IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01043/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 01 September 2015	**On 03 September 2015**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SIMBA MAYEMBE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Respondent : Mr A Otchie, counsel, instructed by Victory at Law Solicitors
For the Appellant : Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals against the decision of Judge of the First-tier Tribunal Swaniker who, in a determination promulgated on 06 May 2015, allowed the Appellant's appeal against the Secretary of State's decision of 29 May 2014 to make a deportation order against him pursuant to section 32(5) of the UK Borders Act 2007.

2. For the sake of convenience I will refer to the parties as they were before the First-tier Tribunal.

Background

3. The Appellant is a national of the Democratic Republic of Congo (DRC), date of birth 11 February 1993. He entered the United Kingdom in 2004 when he was 11 years old as a dependent of his parents. In 2007, following an earlier refusal of his father's asylum application, the Appellant was granted Indefinite Leave to Remain outside the immigration rules in line with that of the rest of his family.

4. On 25 October 2012 the Appellant was convicted of robbery of a taxi driver at knife-point and a further offence during the operational period of a suspended sentence. He was sentenced to a total of 3 years imprisonment, the robbery offence attracting a sentence of two and a half years. These offences were committed when the Appellant was 19 years old. The Appellant has previous convictions for criminal damage and theft in 2009, and possession of a class A drug and robbery in 2011. He received a 10 months suspended sentence in respect of the 2011 robbery, which had been suspended for 24 months.

5. Having satisfied herself that the section 32(5) of the UK Borders Act 2007 applied to the Appellant by reason of his conviction and sentence of over 12 months imprisonment, the Respondent considered whether the Appellant fell within any of the exceptions contained in section 33 of the same Act. Having considered the Appellant's background the Respondent found that the Appellant did not meet the requirements set out in paragraph 399(a) or (b) or 399A of the immigration rules and that there were no exceptional circumstances, as required by paragraph 398, outweighing the public interest in his deportation. The Respondent's assessment took account of the fact that the Appellant had a British national child with his ex-partner, who was born on 04 February 2010. The Respondent accepted that it would be unreasonable to expect the child to leave the United Kingdom as she was a British citizen and had lived in the United Kingdom all her life. The Respondent was however of the view that the child could remain with her mother in the United Kingdom.

Decision of the First-tier Tribunal

6. The Appellant's appeal against this decision was heard on 11 March 2015. The Judge heard evidence from the Appellant, his sister, his mother, his father, and the estranged mother of his daughter. The Judge first considered whether the Appellant met the requirements of the immigration rules relating to deportation decisions. The Judge considered the immigration rules as they were when the deportation decision was made (29 May 2014). The Judge concluded that the Appellant could not meet the requirements of paragraph 399(a) as the mother of his daughter would be able to care for her in the United Kingdom. The Appellant was not in a relationship within anyone within the terms of paragraph 399(b). The Judge then went on to consider, in the context of the immigration rules constituting a complete code, whether there were exceptional factors such as to render the

deportation a breach of section 6 of the Human Rights Act 1998. In so doing the Judge had regard to all the factors listed in section 117A to D of the Nationality, Immigration and Asylum Act 2002. The Judge paid particular regard to the Appellant's relationship with his daughter and the impact on the child's relationship with her father in the event of his deportation. Having regard to the evidence before her the Judge found the Appellant's deportation would have an unduly harsh impact on the child. The Judge then went on to consider the fact that the Appellant had lived in the United Kingdom since he was 11 years old (he was 22 years old at the date of the appeal hearing), that he had not returned to the DRC since his arrival and that he had no family in that country. The Judge fully considered the seriousness of the Appellant's criminal history and his index offence that led to the deportation order, and the strong public interests in his deportation. The Judge found that the Appellant's offence fell towards the lower end of the scale of offending behaviour and that he was a young man of 19 years old when his index offence was committed. The Judge took account of the NOMS report relating to the Appellant and his conduct since his release from prison. Having holistic regard to her findings the Judge was satisfied that the public interest in the Appellant's deportation was outweighed by the impact on his family and that his deportation was not necessary in a democratic society.

