Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01776/2014
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THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 16 November 2015 **On 4 January 2016**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

STEPHEN CHUKUEMEKA UCHENDU
(AND CHILD DEPENDENTS)

Respondent

Representation:

For the Appellant: Mr D. Balroop, Counsel instructed by Shan & Co. Solicitors
For the Respondent: Ms A. Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

Background

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The appellant appealed against the respondent's decision to refuse to revoke a deportation order in relation to him and his three child dependents for whom he claims to be the sole carer. His children are L

(aged 10), V (aged 7) and S (aged 5). No appeal was lodged in relation to the oldest child but the First-tier Tribunal was satisfied that a notice of decision had been served and noted that, by agreement, she would be treated as an additional appellant.

3. The appellant claims that he entered the UK with entry clearance as a visitor in January 1995. He overstayed the visa. On 08 December 2005 he was convicted of use of a false instrument (a passport in the name of Jonathan Able) and was sentenced to a period of imprisonment of 12 months. On 22 September 2006 he was served with a notice of intention to make a deportation order. He appealed the decision but his appeal was dismissed by the Asylum and Immigration Tribunal on 09 November 2006. He subsequently made an asylum claim in the false identity of Jonathan Able. The respondent states that he did not claim to have any dependents at the time. The respondent refused asylum in a decision dated 27 February 2007 and certified the claim as 'clearly unfounded'. The appellant was subsequently listed as an absconder.

4. On 11 April 2011 the appellant applied for leave to remain in the UK in his own name and listed his three children as dependents. He stated that their mother was a Dutch national who had abandoned them and that he was their sole carer. The respondent refused leave to remain in a decision dated 16 June 2011. It was not until 18 June 2012 that the respondent established that the appellant and his alias, Jonathan Able, were one in the same person. On 29 May 2014 he made a further application for leave to remain, which was refused in a decision dated 14 August 2014. The respondent was not satisfied that the appellant met the requirements of the immigration rules or that there were any exceptional circumstances to justify granting leave to remain outside the rules.

5. The Criminal Casework Directorate reviewed the application for leave to remain and treated it as an application to revoke the deportation order. In a decision dated 01 September 2014 the respondent refused to revoke the deportation order that was signed against him on 06 December 2006 and made deportation decisions against the children by virtue of section 3(5)(b) and section 5(4) of the Immigration Act 1971.

6. First-tier Tribunal Judge Metzer ("the judge") allowed the appeal in a decision promulgated on 19 August 2015. He took into account the fact that the appellant was convicted of a serious criminal offence and that there was a presumption in favour of deportation. The judge made reference to the public interest considerations set out in sections 117A-D of the Nationality, Immigration and Asylum Act 2002. He also took into account the fact that the appellant had no lawful status in the UK [22].

7. The judge went on to consider the points that weighed in favour of the appellant including his length of residence in the UK and the fact that he was likely to have few ties remaining in Nigeria. The judge took into account the fact that all three of his children were born in the UK. He

noted that L was at an age when she would be eligible to apply for British citizenship. It was clear that the children were well settled in the UK [23-24].

8. The First-tier Tribunal considered the exception to deportation outlined in paragraph 399(a) of the immigration rules. The judge noted that there was no dispute that the appellant had a genuine and subsisting parental relationship with all three children and stated that the only issue that he was required to determine was whether it would be unduly harsh to expect the three children to live in Nigeria with the appellant [25-26]. His findings in relation to that aspect of the appeal were made in a single paragraph [27]:

> "Given that they have spent their whole lives in the United Kingdom and in [L's] case, she is nearly ten years old and has progressed well in the only country to which not only have they fully integrated but the only country to which they have any experience, then notwithstanding the presumption in favour of deportation and the fact that the first Appellant committed a serious offence in 2005 which has not been repeated, I find the first Appellant has established on the basis of family life with three children with whom he has a genuine and subsisting relationship and has lived in the United Kingdom in respect of his elder two children for at least seven years immediately preceding the date of the immigration decision that it would be unduly harsh for those children, particularly the older two children, to live in Nigeria and it would be unduly harsh for all the children to remain in the United Kingdom without the first Appellant that the first Appellant has established to the relevant standard that the conditions set out at paragraph 399(a) of the immigration rules has been made out."

