Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02856/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 November 2017	**On 23 November 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[I I]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr M Murphy, Counsel, instructed by Waran & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (Appellant) against a decision of Judge of the First-tier Tribunal Bart-Stewart (the judge), promulgated on 17 July 2017 in which she allowed the appeal of [II] (the Respondent) against the Appellant's decision of 29 October 2015 (served on 2 November 2015) to refuse his human rights claim (a deportation order having been made against the Respondent on 26 October 2015).

Relevant background

2. The Respondent is a national of Somalia, date of birth 8 August 1987. He entered the United Kingdom on 28 December 1991 and was then granted exceptional leave to enter valid until November 1997. Although the Respondent claimed he made an application to extend his leave this was not accepted by the Appellant and a travel document issued in June 2011 was subsequently cancelled. On 19 March 2012 the Respondent was convicted of conspiracy to defraud and received a 14 month prison sentence. This brought him within the automatic deportation provisions of the UK Borders Act 2007 and the Appellant duly informed the Respondent that she was considering making a deportation order.

3. In addition to claiming that his deportation would breach article 8 of the ECHR (based on his family life relationships with his partner, who became a British citizen through naturalisation, and his 3 children who were registered as British citizens), the Respondent made an asylum claim. The Respondent appealed the refusal of his asylum and human rights claims and, although his appeal before the First-tier Tribunal, heard in March 2016, was allowed, the Secretary of State obtained permission to appeal to the Upper Tribunal. Having identified a material error in law in a decision promulgated on 19 July 2016, the Upper Tribunal remitted the case back to the First-tier Tribunal for a fresh hearing.

The First-tier Tribunal decision

4. Following the fresh hearing on 23 June 2017 the judge dismissed the Respondent's protection claim. There has been no cross appeal against this aspect of the judge's decision. The judge however allowed the article 8 human rights appeal on the basis that the Respondent's deportation would have an unduly harsh impact on his children. In reaching this conclusion the judge considered the details of the Respondent's offending (he pleaded guilty to conspiracy to defraud Ryanair resulting in the company losing in excess of £30,000; although not an instigator of the conspiracy, and although he did not set it up and did not obtain substantial sums for himself, the Respondent acted in a dishonest manner in driving people to the airport knowing what was happening), but noted, with reference to paragraph 398(b) of the immigration rules, that the sentence was at the lower end of the scale, that he had no prior convictions, and that he had not come to the adverse attention of the authorities since.

5. The judge relied on a report by Errol Henry, an independent social worker, dated 19 May 2017. This report reflected the evidence from the Respondent and his partner to the effect that his partner worked part-time (23.5 hours a week), and the Respondent was a stay-at-home father who, because of the high amount of childcare responsibilities, had developed a close bond with his children. The judge considered the views of the children, who were aged 13, 14 and 16, as expressed in their handwritten letters and through the independent social

worker's report. The judge noted in particular that, according to the independent social worker's assessment, the youngest child showed mild anxiety to see his father after a school day and that this normative form of anxiety had the real potential of becoming harmful to his development, that the whole family appeared interdependent on each other in ways that families surviving traumas can present, that the children saw the potential deportation of their father to Somalia as not only removing him from their lives but simultaneously placing him at risk of death and in a situation of uncertainty which created a level of anxiety uncommon and extremely mentally disorientating for children of their age.

6. The judge directed herself as to the meaning of "unduly harsh" with reference to the cases of *BM and Others (returnees – criminal and non-criminal) DRC CG* [2015] 293 (IAC) and *MAB (paragraph 399; "unduly harsh") USA* [2015] UKUT 435 (IAC), acknowledged the Secretary of State's acceptance that it would be unduly harsh for the Respondent's partner and children to return to Somalia, and noted, as the partner only worked part-time as a lunchtime assistant and cleaner, that it was highly unlikely that she would be in a position to take the children to Somalia for a visit even if she wished to.

7. At [62] the judge stated,

> Because of his wife's work his bond with his children is also unusually close and is a factor that must have significant weight in considering the impact on the children, particularly two teenage boys if their father being [sic] deported and the difficulties they [sic] would be in maintaining contact. He is the main carer on a day to day basis to fit around his wife's work. He is university educated and takes responsibility for the children's education. The social worker reports that there is already an emotional impact on the children from being aware of their father faces deportation. He explains the further psychological and emotional damage likely to be caused if the father is removed. Their fear is not unreasonable. It is a country from which both their parents fled and they know close family members lost their lives. There is a travel advisory warning British citizens not to go there. The prospects are indeed severe and bleak for three adolescent children going through a difficult time in their lives knowing their father is in a country that in their minds is unsafe. Whilst respect must be given to the pressing nature of the public interest in removal or deportation, I find that the best interests of the [Respondent's] children in this case should prevail. It would be unduly harsh on the children and their mother if the [Respondent] is deported and his wife and children remain in the UK.

