38 of the determination the judge records that the appellant still maintains that he should be granted asylum on the basis of the claim he made twelve years ago. The judge considered the evidence that was available then and made available at the hearing and noted what he describes as a howling anomaly and implausibility in the appellant's claim by reference to geographical points of location referred to by the appellant in the DRC. The judge found that his account of travelling from or between two points by boat and having passed through Inongo was totally implausible. He dismissed the asylum claim on the basis of lack of credibility in the appellant's account.

8. At paragraph 39 the judge records that the appellant did not impress the trial judge at the criminal trial and did not impress the judge giving his evidence in relation to the deportation decision and in fact found the appellant to be dishonest, to lack credibility and to be prepared to do and say whatever suited his ends.

9. The findings in relation to the asylum appeal are findings that have not been shown to be infected by any material error of law. The Secretary of State did raise in the refusal letter the issue of exclusion by virtue of the provisions of Section 72, which the judge does not appear to have dealt with specifically in these paragraphs, but the fact that the judge did deal with the asylum claim suggests that either if the Section 72 certificate was upheld there would be no Refugee Convention claim but if it was not such claim would fail in any event for the reason given. It cannot be held that any error made is material to the decision in relation to this element.

10. The second element of the protection claim related to risk on return as a failed asylum seeker who is also a criminal deportee. Mr Mak referred in general conversation to the fact that in a different case that he was involved in the panel in that case, having found an error of law, had adjourned the matter pending the outcome of the country guidance case on this specific point. The Tribunal were advised today that the case has been heard and the determination is awaited. That matter was specifically listed as a result of the decision in the High Court in **P and R v Secretary of State for the Home Department [2013] EWHC 3879** which appeared to result in a finding that a normal failed asylum seeker from the United Kingdom was at no risk on return to the DRC but if that failed asylum seeker then committed a criminal offence and was imprisoned and deported, as a result of that and that matter only, he would face a real risk sufficient to engage the United Kingdom's obligations under Article 3. That decision was appealed to the Court of Appeal although the documents before this Tribunal from the respondent indicate that that

appeal has in fact been withdrawn for reasons that will be known to the Secretary of State but not this Tribunal. But the judge had before him far more than the transcript of the judgment in **P and R** in that what the judge had was additional information that had been referred to in paragraphs 141 and 142 of the Reasons for Refusal Letter which updated the situation and included confirmation from the Director General of Migration of the DRC that they had no interest in returning foreign nationals or failed asylum seekers unless there are criminal matters outstanding in the DRC. In this case there was no evidence before the judge that there was.

11. A decision of the High Court is not binding upon any Tribunal or court below. The position in relation to High Court judgments is that they are persuasive and no more. The judge clearly considered all the evidence made available with the required degree of anxious scrutiny and clearly concluded that greater weight could be attached to the information that was provided and referred to in the Reasons for Refusal Letter. The judge clearly found that there was no real risk to the appellant being returned sufficient to engage either his claim under the Refugee Convention or Articles 2 or 3 on the basis of the information before him. It has not been established that in doing so the judge made any error of law material to that decision. The weight to be given to the evidence was a matter for the judge and the relevant evidence was clearly considered.

12. The second ground on which deportation was opposed related to the appellant's partner and his children's human rights. Details of the various children fathered by the appellant appear at paragraph 16 of the determination as well as the partners or women with whom he had had various relationships.

