



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12372/2017

THE IMMIGRATION ACTS

Heard at Field House
On 25 November 2019

Decision & Reasons Promulgated
On 21 January 2020

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE FINCH

Between

M A S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Jafferji instructed by Burton & Burton Solicitors (Dale Street)
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the rehearing of the appellant's appeal against the Secretary of State's decision of 25 September 2017 refusing his human rights claim.
2. The history of the claim is set out in the error of law decision which was promulgated on 10 May 2019. In that decision it was noted at paragraph 12 that the findings at paragraphs 31 and 33 of the First-tier Judge's decision should be

preserved, and there was agreement before us today that the findings at paragraph 32 also fell to be preserved.

3. The appellant adopted his statements of 2017 and 2018 and his two statements of 2019, the second of which was an amendment of the earlier 2019 statement.
4. When cross-examined he confirmed that after he had served his custodial sentence he was in immigration detention and had been released on bail on 7 June 2018.
5. He was referred to paragraph 17 of the second statement of 2019 and was asked when the problems of his sons' misbehaving started. He said it was when they found out their father was no longer part of their lives and that that had happened a few months after he got out. He was asked whether they were misbehaving while he was in detention and replied that they had been. As to when the misbehaving started he would say that it was right after he was away from them, since 2017. He would say that it was from right after he was away and he had gone into custody in February 2017. He was asked whether he was saying that it was right after then that they had started misbehaving he said sort of he would not say fully and there were problems.
6. He was asked why there was no reference to this in the earlier statements and he said that they had been putting this evidence forward and the issue was increasing. It was put to him that the statement of 28 June 2018 was long after his initial detention and release but there was no evidence there of these problems. He said the problems were there but they had thought it was just passing issues and when it was put to their representatives to put forward and there were serious issues. He was asked whether this happened before he went to prison and he said he had been working as a driver doing deliveries and his wife was now the breadwinner as he did not have permission to work.
7. He was asked why a lot the correspondence and emails from page 59 onwards in the bundle about the problems of misbehaving were directed to his wife and not to him and he said she was more of a communicator and worked in those fields and was a school governor.
8. He was asked about his self-referral to the recovery network on 21 August 2019 and was asked why he had felt it necessary to do this and he said that everything had become too much to bear and there was a lot of pressure and it was his way of coping. His sons had not witnessed him in a state. He was asked whether they had not seen him drinking or smoking and he said he did it out of their sight and they were unaware. He had not been totally wasted. He was not trying to justify it and he had made mistakes.
9. His mother was in Tanzania. As to his father he did not really know where he was as he had left the family when the appellant was young.

10. He was referred to paragraph 9.14 of the SET(M) form of 3 January 2017 with reference to his parents being in Tanzania and he said it was the case that he had assumed this about his father. He did not remember when he had last seen his father.
11. As to when he had last spoken to his mother he said it was a while ago and he had passed a message and that had been a couple of weeks ago. As far as he knew his mother still lived in Tanzania. As to when he had last spoken to her it had been a while, he would say roughly a few months ago. He was asked whether he was therefore in touch with her and he said on the phone: it had been a while and he would say it had been years. His wife spoke to his mother via messages on WhatsApp and he himself had been away, having been locked up. It was put to him that it was obvious his mother did not want to speak to him and he said that if she wanted to the contact was via WhatsApp. His sons were in touch with his mother via WhatsApp and they got messages and that was about it. What the social worker had said at paragraph 138 of the witness statement about his son J's communications with his paternal grandmother that was correct and they sent a message on WhatsApp. It was suggested to him that he was minimising contact with his mother and he said no, he did not know where his family were. It was put to him that his wife knew where his mother lived and he said no, of course. He had left Tanzania since 2005 to 2006 and had had no communication. His mother was always travelling. She had been evicted from the family home and she kept in touch and was still alive. He would not know where to start if he landed in Tanzania today. His mother tongue was Swahili and English was his second language. There was no one to whom he spoke in Swahili. He did not speak to his brothers.
12. There was no re-examination.
13. The next witness was the appellant's wife. She adopted her witness statements of 2017, 2018 and 2019 and said that their contents were true.
14. In examination-in-chief she said that her husband had gone to prison in early 2017. It was the case that the sons had begun to misbehave shortly thereafter. Initially they were misbehaving and not listening to her and not taking instructions and not doing their homework and this was happening at school also but not so much. They were not listening and they had detentions and were on report. That had been happening from 2017 onwards to today.
15. With regard to her statement of 28 June 2018 soon after her husband's release on bail it was put to her that there were no references to the children being withdrawn and misbehaving. She said she thought that at that point it was normal for children of that age and it was a phase. She knew they were upset and concerned and there were emotional issues happening for them, but in terms of the dealing with their feelings, the younger one was not talking about what upset him and there were peaks and troughs and it was not a consistent state.

