Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00935/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 September 2019	**On 15 October 2019**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

JC
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E. Divaris, Counsel instructed by UK Migration Lawyers
For the Respondent: Mr L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. In an error of law decision promulgated on 27 August 2019, I found that a decision of Judge EMM Smith of the First-tier Tribunal promulgated on 30 April 2019 involved the making of an error of law and set it aside, with certain findings of fact preserved. The judge had allowed an appeal by the appellant, JC, against a decision of the respondent dated 21 December 2018 to refuse to revoke a deportation order made against him. The appeal had been allowed on the basis that it would be "unduly harsh" on his British son, and four step-children (two of whom are British), were he to be deported.

2. I found an error of law in the judge's analysis of the "unduly harsh" issue. I directed that the matter be re-heard in the upper Tribunal in order to determine the best interests of the five children involved in this case, and whether it would be unduly harsh for them to remain here without the appellant, in the event his deportation were to proceed. It was in those circumstances that the matter came before me.

Factual background

3. The factual and procedural background to this matter were set out at [3] to [7] of my error of law decision, which is annexed to this decision. Those paragraphs state:

> "3. The appellant entered the United Kingdom in January 1999 as a student and later qualified as a nurse. His leave was renewed, culminating in a grant of indefinite leave to remain in February 2010. On 7 October 2011, the appellant pleaded guilty to an offence of making a false representation to make gain for himself, in respect of £34,212. He was committed to the Crown Court for sentence, where he was sentenced to 16 months' imprisonment. His partner at the time, who had been complicit in the fraud, received a suspended sentence. The appellant had falsified timesheets, dishonestly inflating the number of hours' work for which he claimed from his employer, [Alternative Futures, a care home charity[1]].
>
> 4. On 21 June 2012, the respondent made a deportation order against the appellant under section 32 of the UK Borders Act 2007. The appellant appealed against that decision, and his appeal was initially dismissed by Judge Levin in a decision promulgated on 10 September 2012. The appellant appealed against Judge Levin's decision to this Tribunal, but his appeal was dismissed by Judge Hanson in a decision promulgated on 14 May 2013. The appellant's then partner, with whom he had been sentenced for the false representation offence, subsequently developed cancer. On 27 May 2014, the respondent suspended removal action against the appellant, on account of his then partner's reliance on him for support.
>
> 5. On 14 October 2015, the respondent sought to recommence removal action against the appellant. He was required to resume reporting to the respondent but did not do so immediately. It was not until 14 February 2018, when he made the application which triggered the present proceedings, that the appellant complied with the reporting requirements to which he was subject. In late 2015, the appellant began a new relationship, this time with a lady called SB. SB had resided in the United Kingdom since 2005 and had four children of her own from a previously abusive relationship. She has indefinite leave to remain. In 2005, she was diagnosed as HIV positive, and continues to receive treatment in respect of this condition.
>
> 6. On 8 March 2018, a child was born to SB, and the appellant is the father. That child is a British citizen.

[1] My Error of Law decision promulgated on 9 September 2019 incorrectly stated that the appellant defrauded the NHS; this was based upon page 3 of a letter dated 13 February 2018 from the appellant's solicitors to the respondent, at page E3 of the appellant's bundle/page 56 of the respondent's bundle. The appellant later gained employment with the NHS, but his conviction was in relation to Alternative Futures. There is no suggestion that the appellant has been involved in any crimes against the NHS. Pursuant to rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I have corrected this clerical mistake.

> 7. The applicant's latest application was based upon his private and family life with SB, her four children, and the child they share together. The appellant claimed to be their primary carer and contends that it would be unduly harsh for any of the children to accompany the appellant to Zambia, or for them to remain here without him."

4. Having found that the judge erred in relation to his assessment of whether the appellant's removal would be "unduly harsh" on his four step-children (two of whom are British) and his own British child, that represents the sole issue for my consideration in this decision.

Legal framework

5. See [13] to [16] of my Error of Law decision for an outline of the legal framework applicable to the making of deportation orders.

6. As to the revocation of deportation orders, pursuant to paragraphs 390 and 390A of the Immigration Rules, the underlying assessment to be conducted when considering the revocation of a deportation order is substantively identical to the threshold for making a deportation order. See:

> "390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
>
> (i) the grounds on which the order was made;
>
> (ii) any representations made in support of revocation;
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> (iii) the interests of the community, including the maintenance of an effective immigration control;
>
> (iv) the interests of the applicant, including any compassionate circumstances.
>
> 390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors."

