Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16031/2016**

THE IMMIGRATION ACTS

Heard at RCJ	**Decision & Reasons Promulgated**
On 10th July 2017	**On 19th July 2017**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RSS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Mr Z Raza, Counsel instructed by Charles Simmons Immigration Solicitors

DECISION AND REASONS

1. The respondent (hereinafter referred to as "the claimant") is a citizen of India born on 16th July 1979. He is married to a British citizen and they have two children together, namely a daughter born on 5th July 2017 and a son born on 3rd December 2009. These children are also British citizens.

2. The claimant entered the United Kingdom unlawfully in November 2000 and a subsequent application for asylum was refused. He absconded and

was later arrested on 27th February 2002 following an assault of wounding by the use of a knife. He failed to surrender to bail and absconded yet again, this time fleeing to the Netherlands where he lived for a number of years until his arrest on 20th November 2009 under a European arrest warrant and was extradited back to the United Kingdom. He was convicted on 17th June 2010 and an eighteen month prison sentence imposed.

3. Subsequently, he was served with a deportation order and lodged an appeal against that. The appeal was successful and the claimant was granted three years' discretionary leave to remain in the United Kingdom. Such was valid until 5th March 2015. On 24th February 2015 the claimant submitted an application for further leave to remain in the United Kingdom but on 9th November 2015 a decision was made by the Secretary of State to deport the claimant. That notice to deport was upheld and a refusal notice dated 22nd June 2016 was submitted. Reliance is placed by the Secretary of State upon the guidance as set out in Chapter 13 of the Immigration Directorate Instructions which provides that a person previously granted leave on the basis of Article 8 will only be given further leave if he qualifies under the Article 8 provisions as set out in paragraphs 398 to 399A. The Secretary of State contends that the claimant does not fall within any of the exceptions in Section 33 of the UK Borders Act 2007.

4. The matter came before First-tier Tribunal Judge Holt on 28th October 2016. In a very detailed determination the Judge looked at the circumstances of the claimant, his wife and family and concluded that in, seeking to strike a fair balance between the rights of the claimant and the public proper consideration should be given to the best interests of the children, and that accordingly the appeal should be allowed.

5. Challenge is made to the overall framework of the decision, in particular to paragraph 13 of the determination in which the Judge applied **MAB (para 399; "unduly harsh") USA [2015] UKUT 00435** finding as he did that the focus was to have been entirely upon an evaluation of the consequences and impact of the individual concerned. "Unduly harsh" involved more than "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging".

6. The Secretary of State seeks to argue and with some merit that that approach as set out under **MAB** is no longer the correct approach in the light of the decision of the Court of Appeal in **MM (Uganda) & Anor [2016] EWCA Civ 617**. It is necessary to determine in particular whether it would be unduly harsh for the child to live in a country to which the person is being deported and also whether it would be unduly harsh for the child to remain in the United Kingdom without the person to be deported. It was necessary in making that assessment to bear in mind the public interest in removal as part of the overall context. The more pressing the public interest in removal the harder it would be to show that the effect on child or partner would be unduly harsh and that the expression "unduly harsh" in Section 117C(5) and Rule 399(a) and (b)

require regard to be had to all the circumstances including the criminal's immigration and criminal history.

7. Thus it is said on behalf of the Secretary of State that the analysis conducted by the Judge in relation to the claimant fails to focus upon the relevant issues and is therefore defective.

8. Mr Raza, who represents the claimant accepts that there was an error of law in paragraph 13 but submits that when viewed as a whole it is entirely apparent that the Judge, in considering all the personal circumstances of the claimant, the claimant's wife and children, had clearly come to the conclusion that it would be unduly harsh to remove the claimant from the jurisdiction. Thus he submits that if the Judge had applied **MM** that the outcome would have been the same on a factual basis.

9. One of the difficulties in this matter is that apart from mentioning the meaning of "unduly harsh" in paragraph 13 in the context of **MAB**, the Judge does not highlight that matter specifically in the judgment that is set out.

