Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/23470/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision & Reason Promulgated**
On 24 October 2017	**On 26 October 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

M A
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bradshaw, instructed by Samad & Co Immigration (Witton)
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Carlin promulgated on 22 June 2017 in which the Judge dismissed the appellant's appeal.

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Background

2. The appellant is a national of Bangladesh born on [ ] 1946.
3. On 27 November 2002, the applicant presented a false Portuguese passport using a false name in order to secure the entry of his wife and five children to the UK. The Judge records that the appellant used the false identity because he could not act as the sponsor of his family because he was an over stayer in the United Kingdom.
4. The appellant has worked illegally without paying tax which it is claimed was to enable him to support his family financially. The appellant lives at his home address with his wife, their four adult children, and younger son N born on 23 October 2001. The appellant’s four grandchildren and his daughter’s spouse also reside at the property.
5. N is educated in the United Kingdom and due to take his GCSEs in summer 2018. N is a British citizen who has never been to Bangladesh.
6. The Judge notes the appellant has multiple health problems which are generally controlled by medication prescribed by his GP although he attended hospital in February 2017 due to a heart condition.
7. The appellant has little contact with relatives in Bangladesh his parents having passed away. He has two sisters who live in Bangladesh who are married. The appellant has not maintained contained contact with them and does not know where they live. Other relatives such as aunts and uncles formally in Bangladesh passed away with the appellant not having contact with any cousins who live in Bangladesh. None of the appellant’s relatives who reside in Bangladesh have visited the appellant since he came to the UK, and the appellant’s wife has not visited Bangladesh since she arrived in the UK in 2001 and nor does she have contact with her parents or siblings.
8. The Secretary of State made an order for the appellant’s deportation from the United Kingdom as a result of his offending. On 26 September 2016, the respondent refused the appellant’s human rights claim and maintained the earlier decision to deport the appellant. The appeal before the Judge is in relation to the appellant’s challenge to this decision.
9. The Judge sets out the reasons for the decision dismissing the appeal from [11 – 46] of the decision under challenge, the relevant parts of which can be summarised in the following terms:

    a. The appellant was sentenced to 19 months imprisonment for two offences for which he was convicted. Paragraph 398(b) of the Immigration Rules applies meaning consideration has to be given as to whether paragraph 399 or 399A apply [11]. It is necessary to consider whether section 117 and in particular 117C of the 2002 Act apply [12].

b. The appellant was not sentenced to a term of four years or more, section 117C(3) applies which provides two exceptions set out in subsections (4) and (5) to the rule that the public interest requires the appellant's deportation [13].
c. The Judge found witnesses credible as to the factual situation of which they spoke but did not necessarily accept the views of the appellant and his family as to the consequences of the appellant leaving the UK [14].
d. The appellant does not satisfy the criteria in paragraph 399A as he has not been lawfully resident in the UK for most of his life [16].
e. Is not disputed by the respondent that the appellant has a genuine and subsisting parental relationship with a child under the age of 18, namely his son N. It was not disputed that N is a British citizen and that he has lived in UK all his life therefore continuously for seven years immediately preceding the date immigration decision. Paragraph 399 (a) (i) and (ii) are therefore satisfied [17].
f. The issue was whether it would be unduly harsh for the child to live in the country to which the appellant is to be deported or it will be unduly harsh for the child to remain in the UK without the person who is to be deported [18].
g. The Judge found it would be unduly harsh for N to live in Bangladesh for the reasons set out at [19].
h. The Judge did not find it would be unduly harsh for N to remain in the United Kingdom without his father as:

    i. N will be able to remain in the UK to take his GCSEs [21].
    ii. N will remain living with his mother and older siblings having a large family around him living in the same household and attending the same school meaning a degree of stability would be maintained [22].
    iii. The Judge accepts N's close relationship with his father. N's behaviour deteriorated when his father was in prison and daily contact between them was broken [23].
    iv. N is now a little older with the family knowing from their experiences how separation affected N and it is likely they will do everything they can to ensure that the obvious effects upon N of his father's absence will be mitigated. The family is close with N's mother and older siblings in the UK and the absence of the appellant would be mitigated, to a degree, by the positive influence of the remainder of the family [24].