Evidence and documents

7. The appellant did not seek to rely on any additional live or documentary evidence at the remaking hearing. Mr Divaris provided a helpful skeleton argument, which I have considered.

Discussion

8. The essential issue in this case relates to whether it would be unduly harsh for the five children involved to remain in this country in the absence of the appellant. That issue must be determined in light of their best interests, followed by a consideration of the wider statutory framework for the deportation of foreign criminals.

9. In my Error of Law decision, I preserved the judge's findings up to and including his paragraph [41]. Some of those findings were, in turn, findings preserved from the

earlier decision of Judge Levin. In summary (and where relevant), the findings of the judges below that I have preserved for the purposes of my assessment are as follows:

a. The appellant was awarded a degree in adult nursing and had been employed as a nurse; the defence to which the appellant pleaded guilty was committed because the appellant and his then partner, M, had been living beyond their means following the purchase of their house; the offence to which the appellant pleaded guilty was "*very serious*" because the fraud was against a charity, and therefore deprive that charity funds; the appellant is a foreign criminal, as defined by section 32 of the UK Borders act 2007; the only possible exception engaged under the UK Borders act 2007 would be that the appellant's deportation would breach his rights to private and family life under article 8 of the ECHR; there was (at the time of judge Levin's decision) a "*real risk*" of the appellant reoffending [27];

b. The appellant continued to pose a risk of reoffending at the hearing before Judge Levin, and, although he had not reoffended by the time the matter came before Judge Smith, there was no evidence that the appellant had acquired any insight into his actions [29];

c. The appellant was now in a genuine and subsisting relationship with SB, a citizen of Malawi who holds indefinite leave to remain, having previously been recognised as a refugee. SB has four children from a previous relationship [31];

d. The appellant and SB have a son together; he is a British citizen [31];

e. The appellant has a genuine and subsisting parental relationship with each of the five children (his son, and SB's four children) [31], [41];

f. The appellant is not allowed to work and, therefore, he is the primary carer for all five children while SB works [41];

g. SB has been HIV-positive since 2005;

h. The appellant's private life since the deportation decision attracts little weight as his immigration status has, at best, been precarious;

i. SB looked after her four children on her own before meeting the appellant. There was no evidence that she could not then cope. The appellant's involvement in the lives of all five children was, in part, attributable to the fact he is unable to work. His involvement was not exclusive, as SB worked part-time. She too was engaged in the lives of her children. The appellant shared responsibility for the children but was not their "*primary carer*" (see [41]);

j. The appellant would be able to reintegrate into life in Zambia, and is, therefore, unable to satisfy the private life exception in paragraph 399A. There was no suggestion that the appellant satisfied Appendix FM or the private life provisions of the rules in his own capacity (see [35]).

10. I have reached the findings of fact set out in this decision having considered the evidence in the round, by reference to the preserved findings from the judges below, and my own analysis of the evidence.

Best interests of the children

11. This case involves the best interests of five children, and it is necessary first to consider their best interests. In doing so, this is an assessment which incorporates no consideration of the misconduct of the appellant. It is a free-standing analysis, unencumbered by any consideration of the adverse immigration history, or criminal offending of the appellant.

12. The details of the children are as follows (dates of birth in brackets):

A	(19 May 2006)	Malawian
B	(28 October 2008)	Malawian
C	(12 April 2012)	British
D	(14 March 2014)	British
E	(8 March 2018)	British

Children A – D are SB's. E is the appellant's biological son with SB. The appellant enjoys a genuine and subsisting parental relationship with all five children.

13. The appellant relied before Judge Smith on a report by an independent social worker, Diana Harris, dated 3 April 2019 (the header on each page of the report dates it as 3 April 2018, but it is clear from the date given in the conclusion of the report, by reference to the overall chronology of the case and the appeal, that it was produced on 3 April 2019). Although the standard directions had been issued ahead of the hearing before me, which include provision concerning the ability of the parties to rely on new evidence before this Tribunal, there was no evidence updating the position since the decision of Judge Smith.

14. Ms Harris's report concludes that it is in the best interests of all five children to remain in the United Kingdom, with the appellant. Mr Divaris submits that I should adopt that approach.

15. I agree that the best interests of each of the children are (i) to remain here; and (ii) for the appellant to remain here with them.

16. In the refusal letter, the respondent accepts at [21], [26], [30], [34] and [38] in relation to each of the five children respectively that it would be unduly harsh for them to leave the United Kingdom to reside in Zambia. There has been no suggestion that it could be in the best interests of any of the children concerned for them to leave this country for Zambia.