13. The starting point at paragraph 42 in relation to the human rights assessment by the judge gives rise to the grounds pleaded by Mr Mak that the judge made an error of law. In this respect Mr Mak may be arguably correct. This is a deportation appeal in relation to which post 28 July 2014 the judge was required to apply in the first instance the Immigration Rules set out at A398 to 399B where applicable as the first stage of his assessment process. The relevance of that date was established recently by the Court of Appeal in **YM (Uganda) v SSHD [2014] EWCA Civ 1292** where a failure of the judge to have taken those provisions into account was found to amount to a material error and **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** and case law that has followed thereafter is authority for the proposition that the Immigration Rules are a complete code and that they are therefore the starting point in relation to any assessment of an Article 8 claim opposing a deportation order. Indeed in **LC (China) [2014] EWCA Civ 1310** it was held by the Court of Appeal that the starting point for any such assessment was the recognition that the public interest in deporting a foreign criminal was so great that only in exceptional circumstances would it be outweighed by other factors, including the effect of deportation on any children. In **McLarty [2014] UKUT 315 (IAC)** it was held that there was little doubt that, in enacting

the UK Borders Act 2007, Parliament views the object of deporting those with a criminal record as a very strong policy, which is constant in all cases, with reference to **SS (Nigeria) [2013] EWCA Civ 550**.

14. The judge erred therefore in stating in the first line of paragraph 42 that when considering the question of whether the deportation would be an unlawful breach it was necessary to consider Article 8 ECHR. As the Rules are a complete code there should be no need in other than the most exceptional circumstances, of which this case is not one, for a judge to be required to consider Article 8 outside the provisions of the Immigration Rules. The importance of the judge applying the Rules as they stand from 28 July 2014 is also that those Rules were themselves amended to incorporate the changes brought into force by the Immigration Act 2014 and the provisions that now appear in Section 117 of the Nationality, Immigration and Asylum Act 2002. As those provisions have been included it reinforces the argument that those Rules form a complete code.

15. If one looks at the factual findings made by the judge the judge comments upon the nature of the relationship between the appellant and the children including a claim that he sees Jamal aged 9 in the school holidays and weekends although the judge stated that was not corroborated. The judge makes various comments upon the suitability of the appellant as a good father and a role model but then in paragraph 51 does specifically mention the criteria in Rule 399.

16. The judge in paragraph 51 makes the following finding:

> "In the normal course of things, in a non-deport case, the appellant would probably have persuaded me that it would be a disproportionate interference with his family life, particularly with his children, but in this case, bearing in mind his history while in the UK, and particularly his offending, and the judgment of Lord Justice Richards in **JO and JT**, cited above in relation to deport cases, I find that it would not be a disproportionate interference with his family life if he were to be deported."

That suggests therefore that notwithstanding the fact that the judge embarked on the exercise on the wrong foot when considering it appears Article 8 first and foremost, the judge did recover his stance somewhat by considering the Immigration Rules and paragraph 399.

17. The Immigration Rules in their current form do provide guidance in relation to the issues that this appeal actually turns upon. The appellant was sentenced to a period of imprisonment of less than four years but at least twelve months as recognised in 398(b). Paragraph 399 therefore applies and sets out various criteria that the judge was required to look at to establish whether the appellant had made out or discharged the burden of proof upon him to show that he could satisfy the requirements of the Rules. These include that the appellant has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the United Kingdom and the child is a British citizen or the child has lived

continuously in the UK for at least the seven years immediately preceding the date of the immigration decision and in either case, and I stress the word "and" in this respect,

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; **and**

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported.

18. Stopping at that point and focusing upon the children, the children in the United Kingdom have been cared for within the family unit which, when the appellant was not in prison, was composed of Julia and the appellant. Indeed the judge notes in paragraph 50 that the family life involved considering that of his current partner and three children. There are no concerns regarding Julia's ability to care for the children or indeed any of the mothers' ability to care for the appellant's children and before the judge was a letter from Waltham Forest Safeguarding and Family Support Unit confirming that in respect of the child Esther the legal department had undertaken and completed an assessment on the above child and that their investigations had found no concerns of a child protection nature. Then, of course, what the local authority were doing was looking at the statutory level of child protection intervention but during the process of the investigation and outcome it is clear that the mother of the children and Julia in particular has demonstrated her ability to care for the children and to meet their emotional, physical and practical needs. That must have been particularly so since 2012 because if the appellant was imprisoned in 2012 and remains in detention at the date of this hearing in 2015 she has effectively had the role and obligation and duties of a single parent for her children throughout all that period of time.