i. The Judge refers, when considering the term “unduly harsh” to the decision in MM (Uganda) v SSHD [2016] EWCA Civ 450 [26].
j. The offence committed by the appellant was a serious offence. By virtue of section 117C (2) the more serious the offence the greater the public interest in deportation [30-32].
k. The exception in Section 117C (4) does not apply to the present case because the appellant has not been lawfully resident in the UK for most of his life [34].
l. The exception in section 117C (5) provides for the situation where the appellant is in a genuine and subsisting relationship with a qualifying partner or qualifying child and the effect of the appellant’s deportation on the partner or child would be unduly harsh. Both the appellant’s wife and N satisfy the criteria of a ‘qualifying partner’ and ‘qualifying child’. The unduly harsh test is not satisfied in the case of the appellant’s wife because she would be surrounded by the rest of her family, including four children in the UK. The unduly harsh test is not satisfied in relation to N [35].
m. The Judge accepted the risk of reoffending on the part of the appellant was low largely due to the appellant’s age and his health problems. The Judge noted the passport offence was committed in 2001 and is of an age which points against a likelihood of reoffending. Balanced against the low risk of reoffending is that the appellant has worked for a considerable period of time illegally and paid no tax, committed a Bail Act Offence in 2002, and was at large for a period of about 10 years before being arrested on the warrant issued for his failure to attend; which it is found points to a person who does not comply with rules when it suits his purpose not to, which tempered the weight the Judge was able to give to the fact the appellant was a low risk of reoffending [37].
n. In relation to deterrence, the Judge finds that public confidence may be undermined in the immigration system by this type of offending and that there is a strong public interest in deporting people who commit offences of this nature [38].
o. The Judge took into account the appellant’s personal circumstances. His health conditions were noted some of which are chronic and permanent but not life-threatening. The appellant leads a reasonably full life as shown by his involvement with and activities carried out with N. The Judge noted availability of treatment in Bangladesh [39 – 40].

p. The Judge accepted the appellant will have difficulties on his return to Bangladesh which is a factor to be taken into account [41].
q. The Judge noted authority from the Court of Appeal in which it was found the interests of the children carry considerable weight but have to be balanced against the substantial weight of the public interest in the removal of the appellant [42].
r. The interests of N, whilst important, to do not outweigh the public interest. The decision to deport is proportionate. N will still be living with his mother and siblings. It was not found there are very compelling circumstances that outweighed the strong public interest in deportation and no exceptional circumstances outside the Rules amounting to a violation of article 8 rights [43 – 45].
s. The Judge took into account, in relation to N, the duty to promote and safeguard the welfare of children in the UK as set out in section 55 Borders, Citizenship and Immigration Act 2009 [46].

10. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on the basis it was arguable the Judge did not have proper regard to the considerations regarding the ‘unduly harsh’ test as referred to in MM (Uganda). All the circumstances, including the appellant’s, need to be considered. It is also said to be arguable that despite stating that in coming to the conclusions relating to N the Judge had regard to section 55, he did not properly assess N’s best interest as part of the proportionality balance.

Error of law

11. In MM (Uganda) [2016] EWCA Civ 450 it was held that the phrase ‘unduly harsh’ plainly meant the same in section 117C(5) of the 2002 Act as it did in paragraph 399 of the Immigration Rules. It was an ordinary English expression coloured by its context. The context invited emphasis on two factors: first, the public interest in the removal of foreign criminals and, secondly, the need for a proportionate assessment of any interference with Article 8 rights. The public interest factor was expressly vouched by Parliament in section 117C(1). Section 117C(2) provided that the more serious the offence committed, the greater the public interest in deportation. That steered the tribunals and the court towards a proportionate assessment of the criminal’s deportation in any given case. Accordingly, the more pressing the public interest in his removal, the harder it would be to show that the effect on his child or partner would be unduly harsh. Any other approach would dislocate the ‘unduly harsh’ provisions from their context such that the question of undue hardship would be

decided wholly without regard to the force of the public interest in deportation. In such a case 'unduly' would be mistaken for 'excessive', which imported a different idea. What was due or undue depended on all the circumstances, not merely the impact on the child or partner in the given case. The expression 'unduly harsh' in section 117C(5) and paragraph 399(a) and (b) required consideration of all the circumstances, including the criminal's immigration and criminal history. MAB was wrongly decided (paras 22 – 26).

12. In IT (Jamaica) [2016] EWCA Civ 932 it was held that the First-tier Tribunal had not given appropriate weight to the public interest when revoking a deportation order made against a foreign criminal. The undue harshness standard in section 117C of the Nationality, Immigration and Asylum Act 2002, read in the context of the Immigration Rules, meant that a deportee had to demonstrate that there were very compelling reasons for revoking a deportation order before its expiry.

13. Although the case was decided on its own particular facts, in CD (Jamaica) v SSHD [2016] EWCA Civ 1433 the Court of Appeal upheld the Upper Tribunal and First-tier Tribunal who agreed that it would be unduly harsh on the 4 children of the appellant to remain in the UK without their father who although sentenced to 3 years for dealing in class A drugs was now a very low risk of offending, was committed to change, and there was evidence that the children would find it very difficult to cope if their father were separated from them.

14. The submission on the appellant's behalf by Mr Bradshaw that the Judge had not applied the correct approach as per MM (Uganda) is based upon an assertion the Judge at [20 – 26] assessed whether removing the appellant would be "unduly harsh" without considering other factors that account in the appellant's favour.

