Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11499/2017

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On the 24th October 2018	**On the 21st November 2018**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AJ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Presenting Officer
For the Respondent: Mr Morrison, Counsel instructed on behalf of the Respondent

DECISION AND REASONS

1. The Secretary of State appeals, with permission against the decision of the First-tier Tribunal promulgated on the 9th May 2018 in which the Tribunal allowed the appeal of AJ against the decision of the Secretary of State to refuse his human rights claim and the decision made to deport him made on the 19th October 2017.

2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008. Unless and until a Tribunal or court directs otherwise the Appellant is granted anonymity. No report

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of these proceedings shall directly or indirectly identify him or members 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.

3. Although the Secretary of State is the Appellant before the Tribunal, I will for ease of reference refer to him as the Respondent as he was the Respondent in the First-tier Tribunal. Similarly I will refer to AJ as the Appellant as he was the Appellant before the First-tier Tribunal.

The Background:

4. The Appellant is a citizen of Sri Lanka. He appealed against the decision of the Respondent who, on the 19th October 2017, refused his human rights claim and had made a deportation order against him under section 5(1) of the Immigration Act 1971 on the basis that his presence in the UK is not conducive to the public good.

5. The Appellant's history and relationship with his partner is set out in the papers. The Appellant arrived in the United Kingdom in November 2000 and claimed asylum on 10 November of that year. His application was refused on non-compliance grounds and after lodging an appeal against the decision, on 30 March 2001 the decision was maintained. In October 2001 his appeal against the refusal of his protection claim was dismissed and on 24 October 2001 he became appeal rights exhausted.

6. In 2009 he applied for a certificate of approval to marry a British citizen but that marriage never took place. There was one child of that relationship born in August 2009 who was a British citizen. It is common ground between the parties that the appellant has not seen the child since the beginning of 2013 (see paragraph 32 of the decision).

7. On 24 March 2010 the appellant was granted leave to remain in the UK outside of the rules.

8. The appellant has a number of criminal convictions; the First conviction in 2003 was for a driving offence with excess alcohol for which he was disqualified from holding or obtaining a driving licence for 12 months and received a community punishment order 60 hours. In 2006 he was convicted of an offence obtaining property by deception and was sentenced to a conditional discharge of 18 months. In 2007 he was convicted of theft (in breach of the conditional discharge) and was sentenced to a conditional discharge for two years. In 2011 he was convicted of battery and sentenced to a community order with the curfew requirement of two months and in January 2012 he was convicted of theft (shoplifting) and failing to surrender to custody receiving a conditional discharge of six months and ordered to pay costs, a fine and victim surcharge.

9. In December 2012 he was convicted of assault causing actual bodily harm. The sentencing remarks are set out in the respondent's bundle at K1. On 23 January 2013 he was sentenced for that offence to 12 months imprisonment.

10. Following his conviction at the Crown Court for which he received a total sentence of 12 months' imprisonment, he was served with a notice of liability to deportation on the 1st March 2013. His legal representatives' submitted representations dated 17th June 2013 alleging breaches of Article 3 and 8.

11. In 2015 the appellant began a relationship with A, a British citizen and they became engaged to marry in 2016. They have one child, born in 2016 and at the time of the hearing before the First-tier Tribunal was pregnant with their second child. They do not live together and have separate addresses but they spend every day together. The appellant helps look after the child and feeds and changes the child.

12. The full reasons for that decision are set out in a letter of the Respondent dated 19th October 2017 (see Respondent's bundle).

13. The Appellant appealed against that decision to the First-tier Tribunal. It was asserted in the Grounds of Appeal that to deport him would be a breach of Articles 3 and 8 of the ECHR based on his family life with his partner and minor child and that the mother of his child suffered from ill health and as a result would be unable to care for the child as a single parent.

<u>The Decision of the First-tier Tribunal:</u>

14. The appeal came before the First-tier Tribunal on the 30th January 2018 and the 25th April 2018.

15. In a decision promulgated on the 9th May of that year, the judge allowed the appeal. Whilst the appellant had a child with the previous partner, the judge found that he had no contact that child at last saw her in 2013 (see paragraph11(b)).

16. In respect of his relationship with his partner, the judge noted that they had met in 2015 and became engaged in 2016. They had a child born at the end of 2016 and she was pregnant with a second child. They did not live together but maintained separate addresses but spent every day together. The appellant helped to look after the child; he would feed and change the child. He recorded a paragraph 11 (l) that his partner had a history of addiction and low mood and that the relationship had helped her and improved her mood.