17. In light of the preserved findings of fact, and as demonstrated by the appellant's statement, it is clear that the appellant performs an important role in the lives of each of the children. He is active in not only their childcare while SB is at work, but plays

an important part in facilitating their education, through taking them to school and through providing broader support and encouragement. For example, in relation to child B, the appellant is described in a letter from her teacher that he, "*has consistently been a stable and positive role model for* [B]*: supporting and encouraging her throughout school…*" In relation to children C and D, the appellant is described as performing an "*active role*" in their education, and as having helped them to adjust moving from their previous school to their current educational setting.

18. The appellant attends church with SB and the children and has been described by the pastor of the church as a "*family orientated person who loves his family tremendously*". The pastor added, "*we cannot afford to miss him and the family in the church…*" See the letter dated 28 February 2019 from Pastor KA at Annex 5 of Ms Harris's report.

19. Some of the analysis in the Harris report is of less assistance. Much of it concerns the impact upon the children of a prospective move to Zambia or Malawi, concluding in robust terms that the children do not want to leave and that it would not be appropriate for them to do so (for example, see [2.2], [2.3], [2.4], [9.b], [9.d], [9.k], [9.l], [9.n], [9.o]). Unfortunately, those aspects of Ms Harris's analysis are of less assistance, given it is common ground that it is not expected that the children would be expected to leave the United Kingdom, as outlined above.

20. Other aspects of the Harris report are at odds with the preserved findings of fact reached by Judge Smith. For example, at [2.1], Ms Harris concludes that the appellant is the "*primary carer*" to the children. Judge Smith, by contrast, found that, while the appellant plays an active and extensive role in the lives of the children, he is not their primary (as in sole) carer, and that he shared that responsibility with SB: see [41]. However, for present purposes, that is a distinction which is of little relevance. It is clear that the appellant's role in the family provides vital childcare which facilitates SB's employment and good, in time, facilitate her undertaking further study or training.

21. At [8.7], Ms Harris notes concerns raised by SB's Clinical Nurse Specialist that, in the appellant's absence, she would lose the support she currently enjoys from him, which would have a corresponding effect upon her health. She would most likely have to "*stay at home and look after her children*", with the ensuing impact on her ability to work or study for a future career. SB is also concerned that, in the absence of the appellant in such challenging, changed, domestic circumstances she may experience difficulties in adhering to her medication regime. This paragraph of the report appears to be based on a letter from the clinical nurse dated 10 January 2019, at Appendix 6 to the report.

22. The Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 recently endorsed the approach of the Court of Appeal in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874 to determining the best interests of children. At [58], the Court of Appeal in EV (Philippines) held:

> "In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

23. The "real world" context of the present matter is that the appellant does not have the right to remain here, but that the mother of all five children, SB does. It is only to that limited extent that the immigration status of the appellant is even indirectly relevant to this assessment. As it is common ground that it would be "*unduly harsh*" to expect any of the children to leave the United Kingdom for Zambia, the answer to the "*ultimate question*" posed by the Court of Appeal in EV (Philippines) is that it would not be reasonable to expect the five children in this case to follow the appellant to Zambia. Their mother is settled here, and three of the children are British. The other two are not citizens of Zambia, but citizens of Malawi. Although the appellant is expected to leave the United Kingdom for Zambia, the preserved analysis of the Harris report, taken with the respondent's acceptance that the removal of the children would be unduly harsh, combines to lead to the inescapable conclusion that it would not be reasonable to expect the children to leave the United Kingdom, and that their best interests are to remain here.

24. Given the role of the appellant in the lives of all five children, including his role in the life of his own son, it follows that it is in the best interests of all of the children, individually and cumulatively, for the appellant to remain in this country with them. If he were to leave, children A to D would be deprived of their step-father, and child E would be deprived of his biological father. This would have a corresponding impact on the family as a whole, and would make life difficult for SB, which in turn would have an impact on the children. SB would be without childcare, meaning, at best, the children would have to be cared for by someone other than their father; at worst, it may mean that SB is no longer able to work, and may therefore become reliant on public funds for her subsistence.

Unduly harsh

25. Having arrived at that assessment, it is now necessary to turn to the issue of whether the appellant's deportation would be "unduly harsh" on either the children, or on SB (or both). This consideration is central to the availability to the appellant of Exception 2 contained in section 117C(5) of the 2002 Act, and paragraph 399(a)(ii)(b) of the Immigration Rules.

The children

26. By definition, the analysis of what is "*unduly harsh*" is a different assessment to what the best interests of the children are.

