Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02008/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 4 November 2015	**On 27 November 2015**

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondent: No representative

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. This appeal is brought against the decision of First-tier Tribunal Judge Kirvan and Mrs S Hewitt JP promulgated on 15 April 2015 which allowed the appeal of JAA against deportation.

3. For the purposes of this decision we refer to the Secretary of State as the respondent and to JAA as the appellant, reflecting their positions as they were before the First-tier Tribunal.

4. The appellant is a national of Sierra Leone and was born in 1973.

5. The background to this matter is that he came to the UK in 2003 and has remained here illegally ever since after an asylum claim was refused in 2004.

6. The appellant is married to a Jamaican national. She has three children of Jamaican nationality from a previous relationship who are the appellant's stepchildren. It was found by the First-tier Tribunal that he has a family life with those stepchildren and that finding was not challenged before us. The appellant and his wife also have three children of their own and those children have Sierra Leonean nationality.

7. On 17 May 2012 the appellant was convicted of wounding with intent to do grievous bodily harm and sentenced to twelve months' imprisonment. The offence occurred when the appellant was about to hit one of his stepsons and his wife intervened, taking the blow herself. Following this conviction, on 17 October 2014 the respondent made a deportation order against the appellant under section 32 of the UK Borders Act 2007.

8. By the time of the deportation order, the two oldest stepchildren had been living in the UK continuously for at least seven years. The First-tier Tribunal therefore had to assess whether the requirements of paragraph 399a(ii)(b) of the Immigration Rules were met. The test to be applied was whether "it would be unduly harsh for the child to remain in the UK without the person who is to be deported".

9. The First-tier Tribunal found that it was unduly harsh for the two oldest children to remain in the UK without the appellant and the respondent's main challenge at the hearing before us was to that conclusion.

10. The Tribunal found at [21] that the appellant and his wife were credible and reliable witnesses.

11. At [15], the First-tier Tribunal recorded this evidence from the appellant's wife:

> "The witness also states that if the children were to remain in the United Kingdom without the appellant the children would suffer. Social Services were concerned about the behaviour of the children whilst the appellant was detained and that was why he was returned to live with them on release."

12. The evidence of the wife went on at [16] to [19]:

"16. The eldest [R] had problems at school but his behaviour has improved over the last two years when the appellant has been with them. She states she no longer receives calls from the school nor is she always being asked to attend meetings about his behaviour. He will be taking his GCSEs soon and she did not want him to be put through the stress of being separated again from the appellant as she thought this would affect his education. [R]'s own father died in Jamaica and R can only just remember him but has now built a relationship with the appellant; he is a second father to [R].

17. She also gave evidence that her son [J] also had health problems whilst the appellant was in custody. His condition improved when he heard the appellant's voice on the phone and improvement has been seen in him since the appellant was released. He is attending secondary school and doing well in his studies. The witness' statement includes what she describes as the concern of the children if they are separated from the appellant even now. If he goes to church or the shop they will ask where is and if (sic) helps at the church in the evenings the children will be upset if they go to bed and he has not returned home.

19. The evidence of the appellant was in accord with that of his wife. The appellant confirmed his strong involvement with the children. He will stay at home and take care of the children while his wife does voluntary work. He also takes them to and from school and put them to bed. They have a strong bond with him. He considers himself father to all of the children, both is biological children and his stepchildren. Only the eldest has a slight memory of his father. He also confirmed that the children went through considerable trauma while he was in detention. He states he had to speak to them every morning and night to help them cope with the pain of separation. He also confirmed [R]'s behaviour had deteriorated and [J] fell ill. He also confirmed that Birmingham Social Services assessed that it was in the best interests of the children for him to return home as soon as he was released from detention due to the detrimental affect his detention had had on the children. He also took the view that his wife would not be able to cope with raising six children on her own."

13. At [36] to [40] the Tribunal made the unduly harsh assessment as follows:

"36. We have also considered whether the children could remain in the United Kingdom with their mother and the appellant be deported to Sierra Leone. In favour of his deportation as stated above is of course the public interest. He has committed a serious offence and been sentenced to twelve months for it. The fact that the offence was against his own wife does not detract from the seriousness of that matter. It is not in the public interest to have foreign criminals continuing to reside in the United Kingdom when they have committed a gross act of domestic violence and in fact in this case the offence was committed against his wife because she was protecting one of the children.