17. The judge considered his asylum claim, in the light of the earlier claim that had been dismissed in 2001._At paragraphs 20 – 24 the judge gave reasons as to why the appellant could not discharge the burden of proof to establish that he was a refugee.

18. The judge noted that the focus on the case was his relationship with his partner and child (see paragraph 32). At paragraph 33, he was satisfied that the appellant had a parental relationship with the second child whom we saw every day and spends most of the day with. The judge again set out that the appellant played with his child fed him and he changed the child and thus the judge found that he had a genuine and subsisting relationship with him. He also recorded a paragraph 36 that the respondent accepted that he had a genuine and subsisting relationship with his son. At paragraph 39 the judge stated that “the appellant’s partner clearly struggled to cope and has a history of difficulties. At the moment the appellant’s son has the benefit of both parents.” The judge went on to state “the interests of the appellant’s children will be served with the integrity of the family unit is not challenged. It has long been settled that it is in the interest of children to live with their parents.”

19. Having found that the children had a close relationship with the Appellant and in conclusion at [40] that “it is in the interests of the children to live in a nuclear family. In the particular circumstances of this case it would be unduly harsh on the appellant’s son to separate him from the stabilising influence of the appellant. It would be unduly harsh on the appellant’s son to break up the home he has with both parents and force him to into live in a single-parent family, particularly at the time when their family is expecting to expand within the next two months.” He therefore found that the exception of paragraph 339 was made out. At paragraph 45 he found that the appellant’s partner would struggle to cope without the appellant and that “he played a crucial role in parenting his child”. At paragraph [48] the judge found that the effect of the respondent’s decision is “unduly harsh on the appellant’s partner and child because it will break a fragile family unit in which the appellant is the most capable person. The decision will force a British citizen infant to lose a caring, active, father.”

20. When considering Article 8, he found that the appellant had spent most of his life in the UK having lived in the UK since 2000; his home was in the UK and he’s had employment there. Considered the offending history at paragraph 49 he found that he not offended since 2012 and that his offending was mostly at summary level but it had been six years since he last offended. He made reference to the evidence stating that the appellant had disassociated himself with his peers that had led to his offending behaviour. He made reference to the appellant as potentially vulnerable and that the effect of deportation would leave two British citizen children to be brought by vulnerable single mother (although there was only one relevant child). He found that the appellant did not present is a risk of reoffending.

The Appeal before the Upper Tribunal:

21. The Secretary of State sought permission to appeal that decision and permission was granted on the 6th July 2018 by First-tier Tribunal Judge Jackson for the following reasons:-

> "The grounds of appeal are that the First-tier Tribunal has materially erred in failing to provide adequate reasons for finding that the appellant falls within the exceptions to deportation in paragraph 399 (a) of the Immigration Rules in Section 117C of the Nationality, Immigration and Asylum Act 2002; in failing to identify unduly harsh consequences on the children if the appellant were deported and in failing to attach sufficient weight to the public interest in deportation even if the appellant was not at risk of reoffending.
>
> It is arguable that the First-tier Tribunal has failed to make adequate findings as to why it would be unduly harsh on his children (one of whom he has had no contact with since 2013 and the third had not been born at the time of the appeal) to remain in the United Kingdom without him. The passing reference to the mother struggling to cope alongside a description of the usual effects of deportation of a parent is arguably insufficient to satisfy one of the exceptions to deportation. It is further arguable First-tier Tribunal has failed to attach sufficient weight to the public interest, attaching to much weight in the appellant's favour to a lack of risk of reoffending. The First-tier's decision contains arguable errors of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted."

22. The appellant was represented before the Upper Tribunal by Mr Morrison of Counsel. The Secretary of State was represented by Mr Diwncyz.

23. I therefore heard submissions from both parties which are set out in the Record of Proceedings. These submissions will be incorporated into my consideration of whether or not the grounds demonstrate that the judge's decision involved the making of an error on a point of law. The Appellant had not provided a Rule 24 response but Mr Morrison made oral submissions. It is not necessary to set out the submissions of each of the parties as I will set out the relevant aspects of those submissions when dealing with the grounds advanced on behalf of the Secretary of State and my consideration of those issues.

