**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/07352/2017

**THE IMMIGRATION ACTS**

| **Heard at Birmingham Civil Justice Centre** | **Decision & Reasons promulgated** |
|---|---|
| **On 2nd July 2019** | **On 22nd July 2019** |

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**SKG**
**(Anonymity direction made)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Howard of Fountain Solicitors.
For the Respondent: Mrs H Aboni Senior Home Office Presenting Officer.

**FINDINGS AND REASONS**

1. In a decision promulgated on 21 February 2019 the Upper Tribunal allowed the Secretary of State's appeal against the decision of a judge of the First-Tier Tribunal who allowed the appeal on human rights grounds.

## Background

2. The appellant is a national of Eritrea born on 10 January 1979 whose claim for international protection was rejected by the First-Tier Tribunal against which the appellant was not granted permission to appeal.

3. The appellant is the subject of an order for his deportation from the United Kingdom following his conviction at Shrewsbury Crown Court on 18 September 2007 for possessing a false identity document for which, on 25 February 2008, the appellant was sentenced to 12 months imprisonment. The immigration history shows various applications being made; the most recent resulting in a decision to refuse a protection and human rights claim dated 21 July 2017 which is the decision subject to this appeal.

4. The appellant has six dependants being his wife TT born on 1 January 1985, and children RK born on 7 June 2006, LK born on 28 December 2007, SK born on 2 December 2009, and twins EK and JK born on 24 April 2011.

5. Following the error of law finding the following directions were made by the Upper Tribunal:

> "a. …The rejection of the protection claim is a preserved finding in relation to which the appellant was not granted permission to appeal in any event. The appellant's immigration and criminal history, family composition, and concessions regarding the relationship the appellant has with his partner and children are also preserved findings.
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> b. The matter shall be listed for a Resumed Hearing before Upper Tribunal Judge Hanson on the next available date, subject to the availability of Mr Pipe, time estimate 3 hours, limited to consideration of whether the appellant's deportation will be unduly harsh upon his partner and children and, therefore, not proportionate pursuant to article 8 ECHR."

## The evidence

6. The appellant has, in accordance with directions, provided a consolidated bundle containing further witness statements dated 12 June 2019 which have been considered together with the earlier evidence. There is also a copy of a British passport issued to LK on 29 April 2018.

7. The appellant in his witness statement repeats his claim to face a real risk on return to Eritrea as a Pentecostal Christian but that is not an issue before the Upper Tribunal as such claim was rejected by the First-Tier Tribunal which found the appellant did not leave Eritrea illegally, the appellant's evidence to be unconvincing even to the lower standard, that the appellant lacked credibility on a number of occasions, leading to the protection claim being rejected. In relation to the issue to be considered; the first appellant confirms he and his wife have five

children in the United Kingdom all of whom have been born here and brought up with British values. The two older children have been in the UK for over 10 years and have been registered as British citizens. The appellant states all the children bar one attends a local primary school in Birmingham where they are performing well with the older child attending a girls grammar school, also in Birmingham. The appellant states it is not in the best interests of the children to be forced to leave the United Kingdom.

8. The appellant claims it will be unduly harsh for the eldest child to remain in the United Kingdom and for him to be deported as it would totally destroy the family and it will be unduly harsh for the children to live in Eritrea as they enjoy family life with their British national siblings and separation will destroy the family unit. The appellant claims it is not possible for his wife to return to Eritrea and claims their life will be in danger should they return to any part of Eritrea. The appellant also claims neither his wife nor he have any family in Eritrea who will be able to provide them with accommodation or protection and that there is nowhere in Eritrea that it will be safe for them to return to. The appellant also claims a fear that his female children and wife may be subject to further violence in Eritrea as they will be vulnerable on their return and will not be able to practice their faith freely.

9. The appellant's wife TT, in her witness statement, repeats the claim that her life will be in danger in Eritrea and claims she shall be forced to undertake endless national service against her will. This witness refers to her faith as a Pentecostal Christian and claims that she, her husband and their children will be persecuted if returned to Eritrea. The statement refers to assistance her husband has given to the primary school attended by the children in Birmingham. The witness repeats that their five children have been born in the UK, that two have been registered as British citizens, the schools attended by the children, and the fact the children are settled and integrated into British society. The witness repeats the appellant's claim of lack of accommodation and feeling scared if returned to Eritrea and fear for the female children and herself as they may be subject to further violence on return to Eritrea as a result of their vulnerability.

