Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14580/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 6 December 2018	**On 19 February 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

BANDIBOMBE [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Sobawale, instructed by Arndale Solicitors
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision which is dated 16 October 2018, Upper Tribunal Judge Hanson found that the First-tier Tribunal had erred in law such that the decision fell to be set aside. His reasons for reaching that conclusion were as follows:

> "1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Cox, promulgated on 4 May 2018, in which the Judge allowed the appellant's appeal against the respondent's refusal to revoke a deportation order made on the 21 May 2013. The Judge found that the decision was incompatible with the appellant's human rights. The reference to the parties as appellant and respondent is to their status as they appeared before the First-tier Tribunal.

Background

2. The appellant was born on 15 January 1973 and is a citizen of the Democratic Republic of Congo. The appellant entered the United Kingdom on 6 September 2003 and claimed asylum on 11 September 2003. The appellant secured a visit Visa in Addis Ababa on 20 March 2003. On 30 September 2008 the appellant was convicted at Leeds Crown Court for possessing a false/improperly obtained identity document and sentenced to 6 months imprisonment suspended for 2 years. The appellant had been served with IS151A for entering the United Kingdom on a false document.

3. On 7 January 2010 the appellant was convicted at Leeds Crown Court for possessing a false/improperly obtained identity document, 2 counts of failing to disclose information to make gain for himself or to cause loss to another and breach of the suspended sentence. The Court sentenced the appellant to 16 months imprisonment four months of which resulted from the original conviction.

4. The appellant's appeal against the order for his deportation from the United Kingdom was dismissed on 20 August 2013. The appellant became appeal rights exhausted on 7 January 2016. Further submissions were lodged on 18 April 2016 and 1 February 2017 with a request for the respondent to revoke the deportation order.

5. The appellant met his wife in 2006 and they commenced cohabitation on 1 June 2008. On 11 June 2012 the appellant married and on 26 June 2015 a child was born. The appellant and his family live in Leeds with the appellant's wife working part-time with the University of Leeds as an Educational Staff Development Coordinator with an annual income of £10,000.

6. The appellants nationality is not disputed nor that he has a genuine and subsisting relationship with his wife and a parental relationship with his daughter.

7. The Judge at [42] sets out a self-direction that ultimately the question to be determined is how a fair balance should be struck between the competing public and individual interests involved.

8. It was accepted the appellant came within paragraph 398(b) of the Immigration Rules and the sole issue to be determined thereunder is whether it would be unduly harsh for the appellant's daughter to remain in the United Kingdom if he was to be deported. The Judge at [46] refers to the decision of the Court of Appeal in MM (Uganda) [2016] EWCA Civ 617 in which it was found that assessing whether the impact is 'unduly harsh' requires an assessment of the public interest in removing foreign criminals and the need for a proportionate interference in any article 8 rights.

9. The Judge was satisfied that great weight was to be given to the public interest in removing the appellant as a foreign criminal [50]. The Judge noted the appellant had been in the United Kingdom unlawfully for over 14 years and is the subject of a signed deportation order [51] and that the appellant commenced his relationship with his wife at a time he was in the United Kingdom unlawfully and his status precarious [52]. The Judge balances this by reference to the appellant's daughter whom he takes to nursery and whom he looks after whilst his wife is working at the University [53].

10. The Judge attached no weight to the appellants evidence in light of his conviction for dishonesty and forceful observations about his character made in the earlier decision [54] but noted the benefit of the appellant's wife's evidence. At [56] the Judge writes:

> "56. However, I have had the benefit of [H]'s evidence. The Presenting Officer noted that she began the relationship with her eyes open. She knew his immigration and criminal history and therefore knew there was a risk that they could be separated. He also noted that they had conceived a child prior to the previous hearing and submitted that this was an attempt to bolster his case. In my view, the Presenting Officer has acted unfairly. This is a very serious accusation, but he did not put this to the witness. She has not had an opportunity to respond and I noted that she told me that she had a miscarriage at the time."

11. At [56] the Judge records he found the appellant's wife to be an impressive witness leading to a conclusion at [59] that the Judge felt able to go behind the assessment of the earlier tribunal as to the appellant's approach to the relationship.