<u>Discussion:</u>

24. I remind myself I can only interfere with the decision of a judge if it has been demonstrated that there was an error of law.

25. The effect of the provisions relating to the deportation of foreign criminals is that by Section 32(4) Parliament had decided that the deportation of foreign criminals is conducive to the public good. By Section 32(5), the Secretary of State is obliged to make a deportation order subject to Section 33. Section 33 identifies a number of exceptions, which if applicable, have the consequences that sub-Section 32(4) and (5) will not apply.

26. On the present facts, the only exception relevant is whether removal would breach his rights and those of his family members under the ECHR.

27. The Immigration Rules reflect the statutory obligation to deport foreign criminals whilst recognising that there may be cases where the making of a deportation order would be incompatible with Article 8 (see Rules 398, 399 or 399A).

28. The correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider whether the Appellant is a foreign criminal as defined by Section 117D(2)(a), (b) or (c). If so, does he fall within paragraphs 399 or 399A of the Immigration Rules and if not, are there compelling circumstances over and beyond those falling within paragraphs 399 or 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors in Section 117 and C.

29. On the facts of the case there is no dispute that the Appellant was a foreign criminal; he was not a British citizen and by reason of his offending history was properly characterised as someone who had been convicted of an offence of at least 12 months imprisonment that and therefore in accordance with paragraph 398 of the Immigration Rules, the public interest required his deportation unless an exception to deportation applies (see decision letter at paragraph 28).

30. Thus the issue before the judge was whether he could fall within paragraphs 399 or 399A.

31. The judge’s findings at paragraph 31 demonstrated that he could not meet the requirements of paragraph 399A (relating to private life) or Exception 1.

32. Thus the issue turned on paragraph 399(a). That section reads as follows:-

> “399 This paragraph applies if 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 this 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;
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported ...”

33. There was no dispute in the decision letter that the Secretary of State conceded that in the light of the child E (based on his residence with his mother) that it would be unduly harsh for the child to live in the country to which the Appellant states he is a citizen.

34. Therefore the judge was required to consider what was meant by “unduly harsh “in the context of the law and the public interest and importantly in the context of specific factual circumstances of the Appellant and the children.

35. On the morning of this hearing the Supreme Court handed down their decision of KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 and considered what was correct approach relating to what is meant by “unduly harsh” within the context of the legislation. It gave particular consideration to paragraphs from the judgment of Laws LJ, with whom Vos and Hamblen LJ agreed, in MM (Uganda) v the SSHD [2016] EWCA Civ 450 and the Upper Tribunal decision in MAB (USA)v SSHD [2015] UKUT 435. Both parties had copy of that decision and were able to make any submissions that they wished to.

36. As the decision for the Supreme Court was not available to the judge he was not able to have the advantage of that decision. He had in any event made no reference to the decision in MM (Uganda) or direct himself in accordance with that decision.

37. I have therefore considered the decision of the FTTJ and his analysis in the light of the decision of the Supreme Court in KO (as cited).

38. There was no dispute in the decision letter that the Secretary of State conceded that in the light of the child E (based on his residence with his mother) that it would be unduly harsh for the child to live in the country to which the Appellant states he is a citizen.

39. The points raised in the grounds and relied upon by the Secretary of State relate to the judge’s consideration of the issue of undue harshness and the public interest and that the judge erred in law when considering the issue of whether the removal of the Appellant would be “unduly harsh”. Mr Diwncyz, behalf of the respondent relied upon the grounds. It was submitted that whilst it was accepted the appellant was in a relationship with a British partner and that they have a child together they did not reside together. He had not seen his previous child since early 2013 and the third child had not been born. However whilst the judge found that it was in the best interests of the child that he remained in close contact with both biological parents, the respondent submitted that it was well established that in a deportation context the requirement was far more stringent. In this respect it was submitted that the judge had failed to provide reasoning as to why paragraph 339 (a) had been met on the facts of the case.

40. In particular, it was asserted that the judge had referred to the appellant's "crucial role" at paragraph 45 however that was not consistent with paragraph 11 (l) in which the judge made reference to the appellant "playing with the child, feeds and changes the child" and that was described as "routine activities" and that it fell short of meeting the high threshold of the unduly harsh consequences.