10. There are also within the bundle two handwritten letters one from LK born on 28 December 2007 who wishes to bring the Tribunal's attention to a few things that she would like to mention about the whole situation. These are set out in the following terms:

> "Firstly, I know that most of my friends have passports and can go out of the UK for a holiday; however I have never been and cannot go because the rest of my family are asylum seekers. I know I and my older sister have passports and it really makes me wonder how we are not allowed. I find it really unfair! Even though my younger sister were born and raised here, they still don't have their passport.

During my life we have been moved around a lot of houses. Since I was born we have moved in 8 different houses. It has been hard to cope, because the memories I make never stay and I know many people who don't have to live like this.

I find it very strange how at a random time G4S come into our house. Also, knowing that they have the keys to my house, makes me worried. I know that they have come to help, but they are still strangers. Especially, when people come inside my room and inspect it, I don't feel right.

When we move houses, sometimes we live in a big house with 5 rooms and extra toilets; however sometimes we have to live in small houses with 3 room and one toilets, like we have now. Which is stressful in the morning to use the toilet and bathroom.

I would love to buy some good quality clothes, shoes and other things we need. All my friends tell me they got pocket money, and I feel like the odd one out.

It is hard to express how I feel because going on holiday means a lot because right now I feel like I am trapped in a cage, and not allowed out. The worst part is when after we come back from school holiday our teacher asks what everyone did, everyone has enjoyed themselves out of the country; however I feel ashamed when I say I didn't go on holiday. We really need to get out of this situation.

I was sure my family have their passports and enjoy the rest of our lives together. This coming summer holiday I would like to go abroad and enjoy my summer holidays with my family.

This September I will be going to be in year 7 at [……] and really hope I can enjoy the holiday before I start secondary school."

11. A statement written by RK age 13, is in the following terms:

"Hi, my name is [R] and I am 13 years old. Life for me and my family has been difficult. Me and my sister both are British because my parents are asylum seekers we, as a family, never experience things which a family who are all British citizens do.

Firstly we aren't permitted to go abroad and visit other countries; all my life has been in the UK and I've never been out of the country to experience different cultures. It's hard for me as all my friends show me pictures of the holidays and bring souvenirs from the places they have visited and when I'm asked about mine I always have the same answer: I didn't go anywhere.

It's especially hard on my younger sisters, who aren't aware of our situation as they don't understand why they can't do the things their friends do. As the eldest I know what our situation is but I know my parents do their best for us and provide everything they can with the little they receive.

> It's difficult for my parents as they have 5 daughters to provide for. As a teenager there's a lot of things that you need to fit in (e.g. branded shoes) and it's difficult for them to afford these things but they do whatever they can although I may not necessarily need them I think that our circumstances shouldn't prevent me from being an ordinary 13 year old girl.
>
> My childhood was has been very unstable as I've moved a lot in my life and especially harder now that I've come of a certain age all I really want is to have stability in my life. I've lived in over 9 houses: and in some of those we've only stayed for a while the shortest time being 3 months. It's hard for us as we are randomly told that we need to move and are only given a short space of time to leave. Furthermore, it's even worse when we settle into a home and were told we have to move.
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> It's especially hard as I worked really hard to get into a good secondary school and I achieved my goal. However, I'm surrounded with students which have upper-class parents. This means my home and school environment are completely different to other girls which affects my studies and work.
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> This month I had my 13th birthday; me and my parents and I considered having a birthday party with my friends. However, I quickly changed my mind as it would mean we would have to have it in our house because I was ashamed for my friends to see my house as I know that they had much better houses.
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> At the end of this I just pray that my family and I can finally all be content and happy. All of this has caused so much pain and stress; all we want is to be like any normal family."

12. The skeleton argument provided by Mr Howard recognises that the key issue in the case is whether the appellant's deportation will be unduly harsh upon the appellant's partner and 5 children in the United Kingdom.

13. There is no dispute between the parties regarding relevant legal provisions. These include section 117 of the Nationality, Immigration and Asylum Act 2002, including 117C which sets out additional considerations in cases involving foreign criminals. Relevant immigration rules include A398, 398, 399, and 399A.

14. A number of cases are referred to in the appellants skeleton argument but those of particular reference to assessing the case where the issue is that of whether the decision is unduly harsh include *KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53* in which Lord Carnwath, with whom the other members of the Court agreed, said, at [23] of his judgment:

> "… [T]he expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of reasonableness under section 117B(6), taking account of the public interest in the deportation of

> foreign criminals. Further 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 the 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 relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor … can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

15. In the more recent case of *RA (s. 117C: "unduly harsh"; offence: seriousness" Iraq [2019] UKUT 123* it was found that the way in which a court or tribunal should approach section 117C remains that set out in the judgement of Jackson LJ in *NA (Pakistan) [2016] EWCA Civ 662* in which it was found that section 117C applies to all cases involving foreign criminal and not just to those sentenced to a period of imprisonment of at least 4 years.

## Discussion

16. The appellant is a 'medium offender', namely a person who has been sentenced to more than 12 months but less than 4 years in prison. The appellant received such a sentence as a result of what was found by the sentencing judge to be a deliberate use of a false passport as a result of which, notwithstanding any mitigation pleaded, he received an immediate custodial sentence.

17. Section 117C(3) states that in the case of a foreign criminal who has not been sentenced to a period of imprisonment of 4 years or more the public interest requires his deportation unless Exception 1 or Exception 2 applies.

18. Exception 1 required the applicant to establish that he has been lawfully resident in the United Kingdom for most of his life which he cannot satisfy as his residence has always been without any form of lawful leave. This subsection contains a further requirement of establishing very significant obstacles to integration into Eritrea, which the appellant relies upon pursuant to paragraph 276ADE of the Rules too, which has not been made out, in any event, on the basis of the appellant's claimed religious difficulties in light of the preserved findings of the First-Tier Tribunal or inability to secure work and accommodation if returned.

19. Exception 2 applies where the foreign criminal 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

the applicant's deportation on the partner or child would be unduly harsh.

20. It is not disputed that on the facts this is a family splitting case as it is accepted it will not be proportionate to remove the appellant's wife and children from the United Kingdom. The question is therefore whether it is unduly harsh for the wife and children to remain in the United Kingdom if the appellant is deported.

21. The sentiments expressed by the girls in their handwritten statements are understandable when considering their age, levels of understanding, and those items that are important to them in their lives at this present time. It is the reality of modern life, however, that many children do not have the type of stability craved by these young people or the able to enjoy the type of material benefits identified as being 'necessities' such as branded shoes, good clothes, or foreign holidays. Whilst it is understandable that peer pressure within the school or social environment can cause difficulties the situation that exists is solely as a result of the reality of the situation in which this family unit finds itself. It is not made out that even if the appeal succeeded the family will be able to afford the items the children refer to in their evidence.

22. What is clear on the facts is that all the children enjoy and benefit from a loving and stable family relationship that they would not wish to lose; but what needs to be demonstrated in the evidence is a degree of harshness going beyond what would necessarily be involved for any child or partner faced with the deportation of the appellant, on the facts of this case.

23. As issues raised in the witness statements regarding difficulty in the family as a whole re-establishing themselves in Eritrea takes the matter no further as it is only the appellant who will be removed. The children wishing their father to remain with them and becoming distressed if he is deported has not been shown to be other than the normal consequence of deportation. It is not made out on the evidence that the children's mother will not be capable of meeting the physical and emotional needs of herself and the children. The witness statement she has provided refers to the children's schooling which there will be no need to change if the appellant is removed. Many single parents cope with such a situation even following the loss of a partner.

