IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00418/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 December 2014 extempore	**On 17 December 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

MR ROYOLA KAWOYA
(ANONYMITY DIRECTION NOT MADE)

Claimant

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr A Amino, Solicitor

DECISION AND REASONS

1. The Secretary of State (whom I refer to as the respondent as she was below) appeals with permission against a determination of First-tier Tribunal Judge G A Black promulgated on 22 September 2014 wherein she allowed the appeal of Mr Royola Kawoya, whom I refer to as the claimant, against the decision of the Secretary of State made on 20 February 2014 that he is a person to whom

Section 32 of the UK Borders Act 2007 applies and therefore is to be deported.

2. The claimant's immigration history is set out in detail in Judge Black's decision. He arrived in the United Kingdom in 1998 and had been granted entry clearance under family reunion provisions. He was later granted indefinite leave to remain in 2001. He has been convicted on ten separate occasions since then and materially on 23 September 2009 was convicted at Cardiff Crown Court of possession of class A crack cocaine - a controlled drug - with intent to supply and was sentenced to two years' imprisonment. He has since been convicted in South East London Magistrates' Court in August 2013.

3. The claimant's case is that he has established a family life here with his partner who is British citizen and with his child who is also a British citizen, and that, given also his lack of ties to Uganda, the country of which he is a citizen, his deportation would be in breach of article 8 of the Human Rights Convention.

4. The Secretary of State was not satisfied that the claimant fell within the relevant provisions of the Immigration Rules as then constituted as set out in paragraphs 398, 399 (a), 399 (b) and 399A of the Immigration Rules.

5. When the matter came before Judge Black on 26 August 2014, Sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002 had come into force on 28 July 2014 as had amendments to the Immigration Rules concerning deportation. Neither representative made any submissions on these matters to Judge Black but she quite properly took the new Sections 117A-D into account. She did not, however, take into account the new provisions of the Immigration Rules in force from 28 July 2014 as the decision of the Court of Appeal in **YM (Uganda) v Secretary of State for the Home Department** [2014] EWCA Civ 1292 demonstrates should have been taken into account. That decision does, however postdate the determination in this case.

6. Judge Black considered specifically Section 117C of the 2002 Act in reaching her decision. She found that the claimant had a genuine and subsisting relationship with his child and partner; that the effect on the claimant's child and partner of his deportation would be unduly harsh; and, on that , that he met the requirements of Exception 2 as set out in Section 117C(5) of the 2002 Act. She concluded that having met that exception, that by virtue of Section 117C (3) the public interest did not require the claimant's deportation given that an exception applied, and allowed the appeal on that basis on human rights grounds.

7. The respondent sought permission to appeal which was granted by First-tier Tribunal Judge Shimmin. The grounds can be characterised as three-fold:

   (i) that the Judge had failed to provide adequate reasons for finding that there was a genuine and subsisting relationship between the claimant, his partner and their child;

   (ii) that the judge had failed to give adequate reasons for concluding that on the facts of this case that the effect of deportation would be unduly harsh;

   (iii) that the Judge had failed to give proper weight to the consideration of the public interest.

8. Permission to appeal was granted on all grounds.

9. I consider that Judge Black did, contrary to what is averred by the Secretary of State, give adequate reasons for finding that there was a genuine and subsisting relationship between the claimant, his child and his partner. While I note Mr Melvin's submissions that this was not a conclusion open to her, given the lack of evidence of cohabitation over a sustained period that is not a factor set out in section 117 of the Act.

10. I do not, however, consider that the judge gave adequate reasons for concluding that the effect of the claimant's deportation on the partner or child would be unduly harsh. It is not clear how the judge assessed the test of undue harshness; it cannot be discerned whether she considered that "unduly harsh" is simply a level of hardship that has to be reached or whether she considered that "unduly" imports a balancing exercise, the degree of an individual's offending, propensity to offend, and the public interest in deportation falling to be weighed against the effect of deportation on a child and/or partner.

11. The reasons given in paragraph 22 are not on either of these two bases adequate; if the test includes a balancing exercise, there is no indication of the public interest or other factors militating against the claimant being taken into account. In the alternative, if it is a level of harshness to be reached, the judge does not indicate what it is, and the reasons given why it is reached do not go beyond what is the normal and usual effect of deportation (and is provided for in the Immigration Rules) which envisages that family relationships with children may be severed. The judge does not adequately explain what specific hardships would flow from deportation. I note also, in passing, that she did not engage with paragraphs 398 – 400 of the Immigration Rules as currently constituted in reaching her conclusion.

12. For these reasons I am satisfied that the determination of Judge Black did involve the making of an error of law in that her approach to the question of undue harshness is insufficiently and inadequately reasoned. I do, however, for the reasons I have given uphold her finding on the genuine and subsisting relationship point. It follows from this that Judge Black's finding that the requirements of exception 2 are met cannot stand.

13. It is therefore necessary to remake the decision of the First-tier Tribunal as to whether, on the facts as found:

    (a) The claimant met the requirements of the Immigration Rules as amended with effect from 28 July 2014, specifically paragraphs 398 to 400, and with specific regard to what is meant by "unduly harsh"; and,

    (b) Whether, having had regard to sections 117A-D it would be a breach of article 8 to deport the claimant to Uganda.

Signed Date **3 December 2014**

Upper Tribunal Judge Rintoul