41. The grounds at paragraph 8 also stated that there was no "objective evidence or finding within the body of the determination that the appellant's continual presence in the United Kingdom is required to safeguard and protect the future of the appellants child and making that finding the judge erred in law."

42. Mr Morrison on behalf of the appellant submitted that there was no legal error in the First-tier Tribunal's decision. He submitted that the judge did address the legal issues and at paragraph 37 – 40 had dealt with the authorities and addressed the issues at paragraphs 37 – 41 and also at paragraph 45 – 48 and paragraph 50. The judge had not made any specific reference to the decision in MM (Uganda) which had been the leading authority at that time but in the light of the decision of the Supreme Court and in particular paragraph 23, he submitted that the judge had found a degree of harshness going beyond that which would necessarily be involved, on the findings of fact. Thus Mr Morrison submitted that the judge had correctly analysed the issue despite not having the advantage of the Supreme Court's decision.

43. As to the facts found by the judge, he found that there was a genuine and subsisting relationship between the appellant and his child and at paragraph 35 identified the issues (the issue of unduly harsh). At paragraph 37 the judge made reference to the decision in AJ (Zimbabwe [2016] EWCA Civ 1012 and NA (Pakistan) [2016) EWCA Civ 662. Mr Morrison submitted that the judge applied law to the facts and at paragraph 39 found that the appellant's partner struggled to cope and had history of difficulties and that the appellant's son had the benefit of both appellants. He submitted that the judge considered the best interests of the children which he found to be for their best interests to live with both their parents. At paragraph 40 he found that it was in the interests of the children to live in a nuclear family and that it would be unduly harsh for his son to be separated from the "stabilising influence of the appellant", and that "it would be unduly harsh on the appellant's son to break up the family unit and forced him to live in a single-parent family, particularly at the time when their family is expecting to expand."

44. Mr Morrison also made reference to paragraph 45 in which the genuine and subsisting relationship with his partner and child was set out and that the judge found that the appellants partner would struggle to cope without the appellant and that he played a crucial role in parenting the child. At paragraph 48 the judge had found it would be unduly harsh because it would break up a "fragile family unit which the appellant is the most

capable person "and that the decision would "force a British citizen infant to lose a caring, active father."

45. When asked to identify the evidence upon which those findings were made, Mr Morrison referred the Tribunal to paragraph 11 (l). That paragraph made reference to the mother having a history of addiction and low mood. He also identified paragraph 33 where the judge stated that the appellant had a parental relationship with his child who saw every day and spend most of the day with; he would feed the child and change the child and has a genuine subsisting relationship with him. At paragraph 40 he made reference to the appellant having a stabilising influence on the appellant and that at paragraph 45 he found him to play a crucial role in parenting. Those matters were set out in the decision but not referenced by any evidence set out in the papers.

46. He was able to take further instructions in relation to the evidence and whilst the doctor's statement referred to the appellant and not the appellant's partner he identified that there was a witness statement from the appellants partner dated 18 April 2018 which made a reference to her having had a history of depression and having been in an abusive relationship. There was reference to having used alcohol and that she had had the support of the appellant. He also identified an earlier statement (in the bundle page 95 of a short statement dated 16 January 2018) which although did not make reference to past events made reference to paragraph 15 to the appellant's relationship with his son and that he was very attached to his father and that they had a great bond. He also made reference to the pregnancy notes and that she would be in a vulnerable position. Thus he submitted that the findings of fact must have come from that evidence.

47. Mr Morrison submitted that at [39-40] he set out the best interests of the children and therefore he submits the judge had in mind the correct test and balanced all the relevant factors.

48. I have carefully considered the parties submissions in the light of the determination of the First-tier Tribunal. In my judgement, the FTT did not properly apply the relevant legal principles when determining the issues in this appeal relating to whether or not it would be unduly harsh for the child to remain in the United Kingdom without the Appellant.

49. In particular I consider that the judge failed to apply the necessary threshold. It is set out in the decision of the Supreme Court at which reaffirmed the definition of "unduly harsh" from the earlier decisions of MK and **MAB** at paragraph [33], stating as follows:-

> "Whether the consequences of deportation will be 'unduly harsh' for an individual involves more than 'uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging' consequences and imposes a considerably more elevated or higher threshold.

> The consequences for an individual will be 'harsh' if they are 'severe' or 'bleak' and they will be 'unduly' so if they are 'inordinately' or 'excessively' harsh taking into account all of the circumstances of the individual." Although I would add, of course, that 'all of the circumstances' include the criminal history of the person facing deportation."