27. As I noted at [25] of my error of law decision, whether deportation would be "unduly harsh" requires consideration of whether there are additional factors, over and above the normal impact of deportation. . "*One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent…*" See KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 at [23]: there is a certain amount of harshness that is "*due*". At [27] of KO, the Supreme Court endorsed the formulation of the test by this tribunal in in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), which was in these terms, at [46]:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

28. Applied to the facts of this case, I do not consider that the removal of the appellant would have an "*unduly har*sh" impact on the children remaining here in his absence. While I note the difficulties that the removal of the appellant would inevitably present for the wider family, and the fact that his removal would conflict with the best interests of each of the children individually and their collective best interests cumulatively, the specific impact would not result in consequences for any of the children, together or individually, that would be "*unduly harsh*". The consequences of the appellant's removal described carefully in the report of Ms Harris, taken with the preserved findings of Judge Smith, did not reveal a "*degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent*."

29. I find that the consequences of the appellant's deportation would not stray into the elevated threshold territory of something that is "*severe, or bleak*", when augmented to the "*elevated standard*" which is "*still higher*" (see MK at [46]). The removal of the emotional and educational support provided by the appellant to each of the children, and to SB, plus his childcare assistance, along with his role at church and in the community, are all natural consequences of the appellant's deportation. There are no distinctive features of the family's life which would render deportation unduly harsh.

30. As Judge Smith found, SB had been able to cope on her own with her four children before she met the appellant. She may have to make alternative childcare arrangements, and may even have to change her working pattern, but having to do so would not take the situation in relation to the children into the territory of "*undue*" harshness. If SB were to be a single mother to the five children, life would be very different. She was able to cope, as Judge Smith found, with four children. There is no suggestion from the material presented to me that she would not additionally be able to cope now that child E would also be present. Children A – D are now older, and A and B, in particular, are at an age where they can be expected to provide a greater degree of assistance around the house.

31. Although Ms Harris notes that SB's nurse is concerned that SB would not be able to take her medication in the absence of the appellant, SB's own witness statement is silent on the issue. She does not describe, for example, how the appellant's assistance is essential for her maintaining her medication regime. She writes at [9] that since she met the appellant, she has been able to maintain her health checks every three months but provides no additional details as to why the appellant's role in this respect is indispensable.

32. Mr Divaris highlighted the summary in his skeleton argument of the importance of family life between parents and children, and how it is not normal for a parent/child relationship to be carried on in anything other than a face-to-face context: see [15] of the appellant's skeleton argument, drawing upon LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC) (a non-deportation case – see [18] – which predates Part 5A of the 2002 Act). At [21], LD held:

> "Families normally live together. Family life consists of the inter-dependent bonds between spouses or stable partners and between parents and children with particular strength being placed upon the interests and welfare of minor children. It is not normal for family life to be enjoyed by correspondence and occasional visits (even assuming that there were no obstacles to such visits following this immigration decision)…"

I do not find the above authority to be of significant assistance in the present context. Plainly, family life can thrive and develop when maintained face-to-face in a way that is simply not possible when one party is in another country. The citation of authority to establish that proposition is not necessary (as the headnote to LD (Zimbabwe) confirms, the case was reported for different reasons). The removal of such opportunities is, by definition, inherent to the "*due*" harshness that is expected in a deportation situation.

33. Drawing the above analysis together, therefore, I find to the balance of probabilities standard, that it would not be unduly harsh on any of the children, individually or cumulatively, for the appellant to be deported. Specifically, it would not be unduly harsh for them to remain here in his absence.

Unduly harsh: SB

34. SB is a "*qualifying partner*" for the purposes of section 117C(5) of the 2002 Act. If it would be unduly harsh on SB for the appellant to be removed, then Exception 2 is also capable of being engaged. Judge Smith noted that the report of Ms Harris was silent as to the difficulties SB had experienced prior to her relationship with the appellant. No attempt had been made to provide any form of updated report had of the remaking hearing before me.

35. SB holds indefinite leave to remain, having previously been recognised by the United Kingdom as a refugee, on account of events which took place in Malawi. I have very few details about the Refugee Convention basis upon which she was recognised as a refugee. There is a suggestion in the letter from SB's clinical nurse specialist at Appendix 6 to the report of Ms Harris that she was raped by her brother-in-law

when she was 17 years old, but it is not clear whether that incident formed the basis of her subsequent recognition as a refugee, or whether there was some other basis. The relationship that SB was in before commencing a relationship with the appellant was abusive. Again, other than brief references to this prior relationship history, including in the representations dated 18 February 2018 from the appellant's solicitors to the respondent, there are very few details about what happened previously, and whether there is any ongoing impact with SB. She writes in her statement at B 66 that the previous abusive relationship entailed mistreatment for 6 to 7 years.