37. However it appears that following carefully assessment by Social Services a decision was made to allow the appellant to rejoin his family. Indeed the support that he has from his wife was demonstrated by her evidence at this hearing and she feels she would find it very difficult to cope mentally without his support and that was accepted in

the previous determination and is also accepted by the panel. We also bear in mind that the appellant has formed his private life whilst his immigration status was precarious and similarly his family life was formed when he had no settled status in the United Kingdom.

38. Turning to the public interest, which must include also the prevention of crime, as stated above, there is also a public interest in the law being used to deter and punish acts of domestic violence. However, it is also the case that any risk would not be to members of the public but to the appellant's family. His wife, who, we find, takes into account the welfare of her children, is strongly supporting his claim to remain with them in the United Kingdom. Social Services have supported him being reunited with the family. Almost two years have passed since he was released from detention and there has been no recurrence. Overall, bearing in mind the best interests of the children, it seems to us that the interests of these children are primary, but not an overriding consideration in this case. In the particular circumstances of this case, even given the somewhat chequered family history, we do find that there is a strong parental relationship with his children which has been sustained and these children desperately need their father as their mother needs his support.

39. Bearing in mind also that three of the children have applications currently in process which are likely to lead to them having settled status in the United Kingdom, it seems to us that it would be premature if a decision was taken to separate the appellant from his children.

40. Overall, having balanced the interest of the public in the UK and the prevention of crime and disorder in particular, against the interest of the family and in particular the children, we have reached the decision that currently the circumstances are such that whilst balancing the public interest against the interest of the family, and particularly the six children involved, we find that paragraph 399(a)(ii) does apply to the appellant. It would (sic) unduly harsh for the children to live in the country to which the person is to be deported for the reasons given above and it would also be unduly harsh for the children to remain in the United Kingdom without the appellant. We have reached this conclusion even whilst weighing in the strong public interest and the prevention of crime and disorder and the deportation of foreign criminals."

14. The respondent's challenge before us was that the First-tier Tribunal erred in the "unduly harsh" assessment. The test was a high one, the Tribunal finding in the case of **MAB (para 399 "unduly harsh") USA [2015] UKUT 435 (IAC)** at paragraph 3 of the headnotes that:

> "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."

15. It was submitted by the respondent that the situation here could not be sufficient to meet the unduly harsh test. Family life would be disrupted but this was not unduly harsh. There was a limited assessment of what the impact on the children would be. The decision appeared to have been

made at [37] on the basis that it would be unduly harsh for the children because the mother would struggle.

16. It was our view that it was unarguable that the First-tier Tribunal had the correct test in mind and applied it in substance. Paragraph 399a(ii)(b) is set out at [26]. That is clearly the test being applied at [36] to [40].

17. It was also our judgement that the extracts from the determination set out above show that the Tribunal had sufficient evidence before it to reach the conclusion it did as to the children's situation being unduly harsh were the appellant to be deported, even where that is a high test requiring "severe", "bleak", "inordinately" or "excessively" harsh circumstances.

18. It was not merely that the wife would struggle as suggested in the respondent's submissions but that there was credible evidence as to the very significant degree of suffering the children here experienced whilst the appellant had been in detention. The Tribunal was entitled to take into account that even though the appellant's criminal offence was against his wife and involved mistreatment of the children, it was notable that Social Services supported his immediate return to the family on release from detention because of the serious situation that had arisen in his absence. The repercussions from that period of separation had continued with the children still becoming distressed when he was absent from the home even for short periods.

19. In essence, the respondent's argument is that the decision on whether deportation would be unduly harsh for the children was not one reasonably open to a rational decision-maker. It is our view, for the reasons set out above, that this ground is not made out.

20. Where the provisions of paragraph 399a(ii)(b) were met, the appeal fell to be allowed. The remaining arguments contained in the written grounds go only to what would be a second stage consideration of "very compelling circumstances" following paragraph 398 and not to the unduly harsh assessment.

21. For all these reasons we did not find that the grounds showed that the First-tier Tribunal erred in law.

Notice of Decision

The determination of the First-tier Tribunal does not show an error on a point of law and shall stand.

Signed  Date 9 November 2015

Upper Tribunal Judge Pitt