The Grounds of Appeal to the Upper Tribunal

7. The Grounds contend that the First-tier Tribunal failed to consider whether there were very compelling circumstances over and above those contained in paragraphs 399 and 399A of the immigration rules, given that the Judge was not satisfied the Appellant met the requirements of paragraph 399. The Grounds further contend that the Judge erred in her assessment of the unduly harsh test. The Respondent submitted that the First-tier Tribunal relied on 'fundamentally normal' circumstances that did not establish an exception to the express requirement under section 117C that deportation was required. The Respondent contended that the decision to deport the Appellant was proportionate and in line with the seriousness of his offence. The Respondent stated that the child's primary carer was her mother, and that there was no evidence that the Appellant's presence was necessary to prevent the child being ill-treated or her development being significantly impaired. While the Respondent acknowledged that the Appellant's absence may result in 'some negative emotional impact on the child' the Respondent was of the view that the Appellant's relationship could continue through remote forms of communication and that there was no evidence the child would be unable to visit her father. The Grounds further argue that the Judge erred in law by finding that the Appellant's offence fell towards the lower end of the scale of offending on the basis that he was young, impressionable and led by bad company.

The error of law hearing

8. At the hearing Mr. Clarke, representing the Respondent, accepted that the drafter of the Grounds proceeded on the basis that the Judge considered the immigration rules as they were after 28 July 2014 rather than at the date of the decision. In these circumstances he proceeded to only rely on Ground 2, that relating to the Judge's assessment of 'undue hardship'. Mr Clarke submitted that the Judge was not entitled to find that the Appellant's offence was at the lower end of the offending spectrum. Mr Clarke pointed out the aggravating features of the offence, that it was pre-planned, that it was committed while the Appellant was subject to a suspended sentence, and that the victim was vulnerable (he was a taxi driver), and that the Appellant committed other offences in his youth. It was submitted that to be unduly harsh required something more than mere separation.

9. Mr Ochie, representing the Appellant, relied on his skeleton argument. He submitted that the Judge placed detailed reliance on the authority of **Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC)** and that she properly took account of the age of the child, the lack of contact the Appellant had with anyone in the DRC and the Appellant's relationship with his other family members.

10. I indicated that I would reserve my decision.

Discussion

11. The deport decision was made on 29 May 2014, prior to an amendment to the immigration rules on 28 July 2014 that altered the provisions relating to deportations. However, paragraph A362 of the immigration rules indicates that, "Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served." It is clear from both **YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292** (paragraph 39) and **Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC)** (paragraph 13) that, in the context of a deportation appeal, the Judge should have considered the immigration rules are they were at the date of the hearing and not at the date of the decision (consider also the authority of **MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC)**).

12. The Judge therefore misdirected herself in law when she considered the appeal in the context of the immigration rules as they were at the date of the decision. I must now consider whether this error of law materially undermined her decision. The amended form of the immigration rules, as from 28 July 2014, required, *inter alia*, that it be unduly harsh for the Appellant's child to live in the DRC, and that it be unduly harsh for the child to remain in the UK without the Appellant. This mirrors the wording of section 117C, as inserted from 28 July 2014 into the Nationality, Immigration and Asylum Act 2002 by the Immigration Act 2014. The Judge gave detailed consideration, in the context of Exception 2 in

section 117C, as to whether the effect of the Appellant's deportation on his child would be unduly harsh. At paragraph 29 the Judge specifically considered whether it would be unduly harsh for the child to live in the DRC or for the child to remain without her father in the United Kingdom. In so doing the Judge materially replicated the test established in paragraph 399(a)(ii) as of 28 July 2014. In these circumstances I am satisfied that, in substance, the Judge has considered the relevant test under paragraph 399(a)(ii) and that her consideration of the immigration rules as of the date of the deportation decision does not of itself materially undermine her determination.

13. In criticizing the Judge's assessment of the unduly harsh test the Respondent submitted that the Appellant's family life was 'fundamentally normal' and that his separation from his 5 year old daughter did not, without more, constitute undue hardship.

