Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00062/2015

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 25 May 2017	**On : 30 May 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

GUIHERME FERNANDO VAZ JOAO
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Jones, instructed by Arlington Crown Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 10 April 2015 to refuse his human rights claim, further to a deportation order made against him on 27 March 2015 under section 32(1) of the UK Borders Act 2007.

2. The appellant is a citizen of Angola, born on 5 October 1967. He arrived in the UK on 11 August 2000 and claimed asylum the same day. His claim was refused and he unsuccessfully appealed against that decision, becoming appeal rights exhausted on 13 June 2003. Further representations were made to the respondent on health grounds and, in March 2008, the appellant made a fresh asylum claim which he later withdrew. The appellant's partner, with whom he had been in a relationship in Angola since 1997, joined him in the UK after 2000 and was eventually granted indefinite leave to remain outside the immigration rules and subsequently became a British citizen. The appellant and his partner had three children, twin sons [En] and [Ek] born on [ ] 2003 and another son [Er] born on [ ] 2010, all British citizens. His son [Ek] suffers from autism.

3. On 29 January 2010 the appellant was convicted of driving a motor vehicle with excess alcohol and using a vehicle whilst uninsured. On 13 September 2010 he was convicted of two counts of possessing/control false/improperly obtained ID card and resisting or obstructing a constable. He was also convicted, on the same day, of four counts of possessing/control false/improperly obtained another's identity document, acquiring criminal property and making a false statement or representation in order to obtain benefit or payment. He was sentenced to two years' imprisonment.

4. On 14 October 2010 a liability to deportation notice was issued to the appellant, but subsequent to the receipt of further representations the respondent decided not to pursue deportation action in light of the appellant's Article 8 rights. The appellant was granted a period of discretionary leave from 16 August 2011 until 8 August 2014.

5. On 29 May 2012 the appellant was convicted of driving a motor vehicle with excess alcohol, using a vehicle whilst uninsured and driving otherwise than in accordance with a licence. He was sentenced on 15 June 2012 to 16 weeks' imprisonment, suspended for 12 months.

6. On 29 July 2014 the appellant submitted an application for further leave to remain in the UK. The respondent then decided to pursue deportation action and on 3 February 2015 a decision to deport was issued. The appellant made further representations in response. On 27 March 2015 a deportation order was made against the appellant under section 32(1) of the UK Borders Act 2007. On 10 April 2015 the respondent refused the appellant's human rights claim.

7. In refusing the appellant's human rights claim, in her decision of 10 April 2015, the respondent accepted that the appellant had a genuine and subsisting relationship with his British partner and three children but did not accept that it would be unduly harsh for them to live in Angola with him or for them to remain in the UK without him. The respondent did not, therefore, accept that the appellant met the criteria in paragraph 399(a) or (b) and neither was it accepted that he could meet the criteria in paragraph 399A on the basis of private life. The respondent considered that there were no very compelling circumstances outweighing the public interest in the appellant's deportation

and that his medical conditions were not such as to lead to his deportation being in breach of Article 3.

8. The appellant's appeal against the respondent's decision was initially heard in the First-tier Tribunal on 24 November 2015 by First-tier Tribunal Judge Burns. The judge's decision dismissing the appeal was, however, set aside by reason of error of law by Upper Tribunal Judge Bruce, in a decision dated 3 August 2016, primarily on the basis of a lack of proper consideration of the best interests of the children and in particular the circumstances of [Ek] and the impact upon him of his father's deportation.

9. The appeal was then remitted to the First-tier Tribunal to be heard afresh and was heard by Designated First-tier Tribunal Judge McCarthy on 12 December 2016.

10. Judge McCarthy refused an adjournment request made on behalf of the appellant to obtain further documentary evidence. The judge found that the appellant could not benefit from paragraph 399A since he had not been lawfully present in the UK for most of his life and he found that he could not benefit from paragraph 399(b)(i) because his immigration status had always been precarious. The judge noted that the respondent was no longer asserting that it would not be unduly harsh for the children to live in Angola but was pursuing the case on the basis that it would not be unduly harsh for them to remain in the UK without the appellant. The judge noted that the evidence produced by the appellant, including the independent social worker's report, the evidence from the children's schools and a statement of special needs was out of date and incomplete, and considered that it was exceptionally weak. He was not satisfied that the appellant and his partner had given truthful accounts about the nature and extent of the appellant's involvement with his sons. He accepted that the appellant had a genuine and subsisting relationship with his sons but did not accept that he was their primary carer as claimed and considered that the evidence before him was insufficient to establish that it would be unduly harsh for the children to remain in the UK without their father. The judge found that the appellant could not therefore benefit from paragraphs 399(a) and (b). He did not accept that there were very compelling circumstances outweighing the public interest in the appellant's deportation and found that the appellant's deportation would not be disproportionate. He dismissed the appeal on all grounds.

11. The appellant sought permission to appeal Judge McCarthy's decision to the Upper Tribunal on six grounds: that the judge had erroneously applied the burden of proof in the assessment of proportionality; that the judge had failed properly to take [Ek]'s current needs in respect of his autism into account; that there was a flawed assessment of the primary carer; that there was a failure to take the children's views into account; that there was a failure to consider the impact of separation with reference to the professional evidence; and that there was an erroneous approach to the issue of the mother's ability to cope in the event of the appellant's deportation.

12. Permission to appeal was initially refused by the First-tier Tribunal, but was subsequently granted on 10 March 2017 by Deputy Upper Tribunal Judge Chapman on the grounds that the judge had arguably failed to apply the principles in MM (Uganda) & Anor v Secretary of State for the Home Department (Rev 1) [2016] EWCA Civ 617; that there had been unfairness in the decision not to adjourn the proceedings; and that the judge had failed to give proper consideration to the children's views and to the impact of the appellant's deportation on the autistic child.

