Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09198/2017

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 23 August 2019	**On 27 November 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

D M M
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Rutherford, Counsel instructed by TRP Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Appellant. Breach of this order can be punished as a contempt of court. I make this order because the case touches on the welfare of children who are entitled to privacy and may be harmed by publicity.
2. This is an appeal by a citizen of Kenya against the decision of the First-tier Tribunal dismissing his appeal against the decision of the respondent to refuse him leave to remain on human rights grounds. The appellant is subject to deportation because, as a consequence of his criminal record, the Secretary of State has decided that his presence in the United Kingdom is not conducive to the public good. Permission to appeal was given by a Deputy Upper Tribunal Judge on a very limited basis. He said:

> "It may be argued that the Judge failed to follow the law as now expressed in **KO (Nigeria)**. Leave is given only on the basis of the ground at paragraph 8."

3. The "ground at paragraph 8" refers to the decision of the Supreme Court in **KO (Nigeria) and others v SSHD [2018] UKSC 53**. That decision was handed down on 24 October 2018 and so clearly could not have been in the mind of the First-tier Tribunal Judge when he dismissed the appeal on 26 September 2018.

4. In the renewed grounds Counsel said:

> "In addition to the material errors of law identified above since those grounds were drafted and submitted to the First-tier Tribunal, the Supreme Court has recently given judgment in **KO (Nigeria) and others v SSHD [2018] UKSC 53**. It has been confirmed that the statutory scheme is such that if all the elements of an exception are met then the public interest is outweighed by the breach of the Appellant's human rights. At paragraph 112 the Judge comments that when assessing the public interest, he notes that between 2010 and 2017 the Appellant had seventeen convictions for 23 offences and has had one previous deportation appeal and that the other two offences which led to this deportation order being made were serious and put his family and the public at risk of harm. Following **KO** it has been clarified that the Judge does not need to assess the public interest in this way. The fact that the Appellant meets the criteria for deportation means that there is a public interest in his deportation and the question for the Judge is whether or not, in accordance with the statutory scheme, all the elements of an exception are met and if they are, then the public interest is outweighed by the breach to the Appellant's human rights."

5. The concern implicit in the grant of permission is that the First-tier Tribunal wrongly considered the need for deportation in determining whether the relevant criteria had been met and in particular, in this case, if the effects on the children was unduly harsh whereas the assessment of what is "unduly harsh" should have made without reference to the interest in deportation but to the needs of the children.

6. The First-tier Tribunal Judge clearly cannot be blamed for expressing himself in a way that leant itself to this criticism. Before the decision in **KO** it is unlikely that anyone would have been concerned by that approach.

7. That said, I must now look at the decision and decide what the judge actually did. The Decision and Reasons notes that the appellant was born in 1991 and came to the United Kingdom when he claimed asylum as the dependant of his mother in March 2002. The application was unsuccessful but he was given indefinite leave to remain when his mother was given such leave in November 2005.

8. In March 2012 he was convicted of burglary and sentenced to sixteen months' imprisonment. A deportation was made but the appeal against deportation was allowed by the First-tier Tribunal in February 2013.

9. In April 2017 he was convicted at the Crown Court sitting at Warwick of possessing a bladed article in a public place and was sentenced to nine months' imprisonment. He was sentenced to a consecutive term of three months for an arson offence and the decision to deport was made following these convictions.

10. He had established a private and family life with a partner and their three children. The children are British nationals under the age of 18 but the Secretary of State did not accept that the appellant had a "genuine and subsisting parental relationship with the children". It was accepted that there was some contact between him and the children but not that he was involved in any decision making.

11. The Secretary of State did not accept that it would be "unduly harsh" for the children to remain in the United Kingdom without the appellant. This was based on his not having established a parental relationship and on the children being in the day-to-day care of their mother. Indeed, there were concerns about their safety in the home if the appellant were to return there.

12. The Secretary of State did not accept the appellant had a "genuine and subsisting" relationship with the partner. She was the victim of one of his more recent offences and the appellant's licence conditions required that he did not approach her or communicate with her without the prior approval of the supervising officer. She had visited the appellant in prison but had not supported him by giving evidence in the appeal.

13. The Secretary of State accepted that the appellant had been lawfully resident in the United Kingdom for most of his life but not that he was fully socially and culturally integrated into the United Kingdom. That would be at odds with his having been convicted of a total of 21 offences on, I think, seventeen occasions.

14. It was not accepted that there were very significant obstacles to the appellant's integration into Kenya. It was thought that he has some cultural and linguistic ties to the country from his having lived there as a boy.

15. The judge then considered the evidence before him.

16. Of particular relevance was the decision after a Review Child Protection Conference that the appellant be allowed to return to the family home of his partner and children and reside there from Thursday until Sunday every week. He had also benefitted from a meeting with the West Midlands Fire Service who had helped him understand the consequences of uncontrolled fire and had helped him appreciate the seriousness or potential seriousness of the offence described generically as "arson".