24. Whilst it is asserted in the skeleton argument that the appellant's partner does not have any legal status or leave to remain in the United Kingdom with no certainty she shall be permitted to remain, which it is submitted creates a real risk of the children being left without either of their parents in the United Kingdom, this is no more than speculation. Two of the children are British citizens and the rest have spent all their lives since birth in the United Kingdom. The British citizens are also EU nationals and cannot be compelled to leave the territory of the member state. Their mother as their primary carer, if their father is removed, is

arguably entitled to recognition of a right to remain under either EU law under the *Zambrano* principle or article 8 ECHR on the basis it would be disproportionate to remove her from the United Kingdom. If the appellant is removed his partner, the children's mother, will be able to make an application in her own right which has realistic prospects of success meaning the children will not be deprived of the care of both parents.

25. One thing that comes through from the witness statements prepared by the children is the need for resilience when facing disruption in their lives flowing from their status as an asylum-seeking family. It has not been shown there is anything unlawful in their experiences which at times can be disruptive and intrusive. What is not shown on the evidence, other than expressing a desire for the same to stop, is any adverse impact sufficient to establish the only warranted decision in this appeal is for the same to be allowed. Indeed it is arguable that the degree of certainty the children crave can be achieved within this family unit if the appellant is deported and their mother is granted leave to remain in her own right, albeit that it will be without their father's presence.

26. I accept consideration can be given to the desire for this family to remain together and to the fact that families do ordinarily stay together. The offence was committed some time ago, but the appellant's immigration history shows this is not a case of the respondent doing nothing during the intervening years. The original deportation order in which the respondent took action to deport the appellant and the whole family, in December 2008, was eventually revoked in October 2013 following the receipt further submissions with there being a deportation appeal hearing in April 2014. Any delay that has occurred is not a determinative factor and has enabled the appellant to further establish ties and family life within the United Kingdom.

27. The more serious the offence the greatest public interest in deportation. Although the offence committed by the appellant is not a crime of violence it is an offence of dishonesty relating to a fundamental aspect of the integrity of the United Kingdom's system of immigration control namely the reliability of immigration documents such as passports.

28. The best interests of the children, pursuant to section 55, favour them reminding in the United Kingdom with their mother and father although this is not the determinative factor in this case where there are countervailing reasons of considerable force displacing the same; namely the appellant's deportation and provisions of section 117C and the public interest in deporting foreign criminals.

29. There is no expert evidence to demonstrate that the effect on the appellant's partner and children, even though harsh, will be unduly harsh. The children and their mother will have the support of the schools and the church together with all the benefits to which children are

entitled as British citizens and continued NHS treatment that they have benefited from to date.

30. It was said at the outset of the appeal hearing and at the error of law hearing that the decision at the resumed hearing might be the same as that before the First-Tier Tribunal, if the evidence warrants the same. Whilst it would be easy to say that the existence of five children warrants the appeal being allowed per se that is not an appropriate approach and reflects the situation that existed previously in some cases; which resulted in section 117 and the amendment to the Immigration Rules setting out a threshold that needs to be considered and shown to be crossed by an appellant. Such an assessment is always fact specific. Appling the correct test it is not made out the consequences of removing the appellant upon his partner and/or the children will be unduly harsh as that term is understood in its correct legal context.

31. As Mrs Aboni stated in her submissions is not disputed there is a genuine relationship with the children two of whom are qualifying children. Notwithstanding, the appellant had not proved it will be unduly harsh on the children to remain in the United Kingdom with their mother without him. It is not in the public interest to enable the appellant to remain in the United Kingdom. There is no evidence the children have specific educational, medical or support needs and their mother will be in the United Kingdom to meet such needs in any event. There was no evidence the mother could not meet the needs of the children without the appellant and no evidence of the detrimental impact upon the children's well-being or their development if the appellant is removed. The appellant had not established it will be unduly harsh if the children have to remain in the United Kingdom without him.

32. As the appellant has failed to show he is entitled to the benefit of either Exception 1 or 2 of section 117C(3) the statutory provisions require his deportation from the United Kingdom.

33. On the basis of the available evidence the respondent has established that the decision to deport the appellant is proportionate pursuant to Article 8 ECHR.

## Decision

34. **I remake the decision as follows. This appeal is dismissed.**

Anonymity.

35. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Upper Tribunal Judge Hanson

Dated the 9 July 2019