Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/01554/2013
PA/00076/2015

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 20 October 2015	**On 29 October 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

FL
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Plowright instructed by Perera & Co Solicitors
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in order to protect the anonymity of the appellant who claims asylum and to protect the anonymity of his children. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellant. Any disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or court.

Introduction

2. The appellant is a citizen of the DRC who was born on 9 April 1984. The appellant entered the United Kingdom in October 1996 with his family. He was then aged 12 years old. His father claimed asylum in 1999 (the appellant says it was in 1995) but that was refused. However, the appellant and his family were granted exceptional leave to remain until 17 November 2003. The appellant was granted indefinite leave to remain on 7 January 2004.

3. Between 16 April 2004 and 1 June 2012 the appellant was convicted of fourteen offences on six occasions, including possession of an offensive weapon, driving a motor vehicle with excess alcohol and possession of a class A controlled drug. On 1 June 2012, the appellant pleaded guilty to a number of drugs offences at the Swindon Crown Court. He was convicted of the offence of possessing a class A controlled drug, namely heroin; being concerned in the supply of a class A controlled drug, namely heroin, and being concerned in the supply of a class A controlled drug, namely cocaine. In addition he was convicted of the offence of failing to surrender to custody at the appointed time. He was sentenced to a term of 42 months' imprisonment.

4. On 10 July 2012, the appellant was served with notice informing him of his liability to be deported. On 31 July 2013, he was served with a deportation order pursuant to the automatic deportation provisions of the UK Borders Act 2007. The appellant unsuccessfully appealed the deportation decision to the First-tier Tribunal on 19 November 2013. He appealed to the Upper Tribunal and on 27 February 2014 the Upper Tribunal (Judge Poole) found that the First-tier Tribunal had materially erred in law and remitted the case to the First-tier Tribunal for a *de novo* hearing.

5. By the time of his appeal to the Upper Tribunal, the appellant had claimed asylum. On 30 April 2015, the respondent refused his protection claim.

6. The appeal against that decision (PA/00076/2015) was heard together with the appellant's remitted appeal against the earlier automatic deportation decision under the UK Borders Act 2007 by Judge L Murray on 22 June 2015.

7. By that time, the appellant had been convicted of a further offence on 6 February 2015 at the Swindon Crown Court, namely conspiracy to falsely imprison for which he was sentenced to 28 months' imprisonment.

The Judge's Decision

8. In her determination promulgated on 15 July 2015, Judge Murray dismissed the appellant's appeal against the refusal of his protection claim

on asylum grounds. That decision is not challenged and I need say no more about it.

9. In addition, Judge Murray dismissed the appellant's appeal against the decision to make a deportation order under the automatic deportation provisions of the 2007 Act on the basis that the appellant had failed to establish that his deportation would breach Art 8 read together with paras 399 and 399A of the Immigration Rules (HC 395 as amended).

10. Judge Murray reached three principal conclusions. First, she found that para 399(a) of the Rules did not apply to the appellant as it would not be "unduly harsh" for the appellant's children to remain in the UK if he were deported to the DRC. Secondly, Judge Murray found that although the appellant was "socially and culturally integrated into the UK", he had not established that there were "very significant obstacles to his integration" into the DRC if he were deported under para 399A of the Rules. Thirdly, Judge Murray went on to find that there were not "very compelling circumstances over and beyond those falling within para 399 and 399A" so as to outweigh the public interest such that the appellant's deportation would be disproportionate and a breach of Art 8.

The Appeal to the Upper Tribunal

11. The appellant sought permission to appeal the decision of Judge Murray to the Upper Tribunal. On 13 August 2015, the First-tier Tribunal (Judge Simpson) granted the appellant permission to appeal on two grounds. First, the judge had arguably erred in law in finding that it would not be "unduly harsh" for the appellant's children to remain in the UK without him and secondly, the judge had arguably erred in law in concluding that there were not "very significant obstacles" to his integration into the DRC given that he had left the DRC when he was 5 years old and with which he no longer had any ties.

12. On 25 August 2015 (in relation to the DA/01554/2013 appeal) and on 27 August 2015 (in relation to the PA/00076/2015 appeal), the respondent filed Rule 24 notices. In both, the respondent argued that the judge's findings in relation to para 399(a) and para 399A were open to her and fully sustainable on the evidence.

13. Thus, the appeals came before me.

The Hearing

14. Mr Plowright, who represented the appellant, relied upon the two grounds of appeal upon which permission had been granted. I begin with the challenge to the judge's decision in respect of para 399(a) of the Rules.

15. So far as relevant, that provides as follows:

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

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British citizen; or

...

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; ..."