36. It is unfortunate that there are no further details concerning the prior history of SB, and whether there is an ongoing impact on her physical and mental health from what has taken place in the past. She writes at [12] that her health difficulties leave her feeling "*extremely fatigued*" and that she is "*struggling to cope*". There is no medical evidence demonstrating the extent of her ongoing health problems, other than the letter from her clinical nurse specialist at Appendix 6 of Ms Harris's report, which demonstrates that her condition is being managed through medication.

37. What is needed in order to demonstrate that the appellant's deportation on Ms Harris would be unduly harsh is something to demonstrate that the impact upon her would result in a degree of harshness exceeding that which is "*due*". While the appellant's removal will have consequences on SB, and her children, which will be tragic from the perspective of the family, there is nothing in the materials before me which demonstrates that that impact goes beyond that which necessarily – and sadly and inevitably – flows from the deportation of foreign criminals.

38. I have considered whether the past history of SB could possibly merit a different conclusion on this issue. In the absence of evidence of the sort outlined above, it is not possible for me to do so.

39. I find, therefore, that it would not be "unduly harsh" on SB for the appellant to be removed.

Very compelling circumstances?

40. It is also necessary for me to consider, pursuant to section 117C(6), whether there are "*very compelling circumstances*", over and above the considerations outlined in Exception 2, which would outweigh the public interest in the deportation of foreign criminals. Although the legislation appears only to apply section 117C(6) to foreign criminals sentenced to four years or more, pursuant to NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 at [25], offenders such as this appellant have the ability, in principle, to attempt to satisfy subsection (6).

41. For the reasons given under my analysis of whether the removal of the appellant would be unduly harsh for the children and SB remaining here in his absence, there are no further reasons revealed by either the submissions advanced before me, or the extensive bundle prepared on behalf of the appellant, when taken with the preserved findings of fact, which enables me to reach this conclusion. I have considered all

matters outlined in the submissions advanced orally and in writing by Mr Divaris, and there is nothing which merits a conclusion along these lines.

42. I find, therefore, that the appellant cannot defeat the public interest in deportation under section 117C(6).

Other public interest considerations

43. I note that the appellant speaks English and would be capable of being employed as a nurse (a shortage occupation), and thus there is the potential to be financially independent. These are considerations attracting neutral weight under section 117B (2) and (3) of the 2002 act. They do not render the appellant's removal disproportionate.

44. I have also considered the age of the appellant's conviction, which was eight years ago. He has not offended since, and thus as the appearance of having been rehabilitated. This is a factor of minimal relevance: see RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC) at [33]:

> "…the fact that an individual has not committed further offences, since release from prison, is highly unlikely to have a material bearing, given that everyone is expected not to commit crime. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everyone else) to be. There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance (see SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256, paragraphs 48 to 56)."

It follows that the appellant's apparent rehabilitation is of minimal relevance. In any event, as Judge Smith found, there was no evidence that he had acquired any understanding of the seriousness of his conduct.

Conclusion

45. In conclusion, therefore, the appellant is a "*foreign criminal*" for the purposes of section 117D(2)(c)(iii) of the 2002 Act. Under section 117C(3), the public interest requires his deportation, unless Exception 1 or 2 applies. He is unable to avail himself of either of the exceptions contained in subsections (4) and (5), and there are no "*very compelling circumstances*" over and above those considerations which would render his deportation disproportionate (section 117C(6), nor are there "exceptional circumstances" for me to find that the public interest in maintaining the deportation order are outweighed by other factors (paragraph 390A of the Immigration Rules).

46. Although the best interests of the children are a primary consideration in this jurisdiction, they are not the paramount consideration. They are capable of being outweighed by the cumulative weight of other factors. The effect of the considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002, in particular section 117C(5), and also the public interest in the maintenance of effective immigration controls (section 117B(1)) is that the public interest in deportation is

capable of outweighing the best interests of the children concerned, unless the impact of deportation upon them would be "*unduly harsh*". As I have found, the appellant's deportation will not be unduly harsh on either SB or any of the children.

47. The deportation of the appellant would not place the United Kingdom in breach of its obligations under Article 8 of the European Convention on Human Rights. The automatic deportation provisions of the UK Borders Act 2007 are engaged and none of the exceptions applies.