15. The submission by Mr Mills that the Judge was required to assess the position in relation to the children and balance that against the public interest was not accepted by Mr Bradshaw who indicated that all relevant matters had to be taken into account. It was submitted there are matters in the decision appearing after [26] that should have been factored into the earlier assessment.

16. The Judge at [26] notes the two factors to be considered in MM (Uganda) and notes the cases referred to in paragraph 10 of Mr Bradshaw skeleton argument in relation to which the Judge states specific attention has been given.

17. At paragraph 10 of the skeleton Mr Bradshaw writes:

> 10. It is noted that MM (Uganda) v SSHD [2016] EWAC Civ 617 endorsed the view that the expression, "unduly harsh", "requires regard to be had to all the circumstances including the criminal's immigration and criminal history" (see MM para 26). The Court of Appeal used the term "a proportionate assessment of the criminal's deportation in any given case", at para 24.

18. The Judge was therefore aware that what was required is a holistic assessment. The Judge thereafter considers a number of factors by reference to section 117 and six further factors including best interest

considerations. The finding at [20] was not the summary of the Judges fact-finding or reasoning, in totality, but the Judge setting out what the finding is by reference to the final sentence of the paragraph which reads "in coming to this conclusion, I took into account the following". What followed [20] to the end of the determination is therefore an analysis by the Judge of all the circumstances of the case both in favour of and against the appellant which supported the conclusion that removal of the appellant from the United Kingdom as a result of the deportation order and the impact upon N was not unduly harsh. Within this the Judge considered a number of factors including risk of reoffending, date of commission offence, deterrent elements, appellant's personal circumstances including health and difficulties he would endure on return to Bangladesh, the bond between the appellant and N, remaining support N will have in the United Kingdom with his mother and siblings, and other matters relied upon in the skeleton argument prepared by Mr Bradshaw.

19. The appellant fails to make out any misdirection in law in relation to the understanding of the manner in which the unduly harsh test is to be assessed or the manner in which that test was undertaken by the Judge. The Judge carried out the required holistic assessment and the findings in relation to that matter, weight given to the competing elements, and overall assessment, are all arguably within the range of findings reasonably open to the Judge when considering the evidence as a whole.

20. Ground 2 asserts the Judge did not identify what is in N's best interests and made no clear finding on this individual point. The decision clearly shows the Judge did consider this element and, as Mr Mills submitted, [24] illustrates this. In that the Judge writes:

> 24. However, I was of the view that N is now a little older, that the rest of the family know from their experiences how the appellant's imprisonment and separation affected N and it is likely that they will do everything that they can to ensure that the obvious effects upon N of his father's absence will be mitigated. I did have the opportunity of listening to the evidence of the appellant's wife and [M]. It is abundantly clear that the family is close. The family still resident in the UK are N's mother and elder siblings. I was of the view that the absence of the appellant would to a degree be mitigated by the positive influence of the remainder of the family.

21. Also, at [42], the Judge finds:

> 42. The sixth factor I took into account when considering public interest considerations was the decision in SSHD v AJ (Angola) [2014] EWCA Civ 1636. This case was similar to the present case in that an offence had been committed involving a forged passport and there were children and a partner to be taken into account. In paragraph 55 of the decision, it is noted that the interests of the children carry considerable weight but that they have to be balanced against the substantial weight of the public interest in the removal of the appellant. In that case, in the event that the appellant was deported, the children would continue to have a family life with their mother in the UK, "albeit one which is not so rich as it might be if the appellant were given leave to remain".

22. The Judge, at [43], was of the view that this case bore similarities to AJ (Angola) and that the interests of N, while important, do not outweigh the public interest. The Judge noted “a particularly important factor was N but he will be living with his mother and elder siblings”.
23. The Judge clearly approaches the matter on the basis that the best interests of the child are to remain within the family. This would, based on the current composition of the family, be that of mother, father, and older siblings. The Judge was aware that the best interests of N are not the determinative factor but a factor of considerable importance when conducting the proportionality exercise but found they did not tip the balance in the appellant’s favour. The Judge confirms at [46], that in coming to these conclusions relating to N “I took into account the duty to safeguard and promote the welfare of children in the UK are set out in s.55 of the Borders, Citizenship and Immigration Act 2009”.
24. Whilst the Judge may not have set out this matter in the manner Mr Bradshaw submitted was required, it is clear from reading the decision that the Judge was aware of the importance of this issue, that the ideal solution would be for N to remain with both parents, but that on balance for the reasons set out in the decision the respondent had established that the decision to deport was proportionate in relation to any interference with a protected right of the appellant or other family member. This is within the range of findings reasonably open to the Judge on the evidence.
25. No arguable legal error material to the decision to dismiss the appeal is made out.

Decision

26. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.

Anonymity.

27. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…………………………………………………
Judge of the Upper Tribunal Hanson

Dated the 24 October 2017