16. As regards paragraph 103 of the social worker's report it was put to her that the incidents concerning the elder son all began in late 2018. She said she thought these were the ones that were kept/logged. She had not necessarily kept a record of every type of thing. Her elder son had moved to secondary school and she thought some of the problems related to the transition. The information was logged by the school and they made a report. He had begun at that school in September 2018. He had not misbehaved as much at his previous school. The secondary school affected him more.
17. As regards what was said at paragraph 105 in the social worker's report about the younger son, it was put to her that the problems stemmed from 2019 onwards. She was asked whether he was also misbehaving before then. She said he had been but he was more closed and he would become more introverted and would not engage and there had been a gradual release. She thought particularly after his brother left school that was another loss to him as they were by now at different schools.
18. It was put to her that with regard to the elder son it was a record of low level disruption and she said that might be in comparison to other children and she did not know about them but previously he had been very good at school, academically and experienced change. In summary she endorsed what was said at paragraph 76 concerning how she had coped during the time when the appellant was in prison and in the detention centre previously.
19. She was referred to what was said at paragraph 135 of the social worker's report where she had said that whatever was happening for the elder son at school had no link to the home situation and that the issues were not related. She did not know what she had meant by that and was not sure what the context in which they were discussing it had been. She referred to the child when he was outside school not coming home on time and queried whether the reference to that had been part of it. She was not sure what she had meant about that and was unclear about the context. It was the case that it had been a different social worker, a new one. The social worker had only spoken to her younger son and he did not talk to many people and was introverted to a degree with some people and more so over the years. She did not know if this was age related. The things he did were really worrying her as there was inbuilt anger and raised concerns as to whether he would see his father.
20. She agreed that her husband had checked into rehab in August of this year. She was asked whether she had been aware of his drinking and she said not really, they would have the odd glass of wine together and he had never smoked in front of her. She was aware that he had smoked and drunk but it was not within the home. Her sons were not exposed to it, though she said they might know he had gone out for a drink but they did not have alcohol in the house. As to whether this was affecting the family she said no the children would not be aware. It did not impact on his ability to take care of the children. He got on with it.

21. She was not regularly in touch with the appellant's mother but his mother called if there was an occasion such as Eid. They were in touch via WhatsApp. The appellant's mother tried to get in contact and had spoken to the elder son. She believed that the mother lived in Tanzania and she knew she moved around and it depended on her scenario. They spoke in English and it was not an in-depth conversation. She herself did not speak Swahili.
22. She was asked why the appellant's mother did not speak to him and she said she was not entirely sure. They had not got the best relationship and since he left Tanzania they had lost contact and it was because of that. She did not know about in-depth issues. She had always been civil herself. The mother asked about him but again the conversation was limited. She was asked whether her husband did not help with this and she said they were very random calls and did not occur frequently. She did not call her mother-in-law as it was awkward as she could not really speak to her. With regard to the mother-in-law's situation she gathered that she was not particularly well and was not sure of her age but assumed she was in her 70s like her own mother, or perhaps older. She did not know where the appellant's brothers were and she was not aware that he spoke to them.
23. With regards to the £11,700 in the savings account, her mother had given her £10,000 about a year ago for assisting in buying a house but because of all the uncertainty they had held back on that. Her mother lived in Bedford about an hour and a quarter to an hour and a half away.
24. She had gone to Tanzania for her wedding and had been there for about four and a half weeks. That had been in 2005. As regards her thinking that she could not go to Tanzania as it was unsafe, it was put to her that she had gone then and she said that she believed that since then there had been quite a lot of reported cases and she had had her extended family with her and no children and it was very different. There had been quite a lot of reported acid attacks on foreigners more recently, especially British visitors. On that occasion they had stayed in hotels in very touristy areas.
25. They had met the appellant's mother in Zanzibar but she moved around, for example she had lived in Dar es Salaam. Before going to prison her husband had worked in delivery driving.
26. If he was deported she would not be able to visit him occasionally with the sons. The school holidays were not ideal and it was the hottest time of year in Africa and the prices were high. She was quite scared of going as well. The sons should be aware of their culture and that was very important but it was a question of safety. She had always had her parents around to support her and she would not be able to go on her own and not during the summer.
27. On re-examination she was asked what she thought would be the impact on the children if her husband had to leave the United Kingdom. She said she thought they would be devastated and also she was really concerned about them both needing a

father figure. She was also busy as a working mother and it was really important for them to have stability and that she was trying her best but needed that support and there was a lot she could not do. The elder son was going through a teenage phase and the younger son was quiet.