10. The consideration of "unduly harsh" occurs at a number of points in the legal framework, particularly given the application of the policy applied by the Secretary of State.

11. Under paragraph 398 deportation is deemed to be conducive to the public good for someone who has been convicted of an offence and sentenced to a period of imprisonment of less than four years but at least twelve months. In the circumstances it will be necessary to consider whether paragraph 399 or 399A applies so as to outweigh the public interest in deportation.

12. In that connection it is necessary to consider whether paragraph 399 applies, bearing in mind that there is no issue other than that the claimant has a genuine and subsisting parental relationship with his children, both of whom are British citizens and both of whom have lived continuously in the United Kingdom since 31st December 2009. The issue therefore would be whether it was unduly harsh for the children to live in a country to which the claimant is to be deported or unduly harsh for them to remain without him.

13. It is perhaps difficult to argue that paragraph 399 applies to the relationship with his wife as the relationship was formed when the claimant was living in the Netherlands at the material time.

14. However, Section 117C sets out additional considerations in cases involving foreign criminals, addressing the more serious the offence committed the greater the public interest in deportation, setting out exception (1) or exception (2). Exception (2) is the more appropriate, namely whether the claimant has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship

with a qualifying child and that the effect of deportation on either partner or child would be unduly harsh.

15. Mr Duffy on behalf of the Secretary of State invites me to find that this is a matter that should be remitted to the First-tier Tribunal for a full fact-finding analysis to be conducted in the light of the guidance provided in **MM**. Mr Raza, on behalf of the claimant, submits that on a proper reading of the determination all relevant considerations have been made and proper findings on relevant issues set out.

16. In considering that argument I bear in mind that it is a very fact specific analysis and one conducted in great detail. Significant particularly that a previous decision of the Tribunal was taken into account by way of background. The starting point for the claimant's partner is that she met him when he was in the Netherlands working as a concrete finisher. The relationship was formed in 2001. They had hoped to marry, but her father had refused his consent because of the religious difference, the claimant being Sikh and she being Muslim. She joined the claimant in 2003. She was unaware that he was an absconder. He obtained employment and they were married in April 2005. Their first child was born in July 2007 in Amsterdam. By this time the claimant had secured legal residence in the Netherlands and had purchased a property in which he, she and the child lived.

17. On 20th November 2009 the claimant was arrested in the Netherlands on a European arrest warrant and extradited to the United Kingdom. In December 2009 their second son was born. As was recognised by Judge Holt such was a major upheaval for the family. The claimant's wife had bought a flat in her name and was forced to abandon the flat and sell it at auction, losing much money in the process and still owing money to a bank in Holland. There were financial challenges which survive to the current time. Having thought that they had a secure family life that security ended abruptly in the circumstances described.

18. Judge Holt noted at paragraph 17 that, following his release from custody, the claimant and his wife managed to set up their own business in February 2012. It was a successful business with two full-time employees. They are currently in the throes of a planning application to acquire another business and to develop further. It is recognised that all parties, including the claimant are working hard to develop the business in a lawful and practical way. As was made clear to the Judge and recorded at paragraph 19, although there are other family members living in the area they would not be able to assist greatly in helping the business and were the claimant to be removed from the jurisdiction essentially she would be left on her own to run and manage the business as best she can.

19. One of the shortcomings, if one can put it this way, in relation to the determination that it sets out a number of facts that sometimes seems to fail to draw the various strands together. Clearly the Judge had in mind, not only the difficulties that would be created by the removal of the

claimant in terms of the business, but also historically that one secure life had been disrupted, both in terms of employment, family life, security and now another disruption would seem to be adding to it in a matter of a few years.

20. It seems to me that the cumulative effect of the experience in the Netherlands and the potential adverse outcome to the business in the United Kingdom is such as to meet the threshold of unduly harsh.