Notice of Decision

The appellant's appeal against the respondent's refusal to revoke his deportation order is dismissed on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  Date 8 October 2019

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and there can be no fee award.

Signed  Date 8 October 2019

Upper Tribunal Judge Stephen Smith

ANNEX: ERROR OF LAW DECISION

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(Immigration and Asylum Chamber) Appeal Number: HU/00935/2019

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

JC
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Rendle, Counsel instructed by UK Migration Lawyers Ltd
For the Respondent: Mr L. Larlow, Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. This is an appeal by the Secretary of State, but for convenience I will refer to the parties as they were described before the First-tier Tribunal. The Secretary of State appeals against a decision of First-tier Tribunal Judge EMM Smith allowing the appellant's appeal against a decision of the respondent to refuse his human rights claim and to refuse to revoke a deportation order to which he was subject.

2. At the hearing, I informed the parties that the appeal was successful, provided a summary of my reasons, and directed that the matter would be retained in the Upper Tribunal for the decision of Judge Smith to be remade. I now provide my detailed reasons.

Factual background

3. The appellant entered the United Kingdom in January 1999 as a student and later qualified as a nurse. His leave was renewed, culminating in a grant of indefinite leave to remain in February 2010. On 7 October 2011, the appellant pleaded guilty to an offence of making a false representation to make gain for himself, in respect of £34,212. He was committed to the Crown Court for sentence, where he was sentenced to 16 months' imprisonment. His partner at the time, who had been complicit in the fraud, received a suspended sentence. The appellant had falsified timesheets, dishonestly inflating the number of hours' work for which he claimed from his employer, [Alternative Futures[2]].

4. On 21 June 2012, the respondent made a deportation order against the appellant under section 32 of the UK Borders Act 2007. The appellant appealed against that decision, and his appeal was initially dismissed by Judge Levin in a decision promulgated on 10 September 2012. The appellant appealed against Judge Levin's decision to this Tribunal, but his appeal was dismissed by Judge Hanson in a decision promulgated on 14 May 2013. The appellant's then partner, with whom he had been sentenced for the false representation offence, subsequently developed cancer. On 27 May 2014, the respondent suspended removal action against the appellant, on account of his then partner's reliance on him for support.

5. On 14 October 2015, the respondent sought to recommence removal action against the appellant. He was required to resume reporting to the respondent but did not do so immediately. It was not until 14 February 2018, when he made the application which triggered the present proceedings, that the appellant complied with the reporting requirements to which he was subject. In late 2015, the appellant began a new relationship, this time with a lady called SB. SB had resided in the United Kingdom since 2005 and had four children of her own from a previously abusive relationship. She has indefinite leave to remain. In 2005, she was diagnosed as HIV positive, and continues to receive treatment in respect of this condition.

6. On 8 March 2018, a child was born to SB, and the appellant is the father. That child is a British citizen.

7. The applicant's latest application was based upon his private and family life with SB, her four children, and the child they share together. The appellant claimed to be their primary carer and contends that it would be unduly harsh for any of the children to accompany the appellant to Zambia, or for them to remain here without him.

[2] See Footnote 1 to the Remaking Decision

The decision of the First-tier Tribunal

8. The First-tier Tribunal made findings of fact which have not been impugned in these proceedings. The judge noted that there had been several developments following the appellant earlier appeal before Judge Levin (see [31]). He found that the appellant performed an active role in providing care for the five children, although was not their primary carer. It was common ground that it would be unduly harsh to expect any of the children to relocate to Zambia. The judge found no reasons to depart from Judge Levin's earlier findings that the appellant would be able to reintegrate into life in Zambia.

9. At [41], the judge found that there was no evidence that SB had not been able to cope looking after her four children as a single mother before she met the appellant. The judge noted that, although the appellant currently is actively involved in the day to day care for all five children, he is unable to work due to the immigration restrictions placed on him, presumably meaning he had the time to do so. In any event, he was not the primary carer, as SB only worked part-time, and was able to assist with the childcare when she was not working outside the home. The judge found that the appellant shared responsibility for the children but was not primary carer.

10. The judge rightly recognised and applied the principle that the best interests of the children are a primary consideration, noting that the children cannot be blamed for their father's conduct. At [43], the judge outlined a report by an independent social worker. He noted some gaps in the analysis of the report, in particular the lack of any references to the previously abusive relationship that SB had with her former partner.

