Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09887/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 July 2019	**On 05 August 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

B O
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Brown, Counsel, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Ford (the judge), promulgated on 15 May 2018, dismissing the appellant's appeal against the respondent's decision dated 22 August 2017 refusing his Article 8 human rights claim.

Background

2. The appellant is a national of Ghana born in 1971. He first came to the UK as a visitor in 2001 and last entered the UK, also as a visitor, in 2006. He overstayed. He met his partner, also a Ghanaian national, around 2002/2003. They have 4 children born between 17 December 2006 and 30 November 2015. The oldest is a British citizen, presumably by registration under s.1(4) of the British Nationality Act 1981. The appellant also has a child from a previous relationship who he brought to the UK in 2006. At the date of the First-tier Tribunal's decision the appellant's partner, three of her children and the appellant's child from his previous relationship had been granted Discretionary Leave to Remain until November 2018.

3. As accurately noted by the judge, the appellant has a very poor immigration history. This includes making an application for an EEA residence card using false documents and giving a false identity and making an unfounded asylum claim. An earlier appeal against a decision to refuse his asylum claim was dismissed in 2010.

4. In May 2016 the appellant was sentenced to 4 years imprisonment relating to dishonesty offences. Over a period of about 7 years he deceived the British authorities into parting with an excess of £146,000. The respondent unsurprisingly made a deportation order against the appellant and refused his human rights claim. The appellant appealed the refusal of his human rights claim pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

5. Prior to his appeal in the First-tier Tribunal the appellant was represented by Acharyas Immigration Solicitors. Two bundles of documents in support of the appellant's appeal were filed with the First-tier Tribunal on 16 and 17 January 2018. In a letter sent by fax to the First-tier Tribunal on 27 March 2018, and sent by letter in the post on the same day, Acharyas Solicitors stated, "we have been informed by the appellant that he is to represent himself in the above hearing. We would request we come off record as legal representatives for the above named." At the time of his appeal the appellant was a serving prisoner at HMP Huntercombe.

6. No alternative representatives were instructed. The appellant was not legally represented at his appeal hearing on 26 April 2018.

The decision of the First-tier Tribunal

7. The judge set out the appellant's immigration and criminal history in some detail, including relevant sections of the Sentencing Remarks. The judge correctly directed herself in respect of the burden and standard of proof. At [20] the judge referred to the Court of Appeal decision in **MM (Uganda) v SSHD**

[2016] EWCA Civ 450 which held that, when considering whether deportation would have "unduly harsh" consequences the tribunal had to have regard to all of the circumstances, including the deportee's criminal and immigration history. This was understood to be the law when the First-tier Tribunal's decision was made.

8. The judge heard oral evidence from the appellant, his partner and his daughter, R, by another relationship. The judge summarised the oral evidence at [23] to [33]. The judge found the appellant's partner to be an inconsistent and unreliable witness and found that handwritten letters she sent to the appellant whilst he was in custody were calculated to manipulate the tribunal into sympathy. In the absence of any medical evidence the judge rejected the partner's claim that she was suicidal or suffered from mental health difficulties. The judge was satisfied that she and the appellant were in a genuine and subsisting relationship. The judge found that the best interests of the minor children were served by the appellant remaining with the family in the UK. The appellant was said to be a "loving father" to his children and they were attached to him [39], and that he had a genuine and subsisting parental relationship with them [45].

9. The judge directed herself in accordance with paragraph 399 of the immigration rules and s.117C(6) of the Nationality, Immigration and Asylum Act 2002 in respect to the 'very compelling circumstances' test. The judge was not however satisfied that the evidence disclosed very compelling circumstances over and above those identified in paragraph 399 and Exception 2 in s.117C(5) of the 2002 Act. The judge noted that the children were in good health and found that their mother could continue to care for them. At [48] the judge stated,

> "Exception 2 does not assist him because taking into account P's poor immigration history and the seriousness of his criminal offending, and measuring this against the impact of his removal on him, his partner and his children, I am not satisfied that the decision is unduly harsh as defined in MM (Uganda) (above)." [sic]

10. And at [49] the judge stated,

> "Taking into account the Appellant's very poor immigration history and his offending behaviour, the children's best interests and the impact upon all family members of his removal and balancing this against the strong public interest in P's removal from the UK, I am not satisfied that this decision is unduly harsh in terms of being excessively or inordinately harsh even taking full account of the impact on the children. P will either have to live separately from his children, seeing them on holidays when they can get together in Ghana or elsewhere, or the children will have to adapt to a very different way of life in Ghana if that is their parents' choice. I do not accept that Article 8 demands that this family be permitted to continue their family life in the UK rather than elsewhere. I'm satisfied that this decision is entirely justified given the criminal offending and immigration history of the Appellant. It goes no further than is necessary to protect the public interests stated. It involves a proper balancing of the competing

> public and private interests including the best interests of the children. It is a proportionate decision and does not breach protected Article 8 rights."

11. The appeal was accordingly dismissed on human rights grounds.

The challenge to the First-tier Tribunal's decision and the 'error of law' hearing

12. The grounds contend that it was not until the appellant arrived in immigration detention in January 2019 that he was made aware that he would be entitled to publicly funded legal representation in relation to his deportation matter. The grounds contend that the appellant was wrongly informed by prison staff that he was not eligible for legal aid, and that his previous legal representatives ceased to represent him as he could no longer afford their feeds. The grounds contend that the appellant would have been entitled to legal aid advice and representation under section 10 LASPO and that, with the benefit of legal representation, he would have been represented before the First-tier Tribunal. The grounds contend, somewhat speculatively, that the appellant would have at least moderate prospects of success had he the benefit of legal representation. The grounds did not particularise how legal representation at the First-tier Tribunal hearing would, in his particular circumstances, have "shifted" (employing the term used in the grounds) the balance in his favour. It was nevertheless argued that the lost opportunity to obtain legal aid representation had a significant impact on the fairness of the proceedings.

13. In granting permission to appeal Upper Tribunal Judge Storey considered it arguable that it was procedurally unfair of the judge to proceed with the hearing even though the appellant was unrepresented and noted that there was no self-direction from the judge to indicate that consideration was given to whether the appellant, by virtue of being in detention, had had a proper opportunity to receive publicly funded legal help.

14. At the outset of the 'error of law' hearing I raised with the party the judge's reliance on **MM (Uganda)** at [20], [48] and [49]. Although the judge's approach to harshness was in accordance with binding authority at the date of her decision, this approach has subsequently been held to be wrong. In **KO (Nigeria)** [2018] UKSC 53 the Supreme Court overturned the Court of Appeal's decision in **MM (Uganda)**. In short, the issue of undue harshness is to be determined by reference to the impact on the relevant child or partner and not by reference to the deportee's immigration history or the seriousness of his or her offence. Although the present appeal was concerned with the existence of 'very compelling circumstances' over and above the unduly harsh impact on the children (or partner), in determining what constitutes 'very compelling circumstances' it will normally be necessary to lawfully identify the (non) existence of factors that render the impact unduly harsh. As the judge, through no fault of her own, applied the wrong test in determining whether the impact on the children would be unduly harsh, her assessment of the existence of 'very compelling circumstances' commenced from the wrong reference point.

15. After a brief discussion both representatives accepted that the judge's assessment of the existence of 'very compelling circumstances' was fatally contaminated by her application of the test in **MM (Uganda)** and that this constituted a material error of law.

Discussion

16. The judge took into account the appellant's poor immigration history and the seriousness of his criminal offending when determining that his deportation would not have an unduly harsh impact on his children [48]. For the reasons set out above, and through no fault of her own, the judge applied the wrong test (**KO (Nigeria)** [2018] UKSC 53). Although the appellant had to persuade the judge that there were 'very compelling circumstances' over and above the unduly harsh impact on his children in order to succeed in his appeal, such an assessment could only properly be made if there had already been a lawful assessment of undue harshness. This was not disputed by either representative at the 'error of law' hearing.

17. In **Greenwood (No. 2) (para 398 considered)** [2015] UKUT 00629 (IAC) the former President of the Upper Tribunal (IAC) held, at [14]

> "Logic, reason and common sense dictate that paragraphs 399 and 339A must be considered in the application of the "*over and above*" test enshrined in paragraph 398. Indeed a failure to do so, if material, would itself be an error of law. In cases where, as here, the "*over and above*" test is engaged, paragraphs 399 and 399A provide the bridge, or link, between the application of the test and the resulting outcome."

18. Although Mr Justice McCloskey was considering paragraphs 398 399 of the immigration rules there can be no material difference in approach to undue harshness under s.117C(6). In **NA (Pakistan) v SSHD** [2016] EWCA Civ 662 (at [37]), Lord Justice Jackson stated,

> "In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6)."

19. The interaction between paragraphs 398 and 399 of the immigration rules, and between s.117C(6) and s.117C(5) of the 2002 Act, will, in most cases, require a judge to undertake a lawful assessment of undue harshness. On the facts of the present appeal the appellant had 5 children in the UK, including a British citizen child, who had been rendered destitute after his incarceration. Whilst it may have been open to the judge to conclude that the impact on the children would not have been unduly harsh if she had properly applied the **KO (Nigeria)** test, it

cannot be said that this would inevitably have been her conclusion. Nor can it be said that she would inevitably have concluded that there were no 'very compelling circumstances' over and above any unduly harsh impact. I'm consequently satisfied that the judge's decision must be set aside.

20. For the reasons given above it is not necessary for me to consider the grounds of appeal relating to the fairness of the proceedings.

21. Having heard representations from the parties and having regard to Part 3 of the Practice Directions: Immigration and Asylum Chambers, and in light of the passage of time and the likelihood of further evidence becoming available, I consider it appropriate to remit the matter back to the First-tier Tribunal to be heard afresh by a judge other than Judge of the First-tier Tribunal Ford.

Notice of Decision

The First-tier Tribunal decision is vitiated by material errors on points of law and is set aside.

The decision will be remitted back to the First-tier Tribunal, to be determined afresh by a judge other than Judge of the First-tier Tribunal Ford.

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

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his 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.

D. BLUM 26 July 2019

Signed Date
Upper Tribunal Judge Blum