9. The respondent seeks to appeal the decision on the following grounds:

   (i) The First-tier Tribunal failed to give adequate reasons for finding that it would be unduly harsh for the children to live with their father in Nigeria.

   (ii) The First-tier Tribunal failed to give adequate reasons as to why the children could not be expected to return to Nigeria with their father and continue their family life there.

   (iii) The First-tier Tribunal failed to give sufficient consideration to the public interests considerations relating to deportation of foreign criminals.

Decision and reasons

10. After having considered the grounds of appeal and oral arguments I am satisfied that the First-tier Tribunal decision involved the making of an error on a point of law.

11. There are two slightly divergent decisions of the Upper Tribunal seeking to interpret the meaning of the phrase "unduly harsh" in *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 and *KMO (section 117 – unduly*

harsh) Nigeria [2015] UKUT 00543. While the decisions disagree as to whether the assessment of the "unduly harsh" test should include a partial proportionality exercising taking into account the seriousness of the offending behaviour, what both decisions agree on, is that the test is a stringent one. Whether the consequences of deportation will be "unduly harsh" involves a considerably higher threshold than the consequences merely being "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging". The consequence 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.

12. While the decision in *MAB (USA)* was decided shortly before the First-tier Tribunal decision it may not have come to the attention of those involved by the date of the hearing. Even if the First-tier Tribunal was not aware of the recent case law the plain wording of the phrase "unduly harsh" makes clear that it is a stringent test. The main focus of the challenge to the First-tier Tribunal decision is the lack of reasoning. I am satisfied that the relatively brief reasons given by the judge in paragraph 27 of the decision did not adequately engage with the stringent nature of the "unduly harsh" test in the context of the public interest considerations involved in deportation. I prefer the reasoning of the Tribunal in *MAB (USA)*. The partial proportionality exercise suggested by the Tribunal in *KMO (Nigeria)* is no proportionality exercise at all for the purpose of a proper proportionality assessment under Article 8. The public interest considerations are nevertheless reflected in the high threshold required to satisfy the "unduly harsh" test. The only reason given by the First-tier Tribunal for concluding that it would be unduly harsh to expect the children to live in Nigeria was, in essence, their length of residence in the UK. No analysis was conducted as to what would be in the best interests of the children, what conditions they might face in Nigeria, whether they would be able to access education there and how able they might be to continue their family life with their father. Even if the conditions in Nigeria were unlikely to be as favourable as in the UK no findings were made as to whether, even if harsh, such conditions would be unduly harsh within the meaning of the stringent test contained in the immigration rules. For these reasons I conclude the First-tier Tribunal decision involved the making of an error of law and I set aside the decision.

13. At the hearing it was suggested that I could go on to remake the decision without the need to set the matter down for a further hearing. However, on reflection I consider that it is in fact appropriate to remit the case for a further hearing in the First-tier Tribunal.

14. It is not common for a deportation decision to be made against young children as family members of a person being deported. They have a right to appeal against the deportation decision in their own right. The best interests of the children may conflict with the interests of their father and I am a little surprised that no thought has been given as to whether it might

be appropriate for the children to be separately represented. A potentially prominent feature of the case, which could not be given any weight by the respondent or the First-tier Tribunal because the appellant has singularly failed to produce any evidence of the fact, is that the children may be Dutch nationals.

15. The best interests and the legal position of the children will need to be considered separately and in more detail. It is probable that paragraph 398 of the immigration rules and associated provisions do not apply to dependent family members who have not themselves been convicted of a criminal offence. As such it is likely that a separate assessment of the children's Article 8 rights might need to be made from their father albeit that the public interest considerations relating to deportation may not produce a significantly different assessment to the "unduly harsh" exception contained in rule 399(a) and section 117C(5) of the NIAA 2002. For these reasons I conclude that it will be necessary for more detailed findings to be made relating to the best interests of the children and that the appropriate forum for that assessment is the First-tier Tribunal.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

I set aside the decision and remit the case for a further hearing in the First-tier Tribunal

Signed

Upper Tribunal Judge Canavan Date 21 December 2015