IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01497/2014

THE IMMIGRATION ACTS

Heard at Upper Tribunal Bradford	**Decision & Reasons Promulgated**
On 21st October and 16th December 2015	**On 26th January 2016**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

MR ABU ADAM ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Hussain of Counsel instructed by Halliday Reeves
For the Respondent: Mrs Pettersen, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Dearden made following a hearing at Bradford on 15th January 2015.

Background

2. The appellant is a citizen of Burundi born on 8th April 1985. He entered the UK on 9th March 2003 and shortly thereafter claimed asylum. The application was refused and

his subsequent appeal was dismissed. He became appeal rights exhausted on 27th May 2005.

3. On 18th October 2007 he pleaded guilty at Kingston Crown Court to being knowingly involved in the supply of a controlled drug and was sentenced to fifteen months' imprisonment. He was served with a decision to make a deportation order against him and his appeal was dismissed. He again became appeal rights exhausted on 1st August 2008. He made further submissions but, on 4th December 2009 the deportation order was signed.

4. On 23rd March 2010 an application was made to revoke the deportation order. Further representations were made on 10th December 2010. Eventually, on 4th July 2014 the Secretary of State refused to revoke the existing order and it was the appeal against that decision which was before Judge Dearden.

5. Judge Dearden set out in detail the evidence, the representations, his findings and his conclusions and dismissed the appeal.

6. He recorded that the appellant's representative asked him to adjourn the appeal in order to allow the social worker who had provided an independent report to the Tribunal to give oral evidence. The Judge refused the application, observing that the social worker's report had not actually been served until the day before the hearing was fixed and there had been plenty of time for her to have been called to give evidence if the solicitor had thought it sensible to do so. The fact that Counsel might have taken a different view to those who instructed him was not a good reason to adjourn, because if the papers had been prepared in adequate time a conference could have taken place to discuss decisions of this type.

The Grounds of Application

7. The appellant sought permission to appeal on the grounds that the Judge had erred in law in refusing the adjournment application, failing to understand that the oral evidence was highly material since it illuminated the negative impact upon the children. The children ought to have been given the chance to put their case to the Tribunal at its absolute highest (ZH (Tanzania) [2011] UKSC 4). They were in this position through no fault of their own and ought to have been afforded more latitude. The judge had said that he was unable to understand what the social worker meant by significant and long term impact upon the children's mental health and yet had not allowed an adjournment to enable her to provide live evidence.

8. Second, the assessment under Section 55 was inadequate since the Judge had made no personal assessment of the children. The Judge referred to "many other children in the UK who are without both parents" but did not focus his attention on the personal assessment of these children as he was required to do.

9. It was also argued in the grounds that the respondent had not made any sustainable Section 55 assessment in the decision letter and accordingly the decision was not in

accordance with the law, but Mr Hussain did not pursue this ground in his submissions.

10. Permission to appeal was granted by Judge Landes for the reasons set out in the decision.

11. On 25th February 2015 the respondent served a reply defending the determination and in particular the decision of the Judge to proceed with the appeal and refused the adjournment request.

Consideration of Whether there is a Material Error of Law

12. In Nwaigwe (adjournment: fairness) [2014] UKUT 418 the President held:

> "If the Tribunal refuses to accede to an adjournment request such decision could in principle be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned of a fair hearing; failing to apply the correct test and acting irrationally. In practice in most cases the question will be whether the refusal deprived the effected party of his to a fair hearing. Where an adjournment refusal is challenged on fairness grounds it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather the test to be applied is that of fairness: was there any depravation of the affected party's right to a fair hearing?" See SH (Afghanistan) v SSHD [2011] EWCA Civ 1284.

13. I have some sympathy with the Judge's reasoning when he considered the adjournment request, since as he pointed out, the appeal had been the subject of a Case Management Review hearing and had been adjourned on a previous occasion. However, the problem is that, when analysing the social worker's report he said that he did not understand what she meant by some of the terms which she used and did not have an answer to the question of how long it would take for the children to get over the upset of the appellant's departure and whether they would in due course recover assisted by electronic communication. I was told that the representative had asked for the appeal to go part-heard and to be reconvened in order to allow the social worker to give evidence which could have been a way out of the difficulties. As it is the Judge, having said that, in effect, he did not need the expert to tell him what he already knew, then raised questions to which he did not have the answer.

14. There is a further difficulty. It is quite clear from the decision in MAB (paragraph 399 unduly harsh USA [2015] UKUT 00435 that the focus of the determination should be upon an evaluation of the consequences and the impact upon the individual concerned. It is clear from the Judge's reasoning that he did not make a personal assessment of the effect on these particular children when he observed that they would not be in any worse condition than many other children in the UK or indeed, as he said, much different from some of the children in their schools. That is the wrong approach.