8. The judge consequently allowed the appeal on human rights grounds.

The grounds of appeal, the grant of permission, and the 'error of law' hearing

9. The grounds content that the judge was not entitled, on the evidence before her, and given the high threshold inherent in the 'unduly harsh' test, to conclude that the impact on the children and the Respondent's partner would be unduly harsh. The judge, it is argued, failed to identify factors that distinguished the

appeal from the normal effect of deportation. Issue was taken with the objectivity of some aspects of the independent social worker's report (although there this was not sufficiently particularised and there was no further expansion at the 'error of law' hearing).

10. In granting permission, Upper Tribunal Judge Perkins stated, "all of the grounds are arguable but I am particularly concerned that the judge's conclusion that the hardship inherent on removal would be "undue" is not sustainable. "

11. Mr Melvin relied on the Grounds and submitted that the judge had not properly considered the high threshold that marked the undue harshness test. He provided the authority of *AJ (Zimbabwe) and Another* [2016] EWCA Civ 1012 and drew my attention to paragraphs 17, 31 and 46.

12. Mr Murphy submitted that the issues raised by the Appellant amounted to a rationality challenge to the judge's decision, and that this was a high test to overcome. He submitted that the decision was well reasoned, that the judge properly considered the nature of the criminal offence and properly directed herself in respect of the applicable legal provisions and legal principles. He submitted that there were three qualifying children in this case which magnified the overall interests of the Respondent and his family and that this somewhat reduced the public interest factors. It was submitted that the judge properly considered the impact on the children noting that the Respondent was their primary carer and had a close relationship, that the children were already emotionally unsettled at the prospect of separation from their father, that they could experience a high level of anxiety given their perception that their father would be at high risk if returned to Somalia, and the mother's concern as to her ability to care for her children in the Respondent's absence. Mr Murphy submitted that the offence was towards the lower end of the spectrum and that the Respondent had not been convicted of any offence since his release. It was submitted that the judge's decision was one she was rationally entitled to reach for the reasons given.

Discussion

13. The issue that I have to determine is whether the First-tier Tribunal judge properly applied the 'undue harshness' test, and whether her conclusion was one she was rationally entitled to reach having regard to the evidence before her.

14. No issue has been taken with the legal directions identified by the judge. She properly directed herself with respect to the applicable immigration rules, and in particular paragraph 399. The judge also properly directed herself in respect of the statutory public interest considerations that must be considered by a Tribunal when assessing proportionality, and in particular s.117C of the

Nationality, Immigration and Asylum Act 2002. The judge accurately noted that the Respondent had a qualifying partner and 3 qualifying children for the purposes of s.117C. The judge properly directed herself in respect of the best interests of the children, and was clearly aware of the relevant public interest factors and the weight to attach to those public interest factors. Although the judge refers to *MAB (paragraph 399; "unduly harsh") USA* [2015] UKUT 435 (IAC), there was no suggestion in the Grounds that she impermissibly considered the question of undue harshness without reference to the relevant public interest factors, as determined in *MM (Uganda)* [2016] EWCA Civ 450 (which held that wider public interest considerations must be taken into account when applying the "unduly harsh" criterion). Mr Melvin accepted as much at the hearing. I am satisfied that the judge's reference to *MAB*, when considered in the context of paragraph 57 (which referenced *BM and Others (returnees – criminal and non-criminal) DRC CG* [2015] 293 (IAC) in respect of the definition of "unduly harsh") and paragraph 59 (where the judge considered the seriousness of the Appellant's criminality), indicate that she was only relying on *MAB* for its (unchallenged and un-overturned) threshold definition of unduly harsh.

15. The Respondent relies on *AJ (Zimbabwe)*, and the cases identified in that decision, in challenging the lawfulness of the judge's conclusion that the impact on the Respondent's children would be unduly harsh. Having considered the relevant legal principles and relevant authorities the Court, at paragraph 17, indicated that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals.

> Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules if the interests of the children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. … In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance.