17. The appellant explained that although he had successfully avoided deportation on an earlier occasion he had not then reordered his life. He had kept the same bad friends and had, unsurprisingly, offended again. However, much had happened in his life to cause him to rethink. Not only had he been to prison and was again the subject of deportation proceedings but he had been stabbed after release from custody and had been diagnosed with tuberculosis. Both of these things were described as "life threatening" and he claimed they had had an enormous impact upon him.

18. The appellant said he had been to Kenya on two occasions. One visit was for a holiday in 2007. He never had proper employment in the United Kingdom but he had done some "cash in hand work" working for a mosque. He had helped arrange parking.

19. He had no family in Kenya and would be an outsider.

20. The appellant's partner supported him and gave oral evidence. She would be "very sad" if he was returned to Kenya and missed the support he gave in managing the children.

21. The judge heard oral evidence from the appellant and described him as an "intelligent and articulate young man". However, the judge did not find him reliable. Rather he found he was telling again the story that had been successful when his case was last heard following a deportation order. The judge said of the evidence of the partner that her evidence was treated with caution. He said:

> "The sad fact is that since the arson attack in 2016, for long periods she has had to cope without the appellant being present in the home to support her. The appellant has not even been able to provide financial help as he does not work. All the witnesses have underplayed the extent to which K... S... has had to be a single parent mother as a result of the appellant's behaviour."

22. The judge described the more recent child protection plan as "more encouraging". The judge accepted that the appellant does enjoy a "genuine and subsisting relationship with both his partner and his children". He then directed himself to the public interest.

23. I set out below all that the judge said because it was important given the nature of the appeal before me. The judge said at paragraph 111:

> "(*a) Public interest in removing the appellant:* the appellant is a 27 year old man who has never held any meaningful employment and has been committing offences since he was a teenager (for which he has been in custody on three separate occasions). Having persuaded the previous Tribunal at his first deportation appeal hearing several years ago that he had reformed and changed his ways and that he was at low risk of reoffending, he has continued to offend. The two convictions which led to his last period of imprisonment in 2017 had put at risk of harm his own family and the wider public. The details of the arson incident are alarming. I am not persuaded by the account which he gave in his statement to Mr Cooper (social worker) about why he was carrying a knife on the day that he was arrested by the police. I simply do not believe the appellant when he says that he was somehow unlucky to have been encountered by the police on the one day that he was caught carrying a knife for protection related purposes."

24. The judge did not believe that the appellant told the truth about his personal circumstances. He did not believe that the appellant no longer associated with the people who were with him when he got into trouble. He did not believe there had been material change in the circumstances since he was last subject to deportation.

25. At paragraph 117 the judge said:

> "Looking at everything in the round, I find that the appellant still continues to be at risk of reoffending and the public are still at risk of harm. I am far from persuaded that he no longer poses a risk of reoffending or poses a risk of harm to others. He has been given chances by both this Tribunal and by the criminal courts to reform himself. However, his offending is getting more serious and this is reflected in his last two convictions. There is a significant public interest in deporting him."

26. The judge then considered the appellant's "Article 8 rights" and those close to him. The judge noted that it was not in dispute that the appellant enjoyed family life with his partner and children. The ages of the children were given. The eldest, T M, was born in October 2014. The second, T A, was born in September 2015 and the youngest, T Y, was born in May 2017. The judge noted the appellant had not been a continuous presence in their lives and there had been local authority involvement. He concluded that the children "are therefore used to living without their father being a presence in the family home".

27. The judge also found that the appellant's partner would be supported by her close-knit family in the United Kingdom and given help in raising three children as a single parent mother. The judge noted that some contact could be preserved even if the appellant was in Kenya. The judge concluded that deportation would not be "unduly harsh".

28. I note the judge was very aware that the significance of the decision and reached his conclusions carefully.

29. I have considered Ms Rutherford's appropriately pithy.

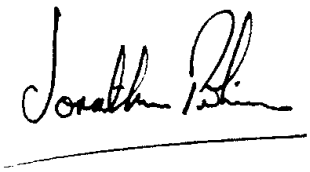
30. On this occasion I agree with Mrs Aboni that when the Decision is read carefully it is quite apparent that the judge has not misdirected himself materially when applying the "unduly harsh" test. Although the judge did look at the history, the conclusion that the appellant's deportation was in the public interest is unremarkable. It is impossible to look at this and say that the judge has raised the standards required to satisfy the unduly harsh test because of the severity of the offending. That approach, we know, would be wrong if allowing the decision in **KO** but it is just not what the judge did.

31. It has taken rather a long way to reach this conclusion but it is plain to me that the wholly justifiable concerns of the Deputy Upper Tribunal Judge when granting permission are not realised when the case is examined properly.

Notice of Decision

32. I dismiss the appeal against the First-tier Tribunal's decision.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 25 November 2019