19. The judge looked at Section 55 and the best interests of the children at paragraphs 53 and 54. The judge noted that it was highly unlikely that the children and Julia would join the appellant in the Congo and so it appears that this was either a case in which the family were not going to go because they did not want to go or because there were good reasons why they should not be expected to go. In this respect Julia in her statement refers to her own experiences in the DRC and the reasons why she maintains she would be unable to return. The judge appears to have accepted it would be harsh for the children to return to the DRC and was clearly viewing the matter on the basis that this is a family separation case. The judge notes that as British nationals the children have a right to remain in the United Kingdom and it has not been argued there is a **Zambrano** point before the judge as that obviously does not arise if the children remain in the United Kingdom with their mother or their mother decides voluntarily to take them to the Congo to join the appellant if he is deported.

20. What the judge found in relation to the children was that the public interest in maintaining immigration control, as deportation was conducive to the public good, outweighed the paramount interests of the children in

this case. The conclusion that the paramount interests of the children in the case are outweighed must infer a specific finding by the judge that it would not be unduly harsh for the children to remain in the United Kingdom without the appellant.

21. We spent a lot of time in the early parts of this hearing in conversation with Mr Mak about the term unduly harsh and what factors were before the judge to establish or to make out the claim that it would be unduly harsh for the children to have to remain if the appellant was deported. The Oxford English Dictionary defines "unduly" as "excessively" and "harsh" as "severe, cruel". Mr Mak referred to a number of practical issues, namely the fact that the children would be without the father, he would not be in the family unit, he would be away from the United Kingdom for a long time possibly for all the children's childhood, and effectively the loss of a father figure as they developed. While that may be harsh, and if one looks at the respondent's guidance in relation to the interpretation of unduly harsh there are some very useful examples set out as to what are considered harsh and the interpretation of the term 'unduly', the fact that the family would be separated does not per so satisfy this requirement. Lord Justice Sedley in the case of **Lee v Secretary of State** commented upon the fact that the separation of a family or a parent from a child was the impact of a deportation, that is the effect of deportation.

22. The IDIs: Chapter 13 – Criminality Guidance in Article 8 ECHR Cases V5.0 (28 July 2014) in relation to this element states:

> 2.5.3 The effect of deportation on a qualifying partner or a qualifying child must be considered in the context of the foreign criminal's immigration and criminal history. The greater the public interest in deportation, the stronger the countervailing factors need to be to succeed. The impact of deportation on a partner or child can be harsh, even very harsh, without being unduly harsh, depending on the extent of the public interest in deportation and of the family life affected.
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> 2.5.4 For example, it will usually be more difficult for a foreign criminal who has been sentenced more than once to a period of imprisonment of at least 12 months but less than four years to demonstrate that the effect of deportation would be unduly harsh than for a foreign criminal who has been convicted of a single offence, because repeat offending increases the public interest in deportation and so requires a stronger claim to respect for family life in order to outweigh it.
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> 2.5.5 It will usually be more difficult for a foreign criminal to show that the effect of deportation on a partner will be unduly harsh if the relationship was formed while the foreign criminal was in the UK unlawfully or with precarious immigration status because his family life will be less capable of outweighing the public interest than if he was in the UK with lawful, settled immigration status.

2.5.7 Section 117B(3) of the 2002 Act states that it is in the public interest that those who seek to remain in the UK are financially independent. If a foreign criminal cannot demonstrate that he is financially independent, it will be more difficult for him to show that the effect of deportation on his qualifying partner or qualifying child will be unduly harsh. Financial independence here means not being a burden on the taxpayer. It includes not having access to income-related benefits or tax credits, on the basis of the foreign criminal's income or savings or those of his partner, but not those of a third party. There is no prescribed financial threshold which must be met and no prescribed evidence which must be submitted. Decision-makers should consider all available information, though less weight will be given to claims unsubstantiated by original, independent and verifiable documentary evidence, e.g. from an employer or regulated financial institution.