15. Finally the Judge recorded that within the appellant's bundle there was a report prepared by the independent social worker Christine Brown. The Judge said that there had been a decision of the Vice-President of the Upper Tribunal in which he had made some uncomplimentary remarks about Ms Brown's independence and bearing that in mind and the age of the report (which was dated 16th April 2010) he decided to place little weight upon its contents. Whilst the Judge was quite entitled to say that, since the report was prepared some four years ago he would place little weight upon it, in fact he made no reference to it at all and therefore in effect discounted potentially relevant evidence altogether.

16. Accordingly, cumulatively, there are errors of law in this determination, such that it should be set aside.

The Resumed Hearing

17. I heard oral evidence from the appellant Abu Adam Ali, his partner Natasha Dukes and from the independent social worker Diana Rodgers.

18. There are no credibility issues in this appeal. Broadly speaking the evidence was entirely consistent and Mrs Pettersen properly did not seek to submit that any of the witnesses had been untruthful.

19. Mr Ali confirmed that the contents of his two statements were true and correct.

20. He came to the UK when he was 17 years old, 11 years ago. He has been in a relationship with his partner for all of that time and they have lived together for the last 10 years. They have 3 children, the eldest 10, the second 9 and the last 1. They are all British citizens. His partner has lived in the UK all her life and British by birth.

21. The appellant is the primary carer of the children whilst his wife works full-time. His wife works as a care assistant. At the time of the last hearing she was on maternity leave and when she went back to work it was to a different care home. She works full-time, but the hours vary and are not in any regular pattern. She normally does a 38 hour week. Ms Dukes suffered from depression during the course of last year and was on antidepressants from May to October 2014.

22. The children are all doing well in school and are happily settled here.

23. Ms Dukes has her mother and three sisters all relatively nearby and the children stay with their grandparents about once a month. They see their cousins on a regular basis.

24. Diana Rogers confirmed that the contents of her two reports were accurate and she stood by them. In her report she said that the appellant and his partner present as a warm loving couple who have a close and mutually supportive relationship. That was entirely apparent from the oral evidence given by them both. She said that she had no reason to believe that they would not remain a strong and balanced couple

who would do everything that they could to provide their children with the right environment. All three children presented as clean and well looked after. There were no concerns with the children's attendance, academic attainment or presentation. She recorded that the headmistress described the family as "lovely" and where very involved in school life. She herself observed that the children were relaxed, happy, polite and articulate who enjoyed a warm and comfortable relationship with their parents.

25. In her oral evidence she said that the children would be devastated if the appellant were deported. The family have decided not to share the anxieties about the potential deportation with the children, a decision which she supported.

26. Ms Rogers said that the loss of their father would be a bereavement to the children. In the short term they would experience confusion, despair and anger. He has been at their home 24 hours a day. There would be a huge emotional impact particularly upon the older children who were approaching adolescence and would struggle to understand the loss of their father.

27. Ms Rogers acknowledged that children were resilient and many do adapt and survive. However children were not always fine and the impact on these children was frankly unknowable. In her professional opinion it could lead to significant problems particularly for the older girl. Girls often turn in on themselves in such situations which could lead to self-harm, depression and poor life choices. Whilst other family members would no doubt rally round they could not replace their father. He was the dominant factor in their lives in providing a secure and loving home.

28. Mrs Pettersen asked Ms Rogers whether the loss could be mitigated by the use of Skype and Facebook. Ms Rogers said that that was not how children communicate. They talk when they choose and not at particular times. It could even add to their distress. When asked whether age appropriate explanations could be given to them she said that, so far as the children were concerned, the decision would appear grossly unfair. Their father had done something wrong and had been punished and had since become a model citizen. The children would not cognitively understand the decision, because of their age, and for the older two children there would be an emotional reaction to the deportation of their father which would impact on their development and they would suffer significant harm.

29. There would also be an impact on his partner. She would struggle to cope with her own feelings and be less able to support them. At present the children were living in an environment which was safe, they were loved and valued and boundaries were set. The parents were providing everything necessary to bring the children to adulthood. If that was taken away there would be a real impact on the children's ability to develop into full members of society. The appellant was an integral part of his children's developing identity. They are mixed race, in a white area, and the rest of their extended family are white British.

30. In her addendum to her report she concluded:

> "I am aware that many children are brought up without their fathers but would also add that the majority of families with whom I have worked have been single parent families. I also understand that the maintenance of effective immigration control is in the public interest. However in my opinion breaking up what is a happy and secure family has the potential for significant harm to Mr Ali's three children and such harm would also impact on the wider society in which they live."

31. Ms Rogers is a State registered nurse and children and families social worker with mental health training and has worked for over 20 years in the field.

