Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17001/2017

THE IMMIGRATION ACTS

Heard at Field House,	**Decision & Reasons Promulgated**
On 26 March 2019	**On 10 April 2019**

Before

THE HONOURABLE MRS JUSTICE JEFFORD
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AM
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant (the Secretary of State): Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent (AM): Mrs Nicholas, counsel, instructed by Perry Clements Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department from the decision of the First-tier Tribunal promulgated on 8 January 2019. In that appeal, AM was the appellant/claimant and the Secretary of State was the respondent. In this decision, for ease of refence, we shall refer to them respectively as "the claimant" and the "Secretary of State".

2. The claimant was born on 3 June 1993 and is a national of the Democratic Republic of Congo. He entered the United Kingdom legally on 12 May 2007 when he was 13 years old. In 2014 and 2015 he made unsuccessful No Time Limit applications. He came to the attention of the Home Office in 2016 when he was on remand following his arrest on drugs offences. On 9 September 2016, having pleaded guilty, he was convicted and sentenced in the Gloucester Crown Court on two counts of possession with intent to supply Class A drugs (heroin and crack cocaine). He received a sentence of 30 months on each count to be served concurrently. He pleaded guilty to, but received no separate penalty for, a further offence of possession of cannabis.

3. As a result, as a foreign criminal who had been sentenced to a period of imprisonment of at least 12 months, the claimant became subject to deportation pursuant to section 32(5) of the UK Borders Act 2007. The claimant was served with Notice of Decision to Deport on 25 October 2016. The claimant then made a human rights claim which was refused and certified under section 94B of the Nationality, Immigration and Asylum Act 2002 on 29 December 2016. The claimant sought judicial review of that decision. In light of the decision of the Supreme Court in **Kiarie and Byndloss v Secretary of State for the Home Department [2017] UKSC** 42, that decision was withdrawn. Because of various delays (which are not material) two further decisions were served.

4. The last decision was dated 30 November 2017. The Secretary of State refused the claimant's human rights claim and found that the claimant did not fall within any of the exceptions in section 33 of the UK Borders Act. The Secretary of State was, therefore, required to and did make a deportation order. It is that decision which was the subject matter of the appeal to the First-tier Tribunal.

5. Under section 33(2) of the UK Borders Act, Exception 1 to the automatic deportation under section 32(5) arises where the deportation of the foreign criminal would breach his Convention rights or the UK's obligations under the Refugee Convention. Only the first of those is potentially relevant in the claimant's case.

6. Sections 117A to 117D of Part 5A of the Nationality, Immigration and Asylum Act 2002 apply in this case. Section 117A applies where the tribunal is required to determine whether a decision under the Immigration Acts breaches the claimant's right to respect for private and family life under Article 8 and, in the case of a foreign criminal, requires the tribunal to have regard to the matters in both sections 117B and 117C. Section 117C sets out that following considerations:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the

public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(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."

7. Those requirements are also reflected in the Immigration Rules 399 and 399A.

"399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(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; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(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; or ….

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

8. In summary, the judge of the First-tier Tribunal found that two of the exceptions were engaged, namely that under paragraph 399 and that under paragraph 399A.

9. It is convenient to take first the Secretary of State's second ground of appeal which relates to the judge's decision that the claimant fell within

the exception in paragraph 399A. In order to come within this exception, the claimant must meet each of the three criteria set out in that paragraph (and in section 117C(4)), the first of which is that he must have been lawfully resident in the United Kingdom for most of his life.

10. At paragraph 72 of her decision, the judge found as a fact that the claimant was 13, nearly 14, years old when he arrived in the United Kingdom. That was plainly a correct finding of fact. It followed from that that, at the time of the Secretary of State's decision (and even now), the claimant had not been resident in the United Kingdom for most of his life but for less than half his life. Despite that, in an earlier paragraph [70], the judge stated that it was accepted that the claimant "had resided lawfully in the United Kingdom for the majority of his life" and she so found based on the chronology she had set out.

11. On this appeal, the Secretary of State initially said that he would not seek to take an additional ground of appeal on this basis but would draw the error of fact to our attention. This was not, however, in the nature of an error in the making of a primary finding of fact. The primary facts were not in issue, namely the claimant's date of birth and the date of entry to the United Kingdom. The error was one, it would appear, of calculation. No further evidence or argument was required. We, therefore, considered it appropriate to permit the Secretary of State to rely on this additional ground of appeal to which the claimant had no answer.

12. We add that it is unclear to us, from the decision letter, on what basis the claimant is said to have lawfully resided in the United Kingdom but no further issue was raised about that.

13. We therefore allow the appeal on this ground for the reason that the claimant does not meet the statutory criterion of having resided in the United Kingdom for most of his life.

14. The claimant's appeal to the First-tier Tribunal, however, also succeeded on the basis that he had a genuine and subsisting relationship with his two children and that it would be unduly harsh for them to remain in the United Kingdom without him. The judge also found that it would be unduly harsh for the children to accompany him out of the country and there is no appeal against that aspect of the decision.

15. We set out the relevant evidence as found by the judge of the First-tier Tribunal below and we use the same abbreviations to refer to the children and their mothers as were used in that decision.