16. Para 399(a) is potentially engaged in this appeal because the appellant falls within para 398(b) of the Rules having been convicted of an offence for which he has been sentenced to a period of imprisonment of "less than four years but at least twelve months".

17. By way of background, it is accepted that the appellant has four children in the UK as a result of his marriage to a British citizen. Those children are themselves British citizens and were aged 11, 8, 4 and under 1 year old at the relevant time.

18. It was not disputed before the judge that the appellant had a "genuine and subsisting parental relationship" with those children.

19. Further, it was accepted that it would be "unduly harsh" for those children to live in the DRC if the appellant were deported.

20. The crucial issue presented to Judge Murray in respect of para 399(a) was whether it would be "unduly harsh" for the children to live in the UK if the appellant were deported to the DRC. The judge dealt with this issue at paras 27–29 as follows:

"27. It has been conceded by the Respondent that the Appellant has a genuine and subsisting relationship with three of his four children (the fourth was not considered) who are British Citizens. It has also been conceded that it would be unduly harsh for the children to live in the DRC. The question is therefore whether it would be unduly harsh for the child to remain in the UK without the Appellant.

28. It is clear that in assessing whether it would be unduly harsh I must take into account the best interests of the children as a primary consideration. It is not in dispute that until his conviction on 16 September 2011 for possession of a class A drug for which he was sentenced to 3 years and 6 months imprisonment, he lived with his family which comprised of his wife, Monique, his son Jemiha 8, his daughter Sinai who 4, and his son Isaac who was one. He was released from prison on 31 December 2013 on immigration detention. However, he was convicted of a further offence on 6 February 2015 and sentenced to 28 months

imprisonment. The Appellant states in his witness statement at paragraph 31 that he is deeply concerned that his children will be left without their father as they grow up.

29. I accept having heard from the Appellant and his mother and having seen the greetings cards in the Appellant's bundle that the Appellant has a good relationship with his children and that save for the periods in prison he has lived with them as a family. His wife did not attend the hearing and it is clear from the Appellant's witness statement that the relationship is no longer subsisting, although there are no current divorce proceedings. His wife also did not provide a statement in relation to the effect of his deportation on the children. I note that she provided a statement in February 2014 before the relationship broke down. According to his witness statement he has commenced another relationship. On the current evidence therefore when the Appellant is released it is unlikely that he would live with his children. Whilst it is undoubted in children's best interests generally to grow up with both parents it is currently unclear what access the Appellant would have. There is no evidence before me that his children have come to any harm as a result of his offending behaviour. There is no suggestion that social services have been involved with the children or that they are not being well looked after by their mother. I conclude that it is in their best interests to remain with their mother. I conclude on the evidence before me that that whilst it will be hard for the children to grow up without the presence of their father it has not been demonstrated that it would be unduly harsh".

21. On behalf of the appellant, Mr Plowright initially submitted that the judge had misunderstood in para 29 the position between the appellant and his children when she said that it was "currently unclear what access the appellant would have". Mr Plowright submitted that it was obvious that the appellant would obtain access to his children when released from prison. However, when I enquired whether the appellant had begun family proceedings or had obtained contact with his children, Mr Plowright frankly accepted that there was no evidence that the appellant had applied for contact or what contact he could obtain. In the light of that, the judge's statement that it was "currently unclear what access the appellant would have" was entirely consistent with the evidence before her and is wholly unobjectionable.

22. Mr Plowright further submitted that the judge's conclusion that it would be "hard" for the children to grow up without their father but would not be "unduly harsh" was outside the range of reasonable conclusions that the judge could reach in the light of the appellant being deported and, effectively, the children being denied contact with their father for an extended period of time whilst the deportation order was in force. As is stated in the grounds, Mr Plowright relied on the fact that if deported it was unlikely that the children would see their father for at least ten years which, in relation to the oldest two children, would mean no contact until they were adults.

23. Mr Plowright drew my attention to the recent decision of the Upper Tribunal in MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 (IAC). There, the Upper Tribunal decided that the phrase "unduly harsh" in para 399 of the Rules did not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual. The focus was solely upon the evaluation of the consequences and impact upon the individual concerned. Further, the UT concluded, as is summarised in paras 2 and 3 of the head note:

> "2. Whether the consequences of deportation will be 'unduly harsh' for an individual involves more than 'uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging' circumstances and imposes a considerably more elevated or higher threshold.
>
> 3. 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 the circumstances of the individual".

24. At the hearing I drew the representatives' attention to the subsequent decision of the Upper Tribunal in KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 543 (IAC) where the Tribunal disagreed with the decision in MAB to the extent that in determining whether the consequence was "unduly harsh" it was necessary to take into account the seriousness of the offence committed and the public interest in deporting the foreign criminal. The head note summarises the position accepted by the UT in that case as follows:

> "… the word 'unduly' in the phrase 'unduly harsh' requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh".