12. The Judge took the child's best interests into account as a primary consideration and concludes at [62] that he can go behind the earlier findings in respect of the child's best interests on the basis that concerns recorded in 2013 did not reflect the true situation.

13. At [67- 78] the Judge draws together the threads of the assessment in the following terms:

> "67. I have found this appeal difficult to determine and issues are finely balanced. The Appellant has to identify "very compelling reasons" against deportation. On the one hand, the Appellant has 2 convictions for 5 offences committed between 30 September 2008 and 17 January 2010 including for possession of a false documents and for failing to disclose information to make gain for himself or to cause loss to another. The Presenting Officer advised that the cost to the public was approximately £14,000, a significant sum of money.
>
> 68. The Appellant also breached a suspended sentence. As was noted by the sentencing judge, this is particularly disquieting, as the first judge had effectively given the Appellant a chance to change and he did not do so.
>
> 69. Further, the public interest in the maintenance of a deportation order of those who have committed a crime goes well beyond merely depriving the offender in question from the chance to reoffend in the UK: it extends to deterring and preventing serious crime generally and to upholding public abhorrence of such offending.
>
> 70. In addition, the Appellant's immigration history ways against him. He has been residing illegally in the UK for over 14 years, married his wife, after deportation proceedings had commenced and has been subject to deportation order for nearly 5 years.
>
> 71. Notwithstanding the seriousness of the offence and his extremely poor immigration history, on balance, I am satisfied that the Appellant discharged the burden of proof. He has demonstrated that it would be unduly harsh for his daughter to remain in the UK without him.

72. Although the offences are serious, significantly, the sentencing judge when making a recommendation for deportation, stated "apparently…. I am required to do so" (M4 of the Respondent's first bundle). In my view, this suggests that the Judge may not have made the recommendation, if they had a choice, in my view, this slightly dilutes the public interest in the Appellants deportation. By way of possible explanation for the Judge's possible reluctance, I note the Judge also describes the Appellant as a hard-working individual.

73. In addition, I am satisfied that there is a very low risk of the Appellant reoffending. The FTT had not been able to properly assess the risk of reoffending, but it is now over 8 years since he committed any offence. In my view, this is relevant, in so far as it demonstrates his commitment to the relationships with his wife and daughter.

74. Further, the Appellant's daughter is nearly 3 years old and he shares responsibility for her with his wife. I am satisfied, in contrast to the FTT, that he has a positive and formative role to play in her upbringing. In my view, this factor is very significant and weighs heavily in the Appellant's favour.

75. Further, the Appellant and his wife have been in a long-term relationship for over 12 years. In my view this is an additional factor in the Appellant's favour. They are likely to provide a stable and loving environment for their daughter.

76. Although the Appellant has not provided independent evidence of the likely impact on the daughter, I am satisfied that I can attach weight to his wife's evidence. The effect of the decision is that he will be permanently separated from his wife and daughter and that his wife told me that they will be devastated.

77. Finally, the Respondent conceded that it would be inappropriate for the child to leave the UK. In my view, this is an important consideration. I attach very significant weight to the fact that the family unit would be separated, probably permanently, at the very least for the child's formative years. I am satisfied that this would be wholly contrary to the child's best interests.

78. On the totality of the evidence, I am satisfied that the Appellant has demonstrated on balance that it would be unduly harsh for his daughter to remain in the UK without him. In my view, there are cumulatively, very compelling factors that outweigh the strong public interest in the Appellants deportation. Accordingly, I am satisfied that the Appellant meets the requirements of paragraph 398, having regard to sections 117 A – 117 C of the 2002 Act.

79. Although this is not determinative of the appeal, the Presenting Officer has not raised any other factors that weigh against the Appellant."

14. The Judge at [81] finds that the proposed interference in the appellant's family life with his daughter is unnecessary having attached significant weight to the finding it will be unduly harsh for the appellant's daughter to live in the United Kingdom without him.