16. The claimant has two male children who are both British citizens. The elder, Ty, is the child of the claimant's former partner, C, who gave evidence at the hearing below. He is 9 years old. He lives with his mother. They do not live close to the claimant. The claimant visits when he can and speaks to Ty on the phone. Ty stays with the claimant every second weekend and has done so for most of his life. C's evidence was

that Ty's behaviour could be difficult and out of control. He had been uncontrollable when the claimant was in prison. C had taken him to the doctor who had recommended screening for ADHD and she was waiting for pre-screening. The claimant provided her with emotional support, helped her cope with Ty's behaviour, and was a positive influence on this behaviour. Ty was calmer and happier when he spoke to the claimant. The claimant was the only male role model in Ty's life.

17. Tr is the younger child and is the son of the claimant's former partner, I. Tr is about 7 years old. He too lives with his mother but they live close to the claimant. The claimant takes him to school and Tr also stays with him every second weekend. In May 2017, Tr was referred to Barnet Child and Adolescent Mental Health Service (CAMHS) because of concern about his ability to concentrate and some sensory issues (including avoiding messy play and avoiding getting messy while eating). The school expressed concern about anxiety and low mood while his father was in prison. Between September 2017 and February 2018, Tr attended 6 therapy sessions and a report was provided dated 5 February 2018. The judge noted that the mental health worker stated that it was apparent that Tr had struggled to fill the gap caused by the claimant's absence and that, after the claimant was released, Tr's low mood became far less evident and he seemed happier and more settled both at school and at home. That is an accurate reflection of the content of the report but we note that the mental health worker also stated that Tr seemed happiest talking about his mother and his extended family and that he spoke positively about his peers and teachers at school.

18. Contact between the two children comes about because they both stay with the claimant every second weekend. C's evidence was that the two mothers had a civil relationship but did not really speak to each other unless it was necessary for the sake of the boys.

19. The judge made the following findings:

    (i) *"… [the claimant] is the key to his two children maintaining their sibling relationship and it is reasonably foreseeable that their relationship would break down in his absence. They are too young to be able to maintain the relationship independently and would be unable to have direct contact without the support of an adult. … it would be detrimental to both children to lose the relationship they have with each other."* (paragraph 64)

    (ii) *"For the appellant to be completely removed from their lives would be significant and detrimental for both children …."* (paragraph 65)

    (iii) *"…. [the claimant's] absence during his imprisonment had a detrimental effect on Tr's emotional wellbeing and [the claimant's] absence for an indeterminate period is reasonably likely to result in a deterioration in his mental health. The impact of an indeterminate separation from his father is likely to be*

> *significantly more difficult for Tr to deal with compared with a determinate (and relatively short) period of imprisonment."* (paragraph 68)

20. At paragraph 68, the judge then reached the following conclusion:

> *"Having taken into account all these factors, I find that it is unduly harsh to expect either of the appellant's children to remain in the United Kingdom without him. I have placed particular reliance on the fact that the appellant is the common bond between the two children and the difficulties both have experienced when separated from the appellant in the past. I am satisfied that for them, the consequences of the appellant's deportation from the United Kingdom would be harsher than for any other child of a person being deported such that they can properly be termed unduly harsh."* (Our emphasis)

21. The meaning of "unduly harsh" in section 117C(5) (and paragraph 399) was considered by the Supreme Court in **KO (Nigeria) v Secretary of State for the Home Department** [2018] UKSC 53. The particular issue that arose was whether the relative seriousness of the offence was a matter to be taken into account. In his speech, Lord Carnwath (with whom the others agreed) dealt with the meaning of the expression "unduly harsh" as follows:

> *"… the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in deportation of foreign criminals. 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. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of the relative levels of severity of the parent's offence other than is inherent in the distinction drawn by the section itself by reference to the length of sentence. …."*

22. In the section that follows, Lord Carnwath referred to the decision of the Presidential Tribunal in **MK (Sierra Leone) v Secretary of State for the Home Department** [2015] UKUT 223 as providing authoritative guidance as to the meaning of "unduly harsh":

> *"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, means 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."*

23. It is apparent that the First-tier Tribunal judge was referred to the decision in **KO**, as she cited it at paragraph 60 of her decision as authority for the proposition that the assessment of whether it would be unduly harsh for the children to accompany him or to remain in the United Kingdom without him did not involve any consideration of the seriousness of the offence. She made no further reference to this decision, however, and does not appear to have directed herself as to the meaning of "unduly harsh" by reference to the degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent.

24. It may be that that was the test that she had in mind in reaching her conclusion at paragraph 68 but, if she did, she reached a conclusion which is plainly unsustainable, namely that these children would suffer more than any other child. It is easy to envisage circumstances, for example, a disabled child living with both parents and requiring 24 hour care, who would suffer more from the deportation of one parent.

25. In this case, the conclusion that the sibling relationship would be harmed was based on the slimmest of evidence and despite the fact that the two mothers have a civil relationship and talk for the sake of the children. The position of these two children, in this respect, is not uncommon. Further, the evidence was that each child had exhibited a degree of low mood and/or difficult behaviour when the father was in prison and could be expected to do so if he was deported. Again that was not an unusual situation. The impact on the children, if the claimant is deported, is unfortunate and may be harsh, but we do not consider that goes beyond what is necessarily involved in the deportation of a parent so as to meet the test of being "unduly harsh" and we do not consider that the conclusion that it would be unduly harsh was open to the judge on the evidence.

Notice of Decision

We, therefore, allow the Secretary of State's appeal. We remake the decision and dismiss the claimant's appeal from the Secretary of State's decision.

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

Unless and until a Tribunal or court directs otherwise, the claimant 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 claimant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

pp Mrs Justice Jefford

Date: 2 April 2019