Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU060382016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 July 2017	**On 31 July 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED ABBAS ALI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant (the Secretary of State): Mr P Armstrong, Senior Home Office Presenting Officer
For the Respondent (Mr Ali): Ms K Tobin of Counsel instructed by Fisher Meredith

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision of Judge Herlihy. For ease of reference I shall throughout this decision refer to Mr Ali who was the original appellant as "the claimant" and to the Secretary of State, who was the original respondent as "the Secretary of State".

2. The claimant is a national of Bangladesh who was born in October 1977. He was sentenced to a period of imprisonment of 21 months following his

conviction at Blackfriars Crown Court for conspiracy to commit fraud by false representation following which the Secretary of State made a decision to make a deportation order against him pursuant to Section 32(5) of the UK Borders Act 2007 and Section 3(5)(a) of the Immigration Act 1971. These effectively provide that a foreign criminal who is convicted of an offence carrying a sentence of above twelve months' imprisonment will automatically be deported unless this would be unlawful either under the Refugee Convention or under the European Convention on Human Rights. The claimant's case is that it would be unlawful because it would be disproportionate under Article 8. The material issue in this case is whether or not the effect on his children would be "unduly harsh" which is a matter which is dealt with under the new part 5A of the Nationality, Immigration and Asylum Act 2002 which was inserted by Section 19 of the Immigration Act 2014 with effect from 28 July 2014. The relevant provisions within part 5A are set out at paragraph 117C as follows:

> "**117C. Article 8: additional considerations in cases involving foreign criminals**:
>
> (1) the deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception (1) or Exception (2) applies.
>
> (4) Exception (1) applies where –
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life;
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there will be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) 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.
>
> ...".

3. The claimant contended that the effect of his deportation would be unduly harsh on his children and thus he fell within Exception (2) as set out above. This claim was rejected by the Secretary of State and the claimant appealed against this decision.

4. As noted above his appeal was heard before First-tier Tribunal Judge Herlihy. The hearing was at Taylor House on 11 October 2016 and in a determination promulgated on 15 November 2016 Judge Herlihy allowed the appeal on the basis that he came within Exception (2) of 117C. The Secretary of State now appeals before me, permission having been granted by Upper Tribunal Judge Kamara on 2 June 2017.

5. There are a number of grounds, but for the purposes of this decision I only need to consider one of them. The ground I need to consider is that the judge when considering whether the effect on the claimant's children would be unduly harsh failed to have regard to the decision of the Court of Appeal in *MM (Uganda)* [2016] EWCA Civ 450, where at paragraph 26, the court had found as follows:

> "For all these reasons in my judgment *MAB* was wrongly decided by the Tribunal. The expression "unduly harsh" in Section 117C(v) and Rule 399(a) and (b) requires regard to be had for all the circumstances including the criminal's immigration and criminal history."

6. Before the Court of Appeal made its decision (in April 2016) there had been conflicting decisions in this Tribunal. In *MAB* this Tribunal had found that whether or not the effect on the child was "unduly harsh" had to be considered in isolation without regard being had to the circumstances of the offence. In *KMO (Section 117 – unduly harsh) Nigeria* [2015] UKUT 00543, Judge Southern declined to follow *MAB*, finding that a proportionality exercise needed to be carried out before one could consider properly whether the effect on the children was **unduly** [my emphasis] harsh rather than just harsh. For example, the separation of children from a parent for a long period of time might be very harsh indeed; however, whether it can be said (on Judge Southern's reasoning in *KMO*) to be unduly harsh would depend on the reason for that separation. So if for example the children's father had been convicted of a relatively trivial offence, the harsh effect on the children might be said to be unduly harsh; however, if the parent had been convicted of a very serious offence, such as murder, although harsh the separation would be justified and therefore the effect would not be said to be unduly harsh.

7. Effectively the Secretary of State's submission is that it is not clear from reading Judge Herlihy's submission that she appreciated that the test to be applied when considering whether the effect on the claimant's children was unduly harsh was a test which in itself required her to carry out a proportionality exercise. Nowhere in the decision is reference made to the decision given by the Court of Appeal in *MM (Uganda)*, and nor is it clear that any proportionality exercise was carried out before considering this specific aspect of the claim. On behalf of the claimant, Ms Tobin accepted that it might have been preferable if the judge had explicitly dealt with this matter and stated in terms that she considered that the harshness to the children was sufficiently great to outweigh the public interest in the claimant's deportation; she submitted that nonetheless one could read into her decision implicitly a consideration of whether or not, bearing in mind the effect on the children, the removal was proportionate. She

points out that at paragraph 37 the judge sets out first of all that the Secretary of State had found that "it would not be unduly harsh for the claimant's wife and their children to return to Bangladesh with the claimant or remain in the UK while he is deported to Bangladesh" and then at various parts of the decision dealt with the various factors which were for or against the claimant's case.

8. In my judgment having considered this decision very carefully indeed it is not at all clear that when considering whether or not the effect on the children would be "unduly harsh" the judge did have in mind as she was required to, that the term "unduly harsh" imports within it a proportionality exercise which has to be conducted. When finding at paragraph 46 that it would be unduly harsh "for the claimant's children to remain in the United Kingdom without the claimant if he were deported" although she refers to "considering all the evidence before me" the evidence which in fact she considers within this paragraph is evidence exclusively directed to the effect on the children and that is set out at paragraphs 46 and 47. It is only after making the decision that "the claimant has established that it would be unduly harsh for his children to remain in the United Kingdom without him" that she then goes on to consider the case generally, but by this time it would seem (and this is the most likely meaning that can be read into the decision) that the judge has already decided that the claimant falls within Exception 2 of Section 117C because the effect on the children would be unduly harsh if he was removed. At the very least, the decision is inadequately reasoned to make it plain that the judge has considered as she should whether or not the harsh effect which the children will suffer is sufficiently strong to outweigh the other factors.

9. In these circumstances I do not need to consider the other arguments advanced on behalf of the Secretary of State because this error is sufficiently material that the decision must be set aside. I cannot say that the decision would necessarily have been the same had the judge properly taken into account the guidance given by the Court of Appeal in *MM (Uganda)* and it follows the decision will now have to be remade.

10. Both parties are agreed that the appropriate course is that this appeal now be sent back to the First-tier Tribunal to be heard again at Taylor House by any First-tier Tribunal Judge other than Judge Herlihy and I will so order.

Decision

I set aside the decision of First-tier Tribunal Judge Herlihy as containing a material error of law and remit this appeal back to Taylor House to be reheard by any First-tier Tribunal Judge other than Judge Herlihy.

Signed:

Upper Tribunal Judge Craig Date : 25 July 2017