32. Also in the bundle is a report from another independent social worker, Christine Brown who has been qualified since 1986 and employed by the authorities in Trafford, Thameside and Manchester. The report confirms the excellent parenting which the appellant and his partner provide to the children and also concludes that Mr Ali's deportation would result in them responding with anger confusion and deep distress.

The Respondent's Case

33. The respondent accepts that the appellant is in a genuine and subsisting relationship with his children, who are British citizens, and with his partner Ms Dukes.

34. Judge Dearden recorded that it was the Secretary of State's position that it was the appellant who should go to Burundi leaving his wife and children behind. Mrs Pettersen confirmed that it was not her case that the family should accompany the appellant to Burundi. The issue in this case is the effect on the children if they were left behind here.

35. So far as the partner was concerned, the effect on her of the deportation would not be unduly harsh. There was some evidence that she had been depressed but she only took medication for six months and if there were further difficulties she could seek medical attention. She had her sisters and mother who lived in the same area with whom she had good relationships and there were support networks available to her not only from the immediate family but also from the State.

36. She observed that deportation would not involve loss of all contact and whilst she would agree that no contact at all would be devastating for the children, the ability to Skype would ameliorate the situation. The family had known since 2008 that the appellant was liable to deportation. The appellant would not vanish overnight and the situation could be managed.

37. In her submission the effect on the children as described by Ms Rogers was speculative but she left in my hands the decision as to whether the effect on them would be unduly harsh.

38. Mr Hussain drew my attention to the sentencing remarks of the Judge. Although the appellant had been involved in a serious offence he was at the lower end of the offending. There was only one incident in relation to one offence and there was no other evidence against him. He received a sentence of fifteen months for the supply of a wrap of cocaine worth £20. This was a one-off event in October 2007. There had been no reoffending. He relied on the evidence from the social worker who had observed the family at first hand.

Findings and Conclusions

39. The relevant requirements of the Immigration Rules are set out in paragraphs 398 and 399.

40. The appellant falls within paragraph 398B since he has been sentenced to a period of imprisonment of fifteen months.

41. Paragraph 398B states that the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least twelve months.

42. The Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and if it does not the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

43. The relevant sections of paragraph 399 are where:

    (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 seven years immediately preceding the date of the 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; or

    (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK; and

        (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

        (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

44. The statutory framework for the Rules is set out in Section 117 of the Nationality, Immigration and Asylum Act 2002. Under Section 117C(v), Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

45. Mr Hussain did not put his case on the basis of the relationship with Ms Dukes. That is quite right since the relationship was formed when the appellant was a failed asylum seeker. His appeal against the refusal was dismissed in November 2003 and he began to live with Ms Dukes in 2004. Moreover the couple have known since June 2008 that his appeal against deportation had been dismissed. Whereas there is some evidence that Ms Dukes' mental health suffered during 2014 she is no longer on any medication and does have significant support from her immediate family.

46. The real issue in this appeal is whether it would be unduly harsh for the children to remain in the UK without their father.

47. There has been a divergence of view in the Upper Tribunal as to how this question should be approached. Both MAB (paragraph 399 unduly harsh) USA [2015] UKUT 00435 and KMO (Section 117 unduly harsh) Nigeria [2015] UKUT 00543 were promulgated after the Judge's decision and there is therefore no criticism of him that he did not take them into account. Nevertheless they set out the approach to be applied in deportation cases.

48. In MAB it was held that the phrase unduly harsh does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual whether child or partner of the deportee. Focus is solely upon an evaluation of the consequences and impact upon the individual concerned.

49. By contrast in KMO the Upper Tribunal held that where an assessment is required to be made as to whether a person meets the requirements of paragraph 399 of the Immigration Rules, as that comprises an assessment of that person's claim under Article 8 of the ECHR it is necessary to have regard in making that assessment to the matters to which the Tribunal must have regard as a consequence of the provisions of Section 117C. In particular those include that, the more serious the offence committed, the greater is the public interest in deportation of the foreign criminal. Therefore the word unduly in the phrase unduly harsh requires consideration of whether, in the light of the seriousness of the offence 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.

50. There was no disagreement in KMO with the definition of unduly harsh as set out in MAB which is as follows:

> "Whether the consequences of deportation will be unduly harsh for the 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."

51. In this case I am not required to decide which of the two Upper Tribunal cases should be followed since in both scenarios the answer will be the same.

52. So far as the offence itself is concerned, the supply of a controlled drug is inevitably a serious offence. Those who consume controlled drugs often commit offences which lead to further adverse consequences for society generally. I do not for one minute seek to minimise its seriousness.

53. On the other hand, it is clear from the Judge's sentencing remarks that the appellant pleaded guilty, that he was at the lower end of the offending, that there was no other evidence against him save for the one offence, and the others who were more heavily involved received far longer sentences. The appellant acknowledges in his statement that he was young and stupid and fell into the wrong crowd. The amount of drugs he supplied was clearly very modest, being one wrap of cocaine worth £20. He has no other criminal record and for the last eight years has contributed to his local community through voluntary work for the whole Afro-Caribbean Association working with youths aged between 14 and 19.