14. In assessing whether the Judge legally erred in concluding that the deportation would have an unduly harsh impact on the Appellant's daughter, both in respect of whether she could relocate to the DRC and in respect of her remaining without the Appellant in the United Kingdom, I take account of the recently promulgated authority of **MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 (IAC)**. Headnotes 2 and 3 of this authority establish that 'unduly harsh' is a high threshold. "Unduly harsh" for an individual involves "… *more than* "*uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging*" *consequences and imposes a considerably more elevated or higher threshold. The consequences for an individual will be* "*harsh*" *if they are* "*severe*" *or* "*bleak*" *and they will be* "*unduly*" *so if they are* '*inordinately*' *or* '*excessively*' *harsh taking into account of all the circumstances of the individual.*"

15. In **Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 00415 (IAC)** the Upper Tribunal held that the part 5A considerations in the Nationality, Immigration and Asylum Act 2002, as amended, only come into play, in the context of deportation appeals, at the stage involving a proportionality assessment under paragraph 398 of the immigration rules. With respect to consideration under paragraphs 399, as in the present appeal, part 5A considerations have no direct role when a court or tribunal is deciding whether an applicant meets the substantive conditions of that paragraph. This approach was endorsed in **MAB** where the Upper Tribunal indicated that, "… t*he phrase* "*unduly harsh*" *in para 399 of the Rules (and s.117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned.*"

16. Applying the above legal clarification to the determination under appeal, I am satisfied, for the following reasons, that the Judge properly applied the unduly harsh test in respect of the impact on the Appellant's daughter of his proposed deportation.

17. The Judge heard evidence from a number of witnesses, including his ex-partner, the mother of his child, relating to the extent and depth of his relationship with his daughter. The Judge found the evidence credible and was satisfied that the Appellant had a genuine and subsisting relationship with his daughter. The Judge noted the Respondent's concession in the decision under appeal that it was not reasonable to expect the child to relocate to the DRC given that she resided with her mother and was British. Given that the Appellant and the mother of his child, which whom the child resided, were estranged, the Judge concluded there was no realistic prospect of the mother abandoning her life, family and friends in the United Kingdom to enable the Appellant to continue enjoying a meaningful relationship with his daughter.

18. The Judge specifically found that the Appellant had a close and loving father-child relationship and that the Appellant was very much involved in the life of his daughter and was concerned for her welfare. The Judge found the evidence of the nature and quality of the relationship to be compelling. The Judge took account of the fact that the child was young, and noted the importance, at her stage of life, of the contribution and influence that the Appellant had on his daughter. The Judge made a finding of fact that, given the parties economic circumstances as appeared from the evidence before her, it was unlikely that the Appellant's ex-partner would be able to make many visits to the DRC with their daughter. The Judge found that the level of the Appellant's interaction and active participation in her life would come to an abrupt end upon his deportation. This was a conclusion the Judge was entitled to reach on the evidence before her.

19. The Judge found, as a matter of fact, that the Appellant's deportation would likely have a confusing and detrimental effect on his daughter who, at the age of 5, would be unlikely to understand why her father had to leave the United Kingdom. The Judge did not consider, on the particular facts of this case, that the possibility of remote communication could form any sound basis for maintaining and developing a parent-child relationship or act as a substitute for a meaningful relationship. The Judge concluded that the child would be seriously adversely affected by the deportation of her father and that to be deprived of his love and support would be unduly harsh. In so concluding the Judge had regard to what she found, as a fact, to be the inordinately severe impact on the child as required by the unduly harshness test. The Judge took account of all material considerations in reaching her conclusion as to the impact on the child and she applied the correct legal test.

20. Given that the focus in respect of the assessment under paragraph 399 is solely upon the evaluation of the consequences and impact upon the child, there was no requirement for the Judge to consider the factors under section 117A to D of the Nationality, Immigration and Asylum Act 2002, or for her to consider the circumstances and seriousness of the Appellant's offending.

Notice of Decision and Directions

The decision of the First-tier Tribunal disclosed no material error of law.

Signed

02 September 2015
Date

Upper Tribunal Judge Blum