15. The Secretary of State sought permission to appeal which was granted on 4 June 2018 by another judge of the First-Tier Tribunal, the operative part of the grant being in the following terms:

> "3. The grounds argue failure to have regard to relevant case law and to identify anything sufficiently compelling about the Appellants circumstances. The relatively brief reasoning at paragraphs 71 – 78 of the decision, indicating at paragraph 76 the lack of any independent evidence as to the effect on the child of separation from her father, supports and renders arguable this contention.
>
> 4. There is therefore an arguable error of law disclosed by the application."

Error of law

16. The appellant's appeal is against the respondent's refusal to revoke the deportation order on the basis that doing so will breach his human rights and/or those of his family. It was conceded the key issue in relation to this matter is the question of whether the appellant's removal will be unduly harsh upon his 3-year-old daughter.

17. Whilst the focus of the Judge upon the relationship between the appellant, his wife, and daughter was an integral part of the process, the Judge was required to undertake it is arguable from reading the decision that it appears the Judge based the decision to allow the appeal upon such relationship without an adequately assessment of the question of whether the appellant's removal would be 'unduly harsh'.

18. In MM (Uganda) and [2016] EWCA Civ 450 it was held that the phrase 'unduly harsh' plainly meant the same in section 117C(5) of the 2002 Act as it did in paragraph 399 of the Immigration Rules. It was an ordinary English expression coloured by its context. The context invited emphasis on two factors: first, the public interest in the removal of foreign criminals and, secondly, the need for a proportionate assessment of any interference with Article 8 rights. The public interest factor was expressly vouched by Parliament in section 117C(1). Section 117C(2) provided that the more serious the offence committed, the greater the public interest in deportation. That steered the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly, the more pressing the public interest in his removal, the harder it would be to show that the effect on his child or partner would be unduly harsh. Any other approach would dislocate the 'unduly harsh' provisions from their context such that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation. In such a case 'unduly' would be mistaken for 'excessive', which imported a different idea. What was due or undue depended on all the circumstances, not merely the impact on the child or partner in the given case. The expression 'unduly harsh' in section 117C(5) and paragraph 399(a) and (b) required consideration of all the circumstances, including the criminal's immigration and criminal history.

19. In IT (Jamaica) [2016] EWCA Civ 932 it was held that the First-tier Tribunal had not given appropriate weight to the public interest when revoking a deportation order made against a foreign criminal. The undue harshness standard in section 117C of the Nationality, Immigration and Asylum Act 2002, read in the context of the Immigration Rules, meant that a deportee had to

demonstrate that there were very compelling reasons for revoking a deportation order before its expiry.

20. It is accepted the Judge makes reference to some of the above case law and takes into account the appellant's immigration history and criminality and the consequential decision to deport the appellant from the United Kingdom which was upheld on appeal. This is therefore not an appeal against the initial decision to deport or an assertion that making such a decision would be contrary to the appellant's human rights, as an appeal on that basis was dismissed by the First-Tier Tribunal earlier as noted by the Judge.

21. The appellant's argument is that even though the deportation order had not been executed, in that the appellant has not been removed from the United Kingdom, to do so now would be a disproportionate breach of his protected rights.

22. The Judge was arguably correct not to find that would be unduly harsh for the appellant's wife to remain in the United Kingdom without him as there was no evidence to support such a contention and the parties were fully aware of the appellant's immigration history when they entered into their relationship.

23. The Judge seems to be of the opinion that the physical separation of the appellant from his daughter is a major factor, but this is the effect of deportation.

24. It is arguable the Judge was required to do more than to find that, even if contrary to the child's best interest to be separated from her father, this meant the requisite test was satisfied. Whilst accepting a strong public interest in the appellant's removal it is made out the Judge did not properly consider all relevant factors and undertake the exercise required of him when applying the undue harshness test.

25. The submission on the appellant's behalf that the Judge did not make the decision in isolation is not made out, as the failure to assess matters by reference to relevant case law, as referred to in the Secretary of States application for permission to appeal and subsequent submissions, indicates this is precisely what the Judge did.

26. The submission there was no possibility of contact with the child if the appellant was deported was not made out on the evidence. Even if physical contact will be problematic in terms of the child travelling to the DRC it is not made out indirect contact could not be facilitated or anything adverse in the nature of the relationship and contact between the appellant and the child being changed to such a basis, beyond the impact of the initial separation.