16. At paragraph 31 the Court stated,

> It was not open to the FTT to find that the separation of the children from the father/step-father was a compelling reason to allow the Respondent to remain. Far from being an exceptional circumstance, this is an everyday situation as the authorities I have set out demonstrate. They show that the separating parent and child cannot, without more, be a good reason to outweigh the very powerful public interest in deportation. No doubt the FTT was right to say that these children would

unfortunately suffer from the separation but for reasons I have already explained, if the concept of exceptional circumstances can apply in such a case, it would undermine the application of the Immigration Rules.

17. And at paragraph 46 the Court of Appeal indicated, on the facts of that case, that there would be some emotional damage to the children but noted that this was not unusual whenever a parent is deported and the child is unable to live with that parent outside the UK.

18. It is apparent from the above reference that the "unduly harsh" test in paragraph 399(a) of the immigration rules, reflected in s.117C of the Nationality, Immigration and Asylum Act 2002, has a very high threshold and that the separation of parent and child, even where this may result in some emotional damage to the child, would not ordinarily meet the test.

19. With this in mind I consider the judge's approach to the relationship between the Appellant and his 3 children and the evidence of the impact of his deportation on the children. There is no criticism of the judge's factual findings that he enjoys a very close relationship with his children. He has been living with the family since 2012 and is the parent who has the day-to-day responsibility for the children. The judge placed significant reliance on the independent social worker's report. According to the report all 3 children were meeting their developmental milestones and, in some areas, exceeding expectations. As noted by the judge, the children had high levels of attendance at school and showed good learning attitudes. The independent social worker stated that the whole family appeared interdependent on each other in ways that families surviving performers can present. Although the independent social worker noted that the Respondent's partner had concerns as to how she would cope in his absence, he also found that she, as well as the Respondent, demonstrated the ability to care for the children, and that both she and the Respondent demonstrated that they were capable of meeting the children's needs. I note that the Respondent's partner looked after the 3 children when the Respondent was incarcerated.

20. The independent social worker's assessment indicated that the youngest child showed mild anxiety to see his father after a school day and that this normative form of anxiety had the real potential of becoming harmful to his development. This observation was not however developed any further. The judge noted in particular that the children were anxious about the Respondent's possible deportation to Somalia because they knew from their own experience (with reference to their grandparents) that people had died in Somalia, and they were aware of the security risk posed to ordinary citizens in that country. They saw the potential deportation of the Respondent as not only removing him from their lives but simultaneously placing him at risk of death. The judge noted the view of the independent social worker that carrying this level of anxiety for children their age was uncommon and extremely mentally disorientating for young minds to make sense of.

21. When assessing whether the impact on the children would be unduly harsh the judge was demonstrably aware of the high threshold (paragraphs 57 and 58) having referred to Tribunal decisions describing the consequences for an individual as being harsh if they are 'severe', or 'bleak', and that they will be 'unduly' if they are 'inordinately' or 'excessively' harsh taking into account all of the circumstances of the individual. At paragraph 59 the judge considered the seriousness of the Respondent's offending and the nature of his involvement in the fraud but was entitled to note that the sentence was towards the lower end of the scale in paragraph 398(b), that he had no prior convictions and that he had not come to the adverse attention of the authorities since. It is clear that the judge took these public interest factors into account when determining the issue of undue harshness.

22. In paragraph 62 the judge found that the Respondent's usually close bond with his children was a factor that must have significant weight and that there was already an emotional impact on the children. Ordinarily this would be insufficient to entitle the judge to find that the impact on the children would be 'unduly harsh'. The judge then however notes, with reference to the independent social worker's report, that the children may face further psychological and emotional damage because of their perception that their father would in danger if returned to Somalia. It is apparent that the judge placed significant weight on the children's genuinely held belief, even if that belief was not objectively justified, that the Respondent would be returned to an unsafe country where he would face a risk of death. The judge was rationally entitled to rely on the independent social worker's expert opinion that this would cause the children to carry a level of anxiety uncommon to their age and which would be extremely mentally disorientating. I am satisfied that this significant additional element takes the present case outside the normal run of cases dealing with lengthy separation of parent and child in a deportation context.

23. On the particular facts of this case the judge was reasonably entitled to conclude that the impact of the deportation on the children would be unduly harsh. The children would suffer not just the emotional damage that accompanies any forced separation of parent and child, but the additional significant anxiety of genuinely believing that their father's life would be in danger, even if, objectively, there was no real risk of ill-treatment. While the assessment of undue harshness may ultimately be a generous one, I am not persuaded that it was one the judge was not rationally entitled to reach on the evidence before her and for the reasons given.

Notice of Decision

The decision discloses no error of law. The Secretary of State's appeal is dismissed.

22 November 2017

Signed Date

Upper Tribunal Judge Blum