28. In his submissions Mr Kotas argued that with regard to the issue of undue harshness, it was accepted that it would be unduly harsh for all the children to go to live in Tanzania, but it was a question of whether it would be unduly harsh for them to be separated from the appellant if he were to be returned to Tanzania. It was clear from KO (Nigeria) [2018] UKSC 53 that there was an elevated threshold. The issue in this case was whether the facts were such as cross that threshold.
29. There was a concern about the methodology of the social workers as different social workers had spoken to the parents on the one hand and the elder son on the other hand. It was not the appellant's fault but something to be noted.
30. With regard to the evidence of the appellant's wife, she had managed to cope previously but had found it challenging, indeed manic, previously and that was relevant to the test to be met. The context of any deterioration in the elder son's behaviour was that it had been low level as noted by the science teacher at page 33 of the bundle involving minimal disruption. It could be said that if there were a deterioration in her son's behaviour then that could be the ordinary consequences of deportation and the situation was not severely bleak. She had clearly managed to cope previously, with difficulty. She had kept her job and was the main point of contact with the school.
31. With regard to the social worker's observations set out at paragraph 149 of the report concerning the strength of the relationship between the children and the appellant, there was the problem of uncertainty as to what would happen in the future. There was also the point at paragraph 151 of the absence of a father figure which would be a worry and that they worried about the possibility of being taken into local authority care. The finances were said to be unstable, but Mr Kotas disagreed, as the appellant was not able to work before. It was very serious from the family's point of view but amounted to no more than the ordinary consequences of deportation and the threshold was not met.
32. With regard to whether there were very compelling circumstances over and above, the evidence was a little difficult to accept. An example of this was the ability to contact the appellant's mother, in contrast to what was said in the statement, but she was in Tanzania and the appellant speaks Swahili. It was not within the Rules but a relevant factor and he had familiarity with the culture and his mother was there and he spoke Swahili and these did not amount to very compelling circumstances. There were not very significant obstacles to integration. He did not cross the threshold. The public interest in very compelling circumstances was significant and it was not just a question of the effect on the children.

33. In his submissions Mr Jafferji argued that the issue of undue harshness had to be considered for each child and it was an individual test as section 117C made clear. If it was unduly harsh for either the appeal would succeed and if not then it would be necessary to look outside the Rules and consider it as it was a very different test. But as well as the impact on the appellant of return to Tanzania after a lengthy absence there were questions of reintegration difficulties and rehabilitation difficulties and also the impact on the children on a cumulative basis and also the impact on the appellant's wife and this had to be balanced against the family interest.
34. There was the argument that the offending was at the lowest level to trigger automatic deportation and there had been no difficulties thereafter or risk of reoffending and he was working towards full rehabilitation.
35. On the point of undue harshness there was a lot of evidence. The judge's findings had been preserved. There were two children who were each clearly suffering emotional trauma which was translating itself into very serious misbehaviour at school over a lengthy period of time, and their mother's fears. There were real concerns as to the impact on them of their father's removal and the impact on their education and their life chances. And it was relevant to consider the section 55 assessment. Removal would result in loss of contact with half of their heritage on racial and cultural and religious bases. There were serious issues with regard to their welfare. It was likely that the impact would be to result in a very significant severance of the relationship with the father. The mother was very reluctant to travel to Tanzania. It was clear from her bank statements that she would not be able to afford it. The funds in the savings account were largely as a consequence of a gift from her mother to buy a house which had not yet happened. At the most it would fund two to three visits. The current account was in credit but they were essentially living hand to mouth. This was part of the real world circumstances of the children and would involve complete severance of any meaningful relationship with their father.
36. The witness statements attested to the difficulties that the children were experiencing at school and their attachment to the appellant and the concerns that he would go away again. There was also the issue of the cultural link. The evidence given was consistent, candid and credible. There were concerns about the younger child going beyond the school evidence. Paragraphs 44 to 50 were of relevance and also paragraphs 59, 69, 73 and 76 of the social worker's report. It mainly made important points about rehabilitation and the importance to the children of their identity and the impact on the family. It was the case that the mother had been able to cope during the detention period but that was at a cost to the welfare of the children and their ongoing struggles and behavioural problems at school and his absence was for a finite period in that time in contrast to the situation if he were deported. It could be seen from paragraphs 80 to 90 what the circumstances would be and the mother's concerns. Paragraphs 102 to 106 indicated the difficulties of the children at school and the reasons for misbehaviour did not matter as the question was the impact on their welfare and their father not being there. There would be likely social services