27. The Judge noted the child was 3 years of age but there was no independent evidence, contrary to submissions to the contrary at the Initial hearing, to support the contention that separation would be unduly harsh by reference to any adverse impact upon the child.

28. Although it was submitted that the circumstances justify the decision and that is in the range of those reasonably open to the Judge on the evidence this argument cannot be substantiated in light of the failure of the Judge to consider all the evidence with the required degree of anxious scrutiny and undertake the required legal test.

29. It is not disputed that the appellant may have a strong relationship with his daughter and she with him, but this is not the determinative factor, per se.

30. There is merit in Mrs Peterson's argument that the Judge gave more weight to the evidence of the wife and therefore failed to address a proper test set out in case law and to make proper findings in relation to the same.

31. I find the Secretary of State has made out his case and find material error of law in the decision to allow the appeal in relation to the finding that the appellant's removal from the United Kingdom would have unduly harsh consequences for his daughter, such as to make the decision to refuse to revoke the deportation order disproportionate. The decision of the First-Tier Tribunal shall be set aside. The appellant's immigration, criminal, and family history shall be preserved findings as shall the findings in relation to the nature of the relationship between the appellant, his wife and their daughter. The issue to be determined remains whether the effect of the appellant's removal from the United Kingdom upon his daughter will be unduly harsh in light of the fact that neither the appellant's wife nor daughter are to be removed from the United Kingdom; making this a family splitting case.

32. The appeal shall be further considered by the Upper Tribunal in accordance with the following directions:

a. List for a Resumed hearing before Upper Tribunal Judge Hanson on the next available date sitting at Bradford. Time estimate 3 hours.

b. If the appellant requires an interpreter for the purposes of giving evidence his representative must advise the Tribunal of the language and dialect required, no later than 14 days from receipt of this decision.

c. The appellant must file with the Upper Tribunal and serve upon the respondent's representatives a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely no later than 4 PM 23 November 2018. Witness statements in the bundle must be signed, dated, and contain a declaration of truth. Such statements shall stand as the evidence in chief of the maker who shall be tended for the purposes of cross-examination and re-examination only.

d. Evidence not filed in accordance with the time limit provided above shall not be admissible without the express permission of the Upper Tribunal, such permission to be sought by a proper application filed before the expiration of the time limit which clearly identifies: (i) the reason for failure to comply with this direction, (ii) the person responsible, (iii) the nature of the evidence the appellant is unable to file within the specified time limit and the issue it seeks to address, (iv) when such evidence is likely to be available, (v) whether the respondent consents to the evidence being provided late, and (vi) the effect on any hearing date of that evidence being provided outside the permitted period.

Decision

33. The First-Tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. This appeal shall be managed in accordance with the directions set out above to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal."

2. Following the making of a transfer order, I heard the appeal at a resumed hearing on 6 December 2018 at Bradford when Mr Sobawale of Counsel appeared for the appellant and Mrs Pettersen, a Senior Home Office Presenting Officer, appeared for the respondent.

3. Particulars of the appellant's offending and the preserved findings from the First-tier Tribunal are contained in Judge Hanson's decision [31]. Judge Hanson summarised the issue before the resumed hearing as being

> "whether the effect of the appellant's removal from the United Kingdom upon his daughter will be unduly harsh in light of the fact that neither the appellant's wife nor daughter are to be removed from the United Kingdom; making this a family splitting case."

4. The appellant gave evidence in English. He explained that he cared for his daughter on a "day-to-day basis". He did not want to be a "stereotypical father" who left childcare entirely to the mother. The appellant cannot work so he spends a lot of time with her. Cross-examined by Mrs Pettersen, he explained that his daughter attends nursery three days a week (Tuesday, Wednesday, Thursday). The appellant's wife had never been to DRC. The appellant said that his wife's brother, parents and sister lived in Leeds but that they did not support the family financially. The appellant's wife works at the University of Leeds.