11. At [44], the operative reasoning of the judge which led to the appellant's appeal being allowed was as follows, with emphasis added:

> "[44] Hesham Ali requires the court to set out a balance sheet approach to article 8 which includes the public interest in the deportation of foreign offenders and I must also balance the requirements of whether the facts now as opposed to how they were before Judge Levin in regard to one of the exception [sic] under section 33 [of the UK Borders Act 2007], would have led to Judge Levin finding that the fact of the appellant's private and family life are an exception**. The appellant has a subsisting relationship with a qualifying partner and a child and, therefore, I have assessed whether it would be unduly harsh for the appellant to be removed from the UK. This is a finally [sic] balanced decision and having accepted that the appellant committed a serious crime I factor in that in the eight years since his conviction he has not further offended. He is a qualified nurse and has worked in the past.**
>
> [45] Having considered all the facts before me I am satisfied that it be disproportionate to remove the appellant from the UK and that the public interest does not now require his removal."

Permission to appeal

12. Permission to appeal was granted by First-tier Tribunal Judge Saffer on the basis that it was arguable that the judge had erred, "in relation to whether the fact individually or cumulatively mean that it would be unduly harsh to remove the appellant."

Legal framework

13. This is an appeal brought under Article 8 of the European Convention on Human Rights. The essential issue for the First-tier Tribunal was whether it would be disproportionate for purposes of Article 8(2) for the appellant to be removed. If removal would be disproportionate, one of the exceptions to the automatic deportation provisions contained in the United Kingdom Borders Act 2007 would be engaged. Part 13 of the Immigration Rules issued by the Secretary of State, and the legal framework enacted by Parliament, in particular Part 5A of the Nationality, Immigration and Asylum Act 2002, set out the public interest considerations in connection with the deportation of foreign criminals.

14. Of relevance for present purposes, paragraph 398(b) provides that the deportation of those (such as this appellant) who have received a sentence of imprisonment for at least 12 months, but less than four years, is "conducive to the public good". Paragraph 398(b) states:

> "(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months…

Paragraph 399(a) features an exception to the above principle. It applies where:

> "(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen… [and]
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported…"

15. Section 117C of the 2002 Act mirrors the above provisions on a statutory basis. It provides that the deportation of a "foreign criminal" (that is, a person sentenced to a single period of imprisonment of at least 12 months) is in the public interest, unless one of two statutory exceptions apply. Section 117C(5) is relevant. In the following provision, "C" means the "foreign criminal":

> "(5) 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."

16. It is settled law that the best interests of the child are a primary consideration when considering whether removal of an appellant under Article 8 would be proportionate, see ZH (Tanzania) [2011] UKSC 4 and Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 at [10] per Lord Hodge.

Discussion

17. Weight is normally a matter for the judge. This Tribunal should resist the temptation to interfere with a decision of the First-tier Tribunal simply because it disagrees with it. Mr Rendle initially submitted that the judge gave clear reasons for allowing the appeal. At [25], the judge had said that he considered all the evidence before reaching his decision, he submitted. He analysed the contents of the independent social worker's report and considered the family circumstances before reaching a conclusion that was open to him on the facts.

18. The difficulty with Mr Rendle's submissions, as he realistically recognised as the hearing progressed, is that the judge did not analyse his operative finding that the appellant's deportation would be disproportionate through the lens of either Part 13 of the Immigration Rules, or either of the exceptions contained in section 117C of the 2002 Act.

19. While weight is indeed a matter for the judge, it is trite law that a Tribunal must (i) make findings as to weight by reference to the relevant legal framework, and (ii) clearly disclose the reasons for the findings it makes and the conclusions it reaches. I accept the presenting officer's submissions that the judge failed to comply with these requirements.

20. Although the judge had set out the relevant legal framework at [34], and correctly directed himself as to the applicable caselaw (see, for example, [40]), his operative analysis of the public interest was not conducted by reference to the public interest as set out in the rules and in Part 5A.

21. The judge correctly noted that the fact that the appellant was in a genuine and subsisting relationship with the British children concerned meant that he had to consider whether the appellant's deportation would be "unduly harsh". See the emboldened words in the extract from [44] of the First-tier's decision, quoted at paragraph 11, above. The judge said, "*…therefore, I have considered whether it would be unduly harsh for the appellant to be removed from the United Kingdom.*" Accordingly, the judge correctly directed himself that it was necessary to consider whether the appellant's deportation would be "unduly harsh".