21. The previous determination also considered the difficulties which the claimant's wife would have if she accompanied the claimant to India on account of their mixed race. Such a course is relevant leading to the decision by the claimant's wife that she would not in fact be able to relocate with him and would remain in the United Kingdom.

22. So far as the children are concerned, once again the background is important, although perhaps to a lesser extent. The first child grew up for a number of years in Amsterdam and then had to relocate when very young, and the second child has no experience of the Netherlands. That having been said, it is clearly important for children to have some stability. The Judge at paragraph 22 looked at the nature of the integration of the wife and children in the UK, integration into the local community, the educational milestones of the ongoing educational needs and expressed the matter in this way at paragraph 22:-

> "Remaining in the UK, Ms N and the children would then suffer massive disruption as they attempted to set up a wholly different pattern of life and lifestyle without the appellant being present".

23. At paragraph 24 the interests of the children are considered not only in the stability of their school life, but in the uncertainties and stresses were they to return to India. In some ways they would suffer much as their mother would suffer in terms of a mixed religion family living in a Sikh area. Again, it is to be noted that they would be returning to somewhere where there was an absence of any family support. This again was detailed as from the previous Tribunal hearing. The claimant indicated he had no close family left in India. His mother and brother live in Canada. He has relatives in Holland and the United Kingdom. Apart from two elderly uncles who live in the countryside there would be no-one to assist him or his family if he were to return. He believes that there would be any member of his family in a financial position to offer him support. His wife has not been to India and does not speak the language. She had confirmed to the Tribunal her fears that she would be forced to convert, but even if not, to have a lack of ability to openly practise her faith. The Tribunal who heard the matter considered the issue of inter-religious marriages and the background material and concluded at paragraph 80 of the determination dated 7th February 2011 that it was not reasonable to expect the claimant or the claimant's wife and children to go to India, including certain of the concerns that had been expressed.

24. In the grounds of appeal, as originally drafted, the Secretary of State notes the conclusion of the Judge that it would be very difficult for a single mother with two children to run a business, indicating that such falls short of the requirement of duly harsh and makes a similar comment in relation to reintegration in a country by the claimant. The point is made relying upon **SP (Nigeria)** that the common occurrence of deportation is that there will be family separation, but such does not without more make it unduly harsh.

25. In that connection I note the wording of the Judge in paragraph 22 in the finding that the claimant's wife and children would suffer massive disruption as they attempted to set up a wholly different pattern of life and lifestyle without the claimant being present.

26. It seems to me overall that were the Judge to have been invited to ask the proper question as to whether or not the situation facing the children and/or spouse was unduly harsh the answer would have been "yes", and reasonably so in the light of the detail that has been presented. Thus so far as paragraph 399 is concerned it will be unduly harsh for the qualifying children to live in a country to which the claimant was to be deported and it would be unduly harsh for them to remain without him, he having been deported. It seems to me that exception (2) as set out in Section 117C also has application in this case.

27. Insofar as balancing the risk, of course the matter goes to proportionality. As was recognised the more serious the offence the greater the public interest in removal. In this case however the claimant was convicted in 2010, was granted leave to remain and has not reoffended since. It seems to me that that is something that was of importance to be placed in the overall balance as it was.

28. Although the Judge was in error in applying the wrong test, had the Judge applied **MM (Uganda) & Anor**, I find that the outcome of a factual analysis would be the same, such that there is therefore no materiality in the error so far as the decision is concerned. Even if I am wrong on that matter, for the reasons that I have indicated, had I sought to remake the decision the result would have been the same.

Notice of Decision

29. In the circumstances therefore the appeal by the Secretary of State is dismissed. The decision of the Immigration Judge stands, namely that the appeal against the deportation order is allowed on human rights grounds.

30. I maintain the anonymity direction made by the First-tier Tribunal.

Signed

Date 18 July 2017

Upper Tribunal Judge King TD