involvement. It was not just low level misbehaviour. Paragraph 170 addressed the impact of further separation. There were the boys' letters also at pages 55 and 56 of the bundle and page 61 onwards contained details concerning behaviour at school.

37. It was always the case that when a parent was removed from a child's life there would be an impact and the ordinary consequences of removal were not enough and each case had to be determined on its own facts, and the facts in this case were very different from the facts of an ordinary case. This was a vulnerable family with children struggling to cope. There had been misbehaviour over a lengthy period of time. That had dated from the time in prison and thereafter after the appellant's return to the family home. If he were removed permanently there would clearly be a devastating impact on the children and it would be unduly harsh on each of them and the appeal should be allowed on that basis alone.
38. With regard to the position outside the Rules, it was the matter of an overall balancing exercise. The appellant was lawfully resident in the United Kingdom and faced deportation but at the lowest level and there were no concerns about his behaviour since release. The self-referral had been a positive fact. Removal would be adverse to the public interest because of problems to the family, a strain on the NHS and social services and potentially more broadly in relation to the wife's job which might be at risk given the escalating nature of their problems. Also it was necessary to consider the cumulative effect on both British children and the impact on the wife, and she had found things very difficult previously. The appellant would return to Tanzania after in effect an absence of nearly 25 years, having been back for one year in the interim. The question of whether his mother was in Tanzania to renew contact with and support was a minor issue. It would be very difficult for him to establish a private life in Tanzania and would be detrimental to his rehabilitation. When all matters were put in the balance including the taking into account of the public interest, he succeeded.
39. We reserved our determination.
40. We remind ourselves of the index offence in this case which is the conviction of the appellant on 1 February 2017 for interfering with a motor vehicle/trailer/cycle – endangering other road users for which he received a twelve month prison sentence and also an earlier suspended sentence was activated but made concurrent.
41. Within the appellant's evidence and the most recent witness statement with regard to the children it is said that his detention put a big strain on the family life and his sons began to act up at school due to the stress they were under living without their father. He was very much involved in their lives, taking the younger son to school and taking them to after school clubs and trying to rebuild the routine he had with them before his sentence and detention. He says that due to the stress this whole situation has put on the family the children have been acting up at school and they have been asked to collect them early and the children have even been excluded. He says this is not how the children used to behave but as a consequence of the stress of

him being in prison and detention centre and still not having a secure future in the United Kingdom. He said it is very clear the children are displaying very challenging behaviour due to his ongoing problems. He refers to the importance of them keeping in contact with their cultural and racial background with regard to his life in Tanzania which country they have never visited. They have experienced problems on account of their ethnicity as mixed race children.

42. He says that since he left Tanzania in 2006 he has not seen his parents or his brothers.
43. His wife in her statement and oral evidence also refers to problems with the boys at school as a consequence of the appellant's detention. She says the children are still very distressed about the possibility of losing him from their lives and they have acted up at school leading to early collection or even exclusion. The details of this are provided in emails from the school and the younger son has been excluded from the after school club. They talk regularly to the schools and of course try to deal with the problems of the children themselves. She also refers to the mixed background and heritage of the children and the difficulties she would face in visiting the appellant in Tanzania quite apart from her fears she has for lack of safety in the country.
44. We have referred above to the detailed report of the social workers. It is unfortunate but in the end we think of no materiality that different social workers saw on the one hand the parents and on the other hand the elder son. The younger son did not wish to be interviewed by them.
45. The two children are viewed to have a strong bond with their father and missing him again from their lives is deemed to have the potential of causing long term emotional and psychological stress on them. They will have to worry about not having a father figure around their lives and about the possibility of being taken into local authority care. When the appellant was previously absent, their mother struggled to care for them. The financial situation is unstable. The elder son is entering adolescence and the parents' role in adolescence is critical and demanding. There is a concern regarding the boys' deterioration and their behaviour in school and it is said that if such behaviour is continued without a robust intervention at this early age then it is likely this will have a hugely negative impact on their educational achievements. It is said that it is unknown as to whether their challenging behaviour is due to what has happened to their father or the family situation, and in this regard it is relevant to note what was said by the appellant's wife, as noted at paragraph 135 of the report, that whatever was happening to the elder son at school had no link to the home situation. In her oral evidence it was unclear as to why she had said this or what the context for was saying it was. At paragraph 155 it is also said that it is likely that social services will get involved in assessing the family situation and unpick the underlying causes of their emotional and behavioural instability. It was also said that the situation could become worse if the appellant is separated from them as that is likely to have an impact on their behaviour and their emotional and development issues.