22. However, the judge did not go on to consider whether deportation would, in fact, be "unduly harsh", and if so on what basis. The very next sentence in the judge's analysis simply refers to this being a "*finally* [sic] *balanced decision*", referring immediately to the appellant's lack of offending since the index offence. Reading [44] and [45] together, along with the remainder of the decision as a whole, there is no operative analysis of the issue of undue harshness for the children concerned in these proceedings.

23. I accept that the judge had outlined the contents of the independent social worker's report at [43], noting that the social worker had written about the "*significant negative impact*" of the appellant's removal on SB and the children. The judge wrote that the report had a "*significant impact*" upon his consideration. However, he did not say what the impact of the social worker's report was on his analysis of the issue of whether deportation would be unduly harsh. Despite noting that the report was to have a "significant impact" on his findings, the judge did not explain what that impact was.

24. In addition, the judge had earlier found (see [41]) that there was no evidence that SB had not been able to cope with her four children before she met the appellant. The judge had also expressed concerns about the absence of analysis – or any references at all – in the independent social worker's report to the previously abusive relationship SB had been in. That is significant when viewed alongside the judge's findings that, in the period following that relationship (at what, on any assessment, must have been a difficult time for SB), SB had been able to cope with her four children, on her own.

25. The sad reality of deportation is that it wrecks family life. There will be very few families where deportation of a father or father figure will not have a "*significant negative impact*" (to adopt the judge's summary of the independent social worker's terminology) on family life. Simply reciting that fact is no substitute for the careful analysis required. "*One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent…*" See KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 at [23]. The judge simply did not analyse the extent to which a certain amount of harshness would be "due", and the extent to which any harshness present would go beyond what could be expected.

26. The judge has either skipped over the assessment of whether deportation would have an unduly harsh effect on the children, or conflated that issue with the quite separate issue of the appellant's apparent rehabilitation in the period since his conviction. Either way, the judge does not appear to have engaged with the issue of whether the appellant's removal would be unduly harsh by reference to the facts of the case.

27. The remainder of the operative analysis conducted by the judge ascribed significance to the lack of recent offending by the appellant. The judge's references to the appellant being a qualified nurse and having worked in the past appear to be a reference to his character, or rehabilitation. Those are, of course, factors which are relevant to the public interest balancing assessment. But they are factors which attract little weight. See RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC), Headnote (4),

> "Rehabilitation will not ordinarily bear material weight in favour of a foreign criminal."

28. In isolation, referring to the rehabilitation of the appellant would not be an error of law.

29. However, at [45], the judge simply stated that it would now be disproportionate to remove the appellant from the United Kingdom, and the only factors cited in favour of this (other than the passing reference to the need to assess undue harshness, unaccompanied by any operative assessment) related to rehabilitation considerations. The judge did not recall the significant public interest encapsulated by part 13 of the Immigration Rules, or the near-mandatory provisions contained in Part 5A of the 2002 Act. Rather than applying the established legal framework for the consideration of what amounts to the public interest in the deportation of foreign criminals as set out in those provisions, the judge substituted his own consideration of the issue, arriving at a view of what amounts to the public interest in deportation which finds no support in the legislation. The judge treated rehabilitation as a determinative factor, rather than a matter attracting little weight. While there is a small degree of flexibility inherent to the way part Part 5A operates (the factors are, after all, "considerations" to which a court must "have regard": see section 117A(2)(b)), it was an error of law for the judge not to have express and due regard to those considerations in reaching his operative findings.

30. I consider these errors to have infected the overall assessment of the public interest to such an extent that the decision needs to be set aside.

31. The appropriate course is for the matter to be reconsidered in the Upper Tribunal for consideration of what the best interests of the children are, and whether it would be unduly harsh on them for the appellant to be deported. I preserve the findings of fact of Judge EMM Smith up to [41]; they have not been impugned and I see no reason not to adopt them as the starting point for the future consideration of this matter in the Upper Tribunal.

Conclusion

32. The decision of the First-tier Tribunal featured an error of law such that it must be set aside for reconsideration in the Upper Tribunal, on the basis outlined above.

Anonymity

33. The First-tier Tribunal made an order for anonymity. Given children are involved and given the nature of the contents of this decision and the likely contents of a future decision, I maintain that order.

Notice of Decision

The appeal is allowed. The decision of Judge EMM Smith is set aside, save that the findings of fact up to and including paragraph 41 are preserved.

The matter will be relisted in the Upper Tribunal for fresh consideration of the best interests of the children and whether deportation of the appellant would breach the United Kingdom's obligations under Article 8 of the European Convention on Human Rights.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  Date 28 August 2019

Upper Tribunal Judge Stephen Smith