13. The appeal came before me on 25 May 2017. Both parties made submissions on the error of law. I have concluded that there are no errors of law in Judge McCarthy's decision. My reasons for so concluding are as follows.

Consideration and findings.

14. Turning to the matter raised in the grant of permission relating to the judge's refusal to adjourn the proceedings, Ms Jones quite properly did not actively pursue the point. As Mr Wilding submitted, in order for there to be an unfairness point, there has to have been an assertion of unfairness made by the appellant in the first place, which was not the case here. Ms Jones said that it was disappointing not to be given a further opportunity to produce further evidence but went no further than that. Clearly there was no unfairness in Judge McCarthy's refusal to adjourn the proceedings. The appellant had had ample opportunity to provide further evidence but had failed to do so despite being prompted to by Upper Tribunal Judge Bruce's error of law decision. I note further from the correspondence on the court file that there was a clear indication from the appellant's solicitors that they were ready to proceed with the appeal and that there was never any indication of any intention to produce further documentation. As Mr Wilding submitted, it is relevant to note that there is still no further documentary evidence. Accordingly no error of law arises in that respect.

15. Likewise there is no error of law arising from the judge's approach to the burden of proof. Whilst the judge's choice of wording at [2] was perhaps not the best, it is clear from [29] that he was fully aware that the burden of proof lay upon the respondent when considering proportionality. His findings from [91] plainly reflect a proper approach to the burden of proof.

16. The main focus of the grounds is how the judge dealt with the children's interests, in particular [Ek]'s interests. It is asserted on behalf of the appellant that the judge failed to take [Ek]'s current needs into account, in respect of his autism. However that is plainly not the case. The judge undertook a detailed consideration of the documentary evidence relating to the children, and in particular to [Ek], at [64] and [65] and then from [70] to [85]. He noted that there was no recent evidence and that the evidence that was available was out of date and incomplete. He considered the evidence given by the appellant and his partner and also took account of the independent social worker's report and the documents from the school as well as the statement of special educational needs. The grounds of appeal assert that the judge failed to consider the views

of the children, but again that is clearly not the case, as the judge specifically referred to, and considered, their views at [75] to [77]. With regard to the judge's consideration of the appellant's partner's ability to cope without him, which in turn is linked to his assessment of the primary carer, the judge made clear and cogent findings in that regard. At [66] to [68], [77] and [78], and [98] to [100] the judge gave reasons for concluding that the appellant and his partner had not provided a truthful account of the nature and extent of the appellant's involvement with his sons and considered the mother's ability to look after the children on her own. In so doing he plainly had full regard to the views of the independent social worker and the school, referring specifically to the evidence at [78] and [80], and providing clear and cogent reasons for placing the weight that he did upon that evidence. Having considered all of the evidence in detail, and having provided cogent reasons for his findings, the judge was fully entitled to conclude that both parents were involved with the children's care and that their mother would be able to cope with them in his absence.

17. The decision granting permission refers to an arguable failure on the part of the judge to apply the principles in MM (Uganda), but that is clearly not the case. The judge plainly had that case in mind when assessing the question of whether it would be unduly harsh for the children to remain in the UK without their father, specifically referring to it at [63]. If anything, it seems to me that the judge applied a more generous approach to that question since his focus throughout the following paragraphs was upon the children and their interests. Accordingly his conclusion, that it would not be unduly harsh for the children to be separated from their father, was one that was properly made on the evidence before him.

18. It was Ms Jones' submission that the judge failed to consider the children's views and best interests and failed to give any weight to the independent social worker's report when considering proportionality under Article 8. Ms Jones disagreed with Mr Wilding's submission that there was no need for the judge to consider all the issues again in assessing proportionality and that that would be double-counting. She submitted that that was inconsistent with the principles set out in Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60 which made it clear that the immigration rules were not a complete code and that there had to be a full and separate proportionality consideration in accordance with Razgar, R (on the Application of) v. Sectretary of State for the Home Department [2004] UKHL 27. However I find nothing in Hesham Ali requiring the setting out of a full and repeated consideration of all the issues already considered under the rules provided that it is clear that all relevant matters have been considered and taken into account, as is evident in this case. The judge properly commenced his proportionality assessment by taking account of the best interests of the children as a primary consideration, finding that their best interests were for the family to remain together. He went on to consider the impact of separation on the appellant's wife and children and, contrary to Ms Jones' assertion, took account of the professional reports in that regard. The judge took full account of the public interest, as he was required to do, and provided full and proper

reasons for concluding that the appellant's interests, and those of his wife and children, did not outweigh the public interest in his deportation.

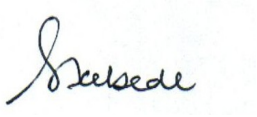
19. Accordingly I find no merit in the grounds. The judge's decision was based upon a full and detailed assessment of all relevant matters, with careful consideration given to the interests of the appellants' children, in particular to his son [Ek], and to the impact upon them of separation. There was nothing erroneous in his consideration of the immigration rules and proportionality outside the rules or in his approach to the evidence. He reached a conclusion that was open to him on the evidence before him. For all of these reasons I conclude that the grounds of appeal do not disclose any errors of law in the First-tier Tribunal's decision.

DECISION

20. The appellant's appeal is accordingly dismissed. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appellant's appeal therefore stands.

Anonymity

Although an anonymity order was made by Upper Tribunal Judge Bruce, First-tier Tribunal Judge McCarthy did not make such an order. I see no need for an anonymity order, there having been no request made before me, and I therefore discharge the order previously made pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed 
Upper Tribunal Judge Kebede Dated: 16 May 2017