46. There is also recorded in that report a number of incidents involving the elder son dating from September 2018 when he had gone to secondary school, of various misbehaviours involving such matters as rudeness, disruptiveness, interruption, disrespect, lateness and failing to engage in lessons.
47. The concerns set out with relevant to the younger son date from May 2019 including an incident that he had a penknife and hit a child and was heard to say he would stab him, his exclusion from the after school club and disruptive behaviour and exclusion from the primary school. Again it is said that it is unknown as to whether such challenging behaviour is due to what has happened to his father.
48. With regard to the issue of undue harshness which is the first element to be considered, bearing in mind the section 117C test, it must be borne in mind that, as was said in KO (Nigeria), the threshold is a high one. Disruption to a family and separation of children from a parent is as has been said by the higher courts, a consequence of deportation that can be expected to arise in the ordinary course of events. It is the case therefore that, sadly, unhappiness and problems for a family are inevitable concomitants of deportation where, as in this case, the family is split with the father being deported to another country in particular in circumstances where, as we accept on the evidence, it is most unlikely that any family visits would take place for reasons partly of finance and partly due to the appellant's wife's fears as to the family's safety in Tanzania.
49. It is clear from the evidence that the two sons have been engaging in disruptive and problematic behaviour at school, though it remains unclear from the social worker's notes to what extent if at all this is connected with their father's pending removal, and bearing in mind that there are no such records with regard to the time when he was previously detained: though we accept that there was the absence of permanence to that which deportation would, it seems in this case, have. But it does seem to us that the undue harshness threshold, this high threshold, is not met in this case. The circumstances are not unusual ones. The family managed previously, albeit with difficulty, and those difficulties may well be enhanced by the boys' awareness that their father is permanently or at least until they reach adulthood, separated from them and they have effectively lost him from their lives subject to communication via phone, FaceTime or other media. We accept of course that these are far from adequate alternatives to face-to-face contact with a person who is playing a regular part in the day-to-day basis in one's life. But these consequences though harsh, do not seem to us, in the context of the legal tests, to involve undue harshness to either child. We note and bear in mind the particular concerns that the appellant's wife has expressed with regard to her younger son, but neither the consequences for him nor his brother seem to us to be such as to amount to the ability to cross the high threshold of undue harshness.
50. As regards to whether there exist very compelling circumstances outside the Rules, we agree that the matter has to be viewed cumulatively in light of the impact on both

boys and on their mother and on the appellant himself, setting this against the public interest. Almost inevitably it will be the case that the best interests of children are to be with both their parents and that is true in this case. That is a primary but not a paramount consideration, as is trite law. In this case we bear in mind the relevant factors as set out by Mr Jafferji such as the amount of time the appellant has been away from Tanzania, the fact that his sentence was one of twelve months therefore placing him into the relevant category at the bottom end, and the absence of any indication that there is a risk of reoffending and the potential impact on his rehabilitation. Against that also is the fact that he is from Tanzania and it is part of his culture and that it seems his mother is in Tanzania, though there has been minimal family contact for years. There is some ongoing contact with her through his wife. There are circumstances here which clearly militate towards a balance in favour of the appellant but they are not very compelling circumstances nor indeed even compelling circumstances in our view. Taking all these matters as a whole we consider that the claim to Article 8 protection outside the Immigration Rules bearing in mind again the very high threshold of very compelling circumstances and bearing in mind the cultural impact on the children of being separated from their culture through their father is not met, we find that the claim is not made out and as a consequence the appeal is dismissed on all 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 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.



Signed

Date 14 January 2020

Upper Tribunal Judge Allen