54. By contrast the appellant in KMO had been at the centre of a considerable fraudulent activity. 188 accounts had been manipulated or used to produce some £98,000 worth of transactions either completed or attempted. The conspiracy was a professionally planned operation over a significant period with multiple frauds. The appellant in MAB was sentenced to three years' imprisonment on a number of counts for sexual offences involving children under the age of 13. There is clearly therefore a significant distinction to be made between the offences in those cases and in this. Moreover, in that case the children were 20, 17 and 13 years old respectively. There was no evidence that there would be any immigration difficulty in their visiting their father in the USA and the evidence did not establish that visits to America would be prohibitively expensive in the foreseeable future. The relationship with the wife had broken down and the family were no longer living together as a unit.

55. Furthermore in KMO the preserved findings from the first hearing were that it would not be unduly harsh to require the elder children to live in Nigeria; there was no evidence to suggest that it would be unduly harsh for the younger two children to live in Nigeria with their parents. Again that is a significant distinction from this case where the respondent is not arguing that the children could accompany the appellant to Burundi.

56. The defining factor in this case is that the appellant is the prime carer of the children.

57. There is no basis upon which to reject the evidence from Ms Rogers who has observed the family at first hand and who has over twenty years' experience as a local authority, social worker and manager all in the field of children and families. She managed a team dealing with child protection issues, completing assessments of parents where the issues of concern included neglect, substance and alcohol misuse, mental health problems, domestic violence, learning difficulties and or where previous children have been removed from their parents' care.

58. I was impressed by her as a witness. She did not seek to exaggerate. When asked about the detriment to the children, an open question, she instantly acknowledged the resilience of children and their ability to adapt and survive. She said that her principal concern was that children were not always fine and that the long term effect on these children would be unknown. There can be no quarrel with her evidence that they would not be fine in the short term. Neither can there be any concern that in the longer term the effect, particularly upon the older girl, could be a serious impact on her self-esteem and her ability to cope with the loss of their primary carer who is absolutely dominant to their lives. At present these children are set to be functioning members of society, in her view, living in a secure, loving home with parents who set a good example to them. Her evidence is entirely supported by the head teacher.

59. There can be no issue with her conclusion that if that was taken away there would be a considerable impact on their ability to develop into full members of society.

60. Although Mrs Pettersen sought to argue that her evidence was speculative, it is the evidence of an experienced professional and I find no proper basis for not relying on it. She did not seek to argue that, if Ms Rogers' conclusions were reliable that the effect on the children did not amount to being unduly harsh.

61. She did submit that the loss could be ameliorated via Skype. That may well be so for children who have less contact with their father, or who perhaps are older. However to suggest that Skype calls to Burundi could properly compensate in any way for the loss of their primary carer is simply unrealistic.

62. In R (on the application of Mansoor) v SSHD [2011] EWHC 832 (Admin) Blake J at paragraph 16 said:

> "Third, the reference to continued contact and can visit and communicate and maintain family ties seems to again have been generic assessments as between husband and wife, husband and minor children, claimant wife and minor children as well as the parents and their older children who were now over the age of 18 using the ages given at the outset of this judgment. If members of a family enjoy family life in an interdependent household of partners and minor and dependent children it is no comfort to say that they can continue to enjoy that family life by telephoning each other, emailing, video conferencing or any other forms of electronic technology that may be in existence. Lord Bingham was indicating this in the landmark case of Huang v SSHD [2007] UKHL 11 at paragraph 20 but more recently and I appreciate not available to the IJ at the time the Upper Tribunal has made the point in the case of EM (Zimbabwe) [2010] UKUT 98 (IAC). If the IJ thought that there will be no interference

> with the family life enjoyed between husband and wife and parents and minor children if they could communicate from abroad he was again mistaken."

63. I have no hesitation in concluding that the consequences for the children would be inordinately severe and accordingly unduly harsh (MAB). The reality of deportation would be the extinguishment of family life as it has been known and indeed possibly at all. The ability of the appellant to communicate effectively from Burundi is quite unknowable. He has no family there who would be able to help him.

64. In the alternative, taking the approach of KMO, and including in the assessment of proportionality the appellant's offending history, the conclusion will be the same. Undoubtedly the offence was serious, with public interest considerations going beyond the offence itself. On the other hand the amounts involved were very small, it was a single occasion and there has been no reoffending.

Notice of Decision

The original Judge erred in law. His decision is set aside. This is remade as follows. The appellant's appeal is allowed under the Immigration Rules.

Signed Date

Upper Tribunal Judge Taylor