23. The use of the term 'unduly' is very important because 'unduly' suggests that all factors have to be taken into account and then it weighed up to establish whether the consequences even if they are harsh or very harsh are unduly harsh. That is the incorporation of the need in Section 117 for the judge to undertake, in any event, a balancing assessment of all relevant factors. The judge clearly did that, albeit not referring to the specific phraseology of the Immigration Rules and it cannot be found on the basis of the evidence that was before the judge that the conclusion it had not been shown it would be unduly harsh for the children to remain in the caring environment with their mum in the United Kingdom meant that it was unduly harsh for them to remain without the appellant.

23. The information provided is itself somewhat limited, being restricted to a witness statement from the appellant, a witness statement from Julia and the birth certificates of the appellant's children. Mr Mak confirmed that the judge had before him all the evidence that the appellant wished to rely upon at the hearing and so I need say no more other than that was the material the judge was asked to consider, the judge did consider it, and the judge made a decision weighing up the nature of the offending, a very serious sexual offence, against the grounds that were put forward and found that they did not enable the appellant to succeed in relation to paragraph 399(a)(ii)(b).

24. The second element related to Julia herself. Paragraph 399(a)(i)(b) states that if a person has a genuine and subsisting relationship with a partner who is in the United Kingdom and is a British citizen or settled in the United Kingdom and (iii) it would be unduly harsh for that partner to remain in the United Kingdom without the person who is to be deported, that may have been an additional ground available to the appellant to succeed. However, the material falls far short of establishing that the required test of unduly harsh effect upon Julia would be met. I do not minimise the impact of removing a father figure from the home, and Mr Mak's submissions were in reality a plea from the heart in relation to the

practical impact of doing that where children of any age are involved or where an adult relationship exists. It is accepted that there will be emotional consequences. It is accepted there would be a period of readjustment for Julia as well as for the children. It is accepted that the children may at some point become angry and cross and feel they have been betrayed. It may be that Julia will have the difficult task of having to explain to them why their father has been removed from the United Kingdom by reference to his conduct and his criminal behaviour.

25. What has not been established on the evidence is that Julia is incapable of meeting the requirements and obligations as a parent, she appears to have done so very well to her credit to date, or that any of the children would be severely affected. It has not been established on the evidence that the impact on the children would be such that there may be or will be or is a real possibility of serious long-term consequences for them. It has not been established on the evidence that if such consequences possibly arose or are likely to arise that there would be inadequate support from Social Services who have been involved with the family, the GP, the school or any other professional body within the United Kingdom sufficient to ensure that the children's needs are met and that they are assisted through what may be seen as a difficult period for them.

26. The simple matter in this case, however tragic it may be for the family members who remain in the United Kingdom, is that the evidence provided to the Judge of the First-tier Tribunal did not establish the existence of unduly harsh consequences for either the children, Julia, or any partner, if the appellant is deported and they have to remain in the United Kingdom without him.

27. The appellant had therefore failed to discharge the obligation upon him to show that he was able to succeed under the Immigration Rules. The Immigration Rules are a complete code and therefore the judge in dismissing the appeal on human rights grounds, albeit that he purports to do it under Articles 2, 3 and 8 rather than the Immigration Rules, is not a decision that is materially affected by what appears on the face of it to be the structural error in relation to the approach taken by the judge to the Article 8 assessment.

28. For those reasons I find that any legal error that the judge may have made in approaching this appeal as illustrated by Mr Mak in the grounds in relation to Article 8 is not material to the decision to dismiss the appeal. On the basis of the conviction and the evidence available it is hard to see that the judge could have made any other decision in relation to the Article 8 elements of the claim under the Immigration Rules and for that reason the appeal is dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date 29th May 2015

Upper Tribunal Judge Hanson