25. As the latter part of that quotation makes clear, in KMO, the Tribunal agreed with the earlier decision in MAB to this extent, namely that "the impact on the individual must be 'inordinately' or 'excessively harsh'" but having regard to all the circumstances including the public interest.

26. As Mr Plowright's oral submission made plain, he pitched the challenge to Judge Murray's conclusion that the separation of the appellant from his children would not be "unduly harsh" on the basis that that conclusion was irrational or perverse: as he put it, it was a conclusion not within the range of reasonable conclusions open to the judge. Whether one adopts the approach in MAB (and ignores the public interest) or in KMO (and takes into account the public interest), Judge Murray's conclusion was not irrational or perverse.

27. The judge found that the appellant's relationship with his wife had broken down. Indeed, his own evidence was that he had started a new relationship. His wife did not attend the hearing. That finding is not

challenged even though Mr Plowright informed me that the appellant's wife was present in the Tribunal building on the day of the UT hearing. It was, in my judgment, properly open to the judge to find that the appellant when released, on the evidence before her, was unlikely to live with his children. Further, the children had since the appellant's imprisonment in September 2011 lived with their mother and there was no basis for concluding that it was other than in their best interests to live with their mother. There was no evidence before Judge Murray that particularised any harm or serious detriment to the children of being separated from their father other than that which naturally one would expect to occur if a parent in a genuine relationship with his children was no longer living in the same country, i.e. the inevitable effect of deportation (see Lee v SSHD [2011] EWCA Civ 348 *per* Sedley LJ at [27]). There was, as I have said, no evidence before the judge that the appellant had begun family proceedings or whether he would obtain contact as a result.

28. It is important to read Judge Murray's determination as a whole. In para 44, when considering Art 8 outside the Rules, she commented that:

> "... in his asylum interview [the appellant] stated that he maintained contact with his children via phone calls and letters. He could maintain this level of contact from the DRC".

29. Whilst, of course, this form of communication, including Skype or other internet face-to-face contact, is not a complete substitute for actual physical contact, it nevertheless allows for some continued and meaningful interaction between an individual abroad (such as the appellant) and his children.

30. In short, the only basis upon which the appellant could claim that his separation would be "unduly harsh" upon his children was that the mere fact that he would be in the DRC and had been a parent with a genuine relationship would impact upon his children. On that evidence, it was not irrational or perverse for Judge Murray to conclude that it would not be "inordinately" or "excessively" harsh on the children to be separated from their father for the significant period of his deportation order. That finding was not irrational even disregarding the appellant offending.

31. If, however, the appellant's offending is taken into account then he has, as Judge Murray noted, and I shall return to shortly, a history of offending including most recently two very serious sets of convictions for drug offences and false imprisonment leading respectively to imprisonment for 42 months and 28 months. Judge Murray found, on the evidence, which is not challenged in the grounds or in Mr Plowright's submissions, that the appellant presents a high risk to the public and there was no objectively verifiable evidence that he had rehabilitated. Weighing that in the balance, applying the approach in KMO, the appellant's challenge based upon irrationality or perversity is on even more untenable ground and cannot, in my judgment, be sustained.

32. For these reasons I reject ground 1 challenging the judge's finding that para 399(a) of the Rule did not apply to the appellant.

33. I now turn to the appellant's second ground relied upon by Mr Plowright, namely that the judge was wrong in law to conclude that there were not "very significant obstacles" to the appellant's integration into the DRC and that, therefore, para 399A did not apply. Para 399A is in the following terms:

> "This paragraph applies where paragraph 398(b) or (c) applies if –
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> (a) the person has been lawfully resident in the UK for most of his life; and
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> (b) he is socially and culturally integrated into the UK; and
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> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported".

34. Judge Murray dealt with the application of para 399A at paras 31–33 of her determination concluding that the crucial issue was in relation to para 399A(c). She said this:

> "31. I have therefore considered whether (a) the Appellant the has been lawfully resident in the UK for most of his life; (b) he is socially and culturally integrated in the UK; and whether there would be very significant obstacles to his integration into the country to which it is proposed he is deported. It is accepted that the Appellant has been lawfully resident in the UK for most of his life. He came to the UK at the age of 12 years in 1996. He has spent 18 years in this country out of which three years and 4 months have been serving custodial sentences and do not therefore count towards continuous residence. The Respondent disputes the fact that the Appellant is socially and culturally resident in the UK due to his persistent offending.
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> 32. The Appellant was at school and college here, has worked in the UK and established a family and has his mother here. He is undoubtedly a persistent offender having been convicted on 6 occasions for 15 offences of increasing seriousness between April 2004 and February 2015. However, in view of his length of residence, his family ties, the fact he came here as a youth and was educated here I consider that he has demonstrated that he is socially and culturally integrated.
>
> 33. I have therefore considered whether there would be very significant obstacles to his integration into the Democratic Republic of Congo. It is argued on his behalf that he has not lived there since the age of 5 years, a period of 26 years, and has no family and does not speak the language. I have not been provided with any background evidence in relation to the DRC or specific difficulties that the Appellant would face if returned there. According to the evidence provided by the Appellant, before he arrived in the UK at the age of 12 he lived in France. He says he

> now speaks no French. I find that this is unlikely in view of the fact he must have spoken it up to the point of his arrival in the UK. I have found that he has not made out any risk on return to the DRC. The Appellant has gained qualifications in this country and is fit and healthy. I accept that his immediate family is in the UK and he has not returned to the Congo since arriving in the UK. However, I find it unlikely that he has no extended family there and that his family would have no contacts there. Whilst it may well be that there are significant obstacles to his return in the form of finding accommodation and work, it has not been demonstrated that there are very significant obstacles".

35. Mr Plowright, relying upon the grounds, submitted that the judge had failed to give any or any adequate weight to the fact that the appellant had left the DRC in 1989 when he was 5 years old. Even though he had come to the UK in 1996 when he was 12, he had not been in the DRC since he was 5. Mr Plowright submitted that the appellant was now 31 years old and he had not lived in the DRC for 26 years. He submitted that the judge had failed to give any reason for concluding that it was not established that he had no extended family in the DRC.

36. First, it is clear that the judge was well aware that the appellant had not lived in the DRC since he was 5 years old – a period of 26 years before. She makes explicit reference to it in para 33. It is simply, therefore, unarguable that she failed to have regard to those matters. Further, it was open to the judge to find that the appellant's family, despite having been in the UK since 1996, had "extended family" in the DRC and that she had not established that the family had "no contacts" there. These were, in my view, reasonable inferences that the judge was entitled to draw from the evidence.

37. In any event, the judge was required to determine whether the appellant had established that there were "very significant obstacles". It was not sufficient that there were "significant obstacles". The judge accepted that there might well be "significant obstacles" but not "very significant obstacles". Obviously, the addition of the word "very" to the phrase heightens the level of obstacle that the individual must establish in order to succeed under para 399A. The judge took into account the appellant's education and background including, as she was entitled to find, that it was unlikely that he no longer spoke French which was his first language.

38. Again, the challenge to the judge's factual findings has to be made at the altitude of irrationality or perversity. Having considered the appellant's circumstances, and having made entirely sustainable factual findings, even though the appellant had not been to the DRC since he was 5 years old (26 years ago), it was open to the judge to conclude that there had not been established very significant obstacles to his integration although there might be significant obstacles.

39. For these reasons, I reject ground 2 and the appellant's challenge to the judge's decision that the appellant could not succeed under para 399A of the Rules.

40. In addition to considering paras 399(a) and 399A, Judge Murray went on to consider the application of Art 8 outside the Rules and whether there were "very compelling circumstances over and above those falling within paragraph 399 and 399A" to establish that the public interest in the appellant's deportation was outweighed. The judge dealt with this issue at paras 34–44 in what can properly be described as an exemplary way. She considered the public interest represented by the appellant's offending including that he remained a high risk to the public and the evidence did not establish that he had rehabilitated. The judge fully took into account the appellant's personal circumstances and the effect upon him and his children of deportation. Her conclusion that "his criminality is serious, persistent and there is no persuasive evidence of rehabilitation" and that "the risk to the public remained high" (see para 44) is not challenged in these proceedings. Given that finding, in the light of the appellant's circumstances, the judge dismissal of the appellant's appeal under Art 8 of the ECHR is wholly legally sustainable. There simply were not "very compelling circumstances" to outweigh the public interest represented by the seriousness of the appellant's offending, its persistence and his future risk. As I have said, nothing in paras 34–44 of the judge's determination is challenged in these proceedings. I refer to it simply to emphasise the comprehensive nature of the judge's assessment of the appellant's circumstances in dismissing the appellant's appeal under Art 8.

Decision

41. The judge's decision to dismiss the appellant's appeal against the rejection of his protection claim is not challenged. That decision stands.

42. For the reasons given above, the First-tier Tribunal's decision to dismiss the appellant's appeal against the decision to apply the automatic deportation provisions of the UK Borders Act 2007 on the basis that the appellant had not established his deportation would breach Art 8 did not involve the making of an error of law. That decision, therefore, stands.

43. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal