Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08689/2017

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 18 February 2019	**On 27 February 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

DWAYNE [C]
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A I Corban, Solicitor Advocate at Corban Solicitors
For the Respondent: Mr N Bramble, Senior Home Officer Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission the decision of First-tier Tribunal Judge Buckwell promulgated on 20 September 2018, in which the Appellant's appeal against the decision to refuse his human rights claim in the context of deportation dated 10 August 2017 was dismissed.

2. The Appellant is a national of Jamaica who first entered the United Kingdom as a visitor in 2002. He was at some point included as a

dependent on his mother's application for leave to remain on human rights grounds, pursuant to which discretionary leave to remain was granted to 15 July 2013 and then to 26 September 2016. On 17 March 2016, the Appellant was convicted of possession of a firearm and subsequently sentenced to 6 years imprisonment. The Appellant was notified of the intention to deport him by the Respondent and made submissions in response, including relying on a genuine subsisting parental relationship with his British and child born in 2009.

3. The Respondent refused the application the basis that although it was accepted that the Appellant had a genuine subsisting parental relationship, it was not considered to be unduly harsh for the child to relocate to Jamaica with him or to remain in the United Kingdom without the Appellant, where he could continue living with his mother. The Appellant did not have a partner in the United Kingdom and did not satisfy the exceptions to deportation on private life grounds either.

4. Judge Buckwell dismissed the appeal in a decision promulgated on 20 September 2018 grounds. In summary it was found that there were no very compelling circumstances to outweigh the significant public interest in deportation in this case and that the Appellant's deportation would not be unduly harsh on the Appellant's son, taking into account the strength of the public interest.

The appeal

5. The Appellant sought permission to appeal to the Upper Tribunal on the ground that the decision of the First-tier Tribunal was not in accordance with the Supreme Court's decision in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, which had been handed down since the decision under challenge. Permission to appeal was granted on this sole ground, although it was noted that there was an issue as to whether any error would be material on the facts of this case.

6. At the hearing, Mr Corban identified the error of law in the First-tier Tribunal's decision as not having regard to all of the factors relevant to proportionality and failing in the first instance to make a lawful assessment and whether the Appellant's deportation would be unduly harsh on his son in accordance with the Supreme Court's decision in KO. It was accepted that in light of the length of the Appellant's sentence of imprisonment, that he would need to show very compelling circumstances to outweigh the public interest in deportation, however the minimum starting point is the exceptions to deportation set out in the Immigration Rules and in section 117C of the Nationality, Immigration and Asylum Act 2002. It was submitted that in the absence of any balancing exercise including consideration of the public interest, by reference to the Appellant's immigration and criminal history and that if one focuses only on the interests of the child, there can only be one answer in this case that the Appellant's deportation would be unduly harsh on his son.

7. As had been highlighted in the grant of permission in this case the real issue is whether any error of law in light of the decision in KO could be material and as such I asked Mr Corban to identify what were the very compelling circumstances relied upon by the Appellant in this appeal. He submitted that the Appellant had been in his son's life since he was born, had had a high level involvement in his life, living with him initially as part of the family and at the age of nine his son was now fully aware of circumstances and deportation would have a greater impact upon him compared to a younger child. It was also suggested that the Appellant's son was at a critical stage of his education and separation from his father would likely have an adverse impact on the same. It was noted that the First-tier Tribunal had accepted that it would be unduly harsh for the Appellant's son to relocate to Jamaica in these circumstances.

8. On behalf of the Respondent, Mr Bramble highlighted the high threshold of establishing very compelling circumstances over and above the exceptions to deportation which would be required for the Appellant to be successful in his appeal. It was accepted that there were clear errors in light of the decision in KO in paragraph 79, 83 and 84 of the First-tier Tribunal's decision, however it was submitted that these were not material on the facts of the case. There had been a child-centred consideration in the beginning part of paragraph 79 of the decision of the First-tier Tribunal and there were no other factors in relation to the child that had not been taken into account. For example, there was no social work report, no medical evidence and no other evidence to show that the adverse impact on the child would be anything beyond what would normally be expected in a deportation context. There was no evidence before the First-tier Tribunal in this appeal to establish that the effect on the Appellant's son would be unduly harsh the Appellant were to be deported to Jamaica and no evidence which could meet the higher hurdle of establishing very compelling circumstances against deportation.

Findings and reasons

9. I find an error of law in the decision of the First-tier Tribunal in its assessment of whether the Appellant's deportation would be unduly harsh on his son, by remaining in the United Kingdom with his mother, as set out in paragraphs 79, 83 and 84 of the decision. The assessment undertaken is not in accordance with the decision of the Supreme Court in KO. I would however note that this was through no fault of Judge Buckwell in this case whose decision, at the date of promulgation, was entirely in accordance with the authority in MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705 which was at that time binding upon him and only subsequently overturned by the Supreme Court in KO.

10. The issue is however whether the error of law found was material to the outcome of the appeal in this case and whether in all the circumstances it is necessary to set aside the decision of the First-tier Tribunal and for it to be remade afresh. In this case I decline to set aside the decision of the

First-tier Tribunal because on the particular facts of this appeal, the error is not material to the outcome of the appeal.

11. In accordance with paragraph 398(c) of the Immigration Rules and section 117C(6) of the Nationality, Immigration and Asylum Act 2002, for a person who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above the two express exceptions to deportation. On the facts of this case, there was no evidence before the First-tier Tribunal of any adverse impact on the Appellant's child which could even meet the test of being unduly harsh, as set out by the Supreme Court in KO, let alone any factors which could even arguably meet the high threshold of very compelling circumstances to outweigh the public interest in deportation.

12. The Appellant's son is a British Citizen who has lived in the United Kingdom since birth and he is now nine years old. As found by the First-tier Tribunal he is settled in education in the United Kingdom, has established family life with his mother and father and even at his young age has developed a social circle of friends. It is in the best interests of the child to remain in the United Kingdom with both his mother and father. Although the evidence of the Appellant and of his son's mother was clearly that the Appellant had a strong bond with his son, had a significant role in his life and his deportation would have an adverse impact on his son, the evidence did not go beyond this to identify any particular impact which would go beyond the usual consequences of deportation of a parent to another country or to show that this would be unduly harsh in this particular case. For example, there is no medical evidence of any particular needs, no independent social work report and no specific factors relied upon to show any unduly harsh impact over and above what would normally be expected. The suggestion by Mr Corban that the Appellant's son, in the latter stages of primary education is at a critical stage of that education are simply unsustainable. There is nothing critical at all about this, the Appellant is not studying towards any particular qualifications and is not even yet in secondary school. As to the Appellant's son's age, this cannot of itself, nor in combination with other factors, amount to a very compelling circumstances on the facts of this case. Further, if reaching a particular page was generally accepted as a very compelling circumstances, the rules and primary legislation would clearly have been drafted differently with exceptions relating expressly to the age of a child. On the facts, it would not be unduly harsh on the Appellant's child to remain in the United Kingdom without the Appellant and the exception is not therefore met.

13. The First-tier Tribunal, when undertaking the balancing exercise, albeit wrongly, to assess whether deportation would be unduly harsh on the Appellant's child, took into account other matters in the round in the Appellant's favour, including the contact which could realistically be maintained between the Appellant and his son from Jamaica, the Appellant's length of time in the United Kingdom having arrived as a minor

and the relationship with his mother who is resident in the United Kingdom. Taking all of these factors together, it is clear that they could not, on any legitimate to view, even cumulatively, establish very compelling circumstances to outweigh the significant public interest in deportation in this case where the Appellant was sentenced to six years' imprisonment for possession of a firearm. The balancing exercise which was undertaken, albeit in the wrong context in relation to the assessment of undue harshness would, in all material respects, be the same assessment which would now be required to determine whether there are very compelling circumstances to outweigh the public interest in deportation. It is clear for the reasons given by the First-tier Tribunal and set out above, that this high threshold cannot be met by this Appellant on the basis of the evidence that was before the First-tier Tribunal. For these reasons it is not necessary to set aside the decision of the First-tier Tribunal because even applying the correct test set out in KO, the Appellant's appeal would inevitably be dismissed on human rights grounds.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed

Date 22nd February 2019

Upper Tribunal Judge Jackson