5. I heard evidence from Mrs [M]. She also spoke in English and adopted her written statement as her evidence-in-chief.

6. I reserved my decision.

7. As the First-tier Tribunal Judge had observed, the appellant's immigration history is very poor. He had resided illegally in the United Kingdom for over fourteen years and has got married during that period indeed doing so after the deportation proceedings had commenced against him; he has been subject to a deportation order for five years. The appellant had also breached a suspended sentence.

8. The appellant has to show that he falls within the Exception set out in Section 117C(5) of the 2002 Act:

> '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.'

9. I have read and agree with Judge Hanson's summary of the jurisprudence concerning the meaning of "unduly harsh" at [18] of his error of law decision. The appellant's child was born in June 2015 so is 3 years old.

10. Mr Sobawale submitted that the appellant's offence was not particularly serious, set against deportation occasioned by offences of violence, drugs or of a sexual nature. However, what is clear from *KO (Nigeria) 2018 UKSC 53* is that the nature of the father or the parent's offending is not a consideration in the determination of the best interests of a child. Just as the seriousness of offending should not feature as a factor

raising the threshold of "best interests" or, indeed, "unduly harsh" so the converse must also pertain. Even assuming that the appellant's offending can be categorised as "less serious" (and that remains debateable) that cannot be a factor which renders separation unduly harsh and which impacts on the child's best interests more readily than would have been the case with "more serious" offending. Offending is essentially neutral as a factor in the analysis.

11. Both advocates at the resumed hearing discussed the possibility of the family having to meet up in a third country (Mrs Pettersen suggested a "tourist destination") for face-to-face meetings given that both parties accept that the DRC is currently too dangerous for either the appellant's wife or the child to visit. Taking a 'real world' view, I find that there is little likelihood of direct contact occurring even infrequently in a third country. I consider that this appeal has to be determined on the basis that the physical separation of the appellant and his partner and child are likely to be long term and that, whilst there may possibly be sporadic contact face-to-face, the maintenance of any relationship will have to occur by way of written and electronic communications. The question, therefore, is whether, given the nature of the separation as I have characterised it, it would still be unduly harsh for the child and her partner to be separated from the appellant.

12. Judge Hanson drew attention to the absence of any independent evidence regarding the likely effect of separation from the appellant upon the child. However, I also record Mr Sobawale's submission that it is a difficult to see what meaningful evidence could be produced by an expert given that the child is only 3 years old.

13. Whilst I am sympathetic to Mr Sobawale's submission, that the fact remains there is no evidence to support his submission (see skeleton argument at [14]) that the impact of removal

> "... on A's daughter would be in the short, medium and long term surpass the level of harshness deemed acceptable for the child of any deportee in a family split case given that the prevailing country situation in the DRC precludes the appellant's partner or daughter from ever visiting or maintaining a family life of any substance following A's forced removal."

In a great many cases where families are split, the non-resident parent completely ceases contact with the child. Such a definitive separation may occur when all the parties are in the same country let alone when they are separated by thousands of miles as will occur in the instant appeal. The reality in this case is that the parent and child will be completely separated at least for the foreseeable future. However, I find that such a separation does not involve a degree of harshness which would go beyond what would necessarily be faced by any child whose parent is deported. A finding of undue harshness, like any finding, can only be made if there is evidence to support it and, in this case, there is no evidence to show the impact of deportation on the child would extend beyond what one would expect in any case of separation thereby rendering it 'unduly' as opposed to only 'harsh'. Mr Sobawale's submission that the impact of separation on this child would 'surpass the level of harshness deemed acceptable for the child of any deportee' is simply not supported by any

evidence. I appreciate the difficulties faced by the appellant and his representatives. The child is so young that it would be pointless and, indeed, probably harmful to ask how the child may feel if the father were to be deported, questions which a child of such an age is unlikely to be able even to comprehend let alone answer coherently. With no enthusiasm, therefore, I am drawn to the conclusion that the appellant has failed to satisfy the provisions of the Exception set out in Section 117C(5). In consequence, the appeal is dismissed.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.

Signed Date 1 February 2019

Upper Tribunal Judge Lane

TO THE RESPONDENT

No fee is paid or payable and therefore there can be no fee award.

Signed Date 1 February 2019

Upper Tribunal Judge Lane