Thus the question is whether the First-tier Tribunal applied that in the context of the factual matrix of this particular Appellant and the family's circumstances. As the Supreme Court stated at paragraph 23, the expression "unduly harsh" is 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.

The Supreme Court further stated at paragraph 23 as follows:-

> "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."

50. Whilst the judge expressly referred to the decision in AJ (Zimbabwe) at paragraph 37, earlier at paragraph 17 the Court of Appeal had made reference to the case law relevant to the best interests of children and that at paragraph 17 "these cases show that it would be rare for the best interest of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests."

51. Mr Morrison submitted that on the facts of this appeal, there were additional factors which included his wife's past history and the medical condition of the Appellant's partner and the involvement of the Appellant in the care of the children.

52. I have taken into account the decision of SSHD v AM (Jamaica) [2017] EWCA Civ1782 where at paragraph 22 the assertion made by the judge in that case the mother was not able to care was described as "self-interested speculation" on the part of that Appellant and that there was no objective evidence from a neutral third party for example a report from the ISW and/or any medical evidence. This was referred to at paragraph 89 of the respondent's grounds that there was no objective evidence that the appellant's presence was requited to safeguard and protect the child. I asked Mr Morrison to identify for the Tribunal the evidence that was before

the judge as the judge had made no reference to this evidence or the source of the evidence in his determination when reaching any findings. The written evidence (in the appellant's bundle and in the respondent's bundle) did not include any medical evidence in support of the appellant's partner's position. There was a witness statement from her at page 92, referring to having spent time with him and a further witness statement dated 16 January which referred to the appellant's relationship with his son but made no reference to her circumstances. There was an additional handwritten statement which made reference to having had depression in the past (page 128) and at page 135 there is a reference to depression. The antenatal notes at page 93 make reference to there being no safeguarding issues identified; there was an up-to-date statement in April 2018 which made reference to having been diagnosed with depression and an abusive relationship. However Mr Morrison could not refer me to any medical evidence or any detailed evidence in the papers that set out the circumstances of the family or the appellant's partner.

53. In my judgment the analysis of the evidence did not identify anything other than that which normally would be the position of a child who was separated from a father with whom he had a close relationship. This is underlined by the fact that the phrase "unduly harsh" anticipates an evaluation being undertaken as it is not just the nature and quality of the relationship because paragraph 339(a) requires there to be a genuine and subsisting relationship before considering whether it would be "unduly harsh". Whilst the judge made reference to the appellant playing a "crucial role", as it was submitted on behalf of the respondent that is not consistent with the evidence of playing with the child, feeding and changing the child (see paragraph 11(l). The judge did not make any analysis of the evidence given and it is difficult to see from the determination how he reached the overall findings when he made no reference to any evidence to underpin those findings which are relevant to the issue of "undue harshness".

54. I have therefore reached the conclusion that the decision does involve the making of an error on a point of law for those reasons and therefore the decision should be set aside. The decision which related to the dismissal of the protection claim shall remain as preserved as there has been no cross-appeal on behalf of the appellant and the error of law identified relates to the human rights appeal (Article 8).

55. As to the re-making of the decision, the Appellant was not present at court. In the light of matters referred to in the decision (which previously included the necessity of an ISW report) and the birth of a second child to the parties, it is necessary for further evidence to be provided by the parties which would also include updating oral and documentary evidence. There has been a material change of circumstances since the hearing. Paragraph 10 of the FTTJ decision makes reference to evidence which was not provided that was relevant to any adjustments for the appellant. That should also be considered by the First-tier Tribunal and the appellant's solicitors will be able to provide any up to date evidence in this respect.

56. Consequently, I am satisfied that the correct course to adopt in relation to this appeal namely that having found an error of law and having set aside the decision, that it is one that should properly be re-made by way of a remittal to the First-tier Tribunal for a fresh hearing so that a decision can be made on the available evidence, including any change in the circumstances of the parties relating to Article 8 and not the protection appeal.

Notice of Decision

57. The decision of the First-tier Tribunal involved the making of an error on a point of law and is therefore set aside. It is remitted to the First-tier Tribunal for a fresh hearing.

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 SM Reeds

Date 18/11/2018

Upper Tribunal Judge Reeds