



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/14798/2013

**THE IMMIGRATION ACTS**

Heard at Centre City Tower, Birmingham  
On 27<sup>th</sup> April 2017

Decision & Reasons Promulgated  
On 11<sup>th</sup> May 2017

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SQ**

**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer  
For the Respondent: Miss E Rutherford of Counsel instructed by Rotherham & Co Solicitors

**DECISION AND REASONS**

**Introduction and Background**

1. The Secretary of State appealed against a decision of Judge Ford of the First-tier Tribunal (the FtT) promulgated on 16<sup>th</sup> October 2015.

2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the Claimant.
3. The Claimant is a national of Ghana born [ ] 1973. He had appealed to the FtT against a decision dated 18<sup>th</sup> July 2013 to refuse to revoke a deportation order.
4. The deportation order was made on 10<sup>th</sup> February 2009, and the Claimant was deported on 19<sup>th</sup> February 2009, under the Facilitated Return Scheme.
5. The deportation order was made following the Claimant being convicted by pleading guilty to two counts of possessing/using false documents for which on 1<sup>st</sup> February 2008 he was sentenced to eighteen months' imprisonment. The sentencing judge noted that the Claimant was in the United Kingdom illegally, and had worked illegally, and had used on two separate occasions two different documents, and concluded that the Claimant had tried to set up a bogus identity.
6. The FtT allowed the Claimant's appeal. The FtT noted that the Claimant is married to a British citizen who has a son from a previous marriage, born in the UK on [ ] 2008. The Claimant married his wife in Ghana on 28<sup>th</sup> October 2010. They have a daughter born in the United Kingdom on [ ] 2013.
7. The FtT found that if the deportation order was not revoked, it would not be unduly harsh for the Claimant's wife and daughter to either relocate to Ghana or remain in the United Kingdom without the Claimant. However, the FtT found that it would be unduly harsh to expect the Claimant's stepson (although he is not the biological father, the FtT found that there is a genuine and subsisting parental relationship) to relocate to Ghana or remain in the United Kingdom without the Claimant. The Claimant's appeal was therefore allowed pursuant to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).
8. The Secretary of State applied for, and was granted permission to appeal to the Upper Tribunal by Designated First-tier Tribunal Judge Manuell.

### **Error of Law**

9. At a hearing on 5<sup>th</sup> December 2016 I heard submissions from both parties regarding error of law. In brief summary, the Secretary of State contended that the FtT had erred by failing to give due consideration to the public interest in the deportation of foreign criminals, and the maintenance of deportation orders which had been made, and had materially erred in considering whether the consequences of refusing to revoke the deportation order would be unduly harsh.
10. On behalf of the Claimant it was contended that the FtT had not materially erred in law, and had taken into account the serious nature of the Claimant's offences, had made reference to the appropriate case law, and was entitled to take into account that there was no evidence of previous convictions or further offending. It was contended that the FtT was entitled to find that the best interests of the children would be served by being with both parents.

11. Full details of the application for permission to appeal, the grant of permission, the submissions made by both parties, and my conclusions are set out in my decision dated 7<sup>th</sup> December 2016, promulgated on 19<sup>th</sup> December 2016. I set out below paragraphs 18-23 which are my reasons for finding an error of law and setting aside the decision of the FtT;
  - “18. Guidance has now been given by the Court of Appeal in MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450, on the meaning of ‘unduly harsh’ in the context of section 117C of the 2002 Act. This guidance was not published when the FtT decision was made. The Court of Appeal confirmed that the Tribunal should have regard to all the circumstances when considering whether deportation is unduly harsh, and these circumstances included the Claimant’s immigration and criminal history. The Tribunal must realise that there is a public interest in the removal of foreign criminals, and there is a need for a proportionate assessment of any interference with Article 8 rights. The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of that criminal.
  19. The FtT found that the effect of maintaining the deportation order would not be unduly harsh in relation to the Claimant’s wife or daughter but would be unduly harsh in relation to his stepson.
  20. In my view the FtT erred in failing to adequately explain, how the effect of maintaining the deportation order would be unduly harsh in relation to the Claimant’s stepson. At paragraph 52 the FtT comments that the stepson is showing that he is feeling the absence of his father and wants to share life experiences with him, and his friends are curious as to why his father appears to be always absent. I do not find that this alone, or taken in combination with other circumstances, amounts to unduly harsh circumstances.
  21. The FtT at paragraph 53 notes that the stepson is doing well at school. At paragraph 55 the FtT notes that if the deportation order runs its normal course, it will last for a further four years and by that time the stepson would be 11 years of age. The FtT notes that the Claimant will have missed out on his primary school years, but again, in my view, fails to explain how given the public interest in deporting foreign criminals, this amounts to unduly harsh circumstances. There is an element of speculation in paragraph 55 when the FtT anticipates that problems would be caused for the stepson, if the Claimant arrived in the household for the first time when the Claimant is 11 years of age, the FtT finds that this is an age when “children start to push boundaries and the relationship would not be on a solid foundation.” I do not find that this conclusion is based upon independent reliable evidence.
  22. The Claimant was deported from the United Kingdom when his stepson was approximately 5 months old. The relationship and bond between the Claimant and his stepson has been formed while they have been living in different countries, and the FtT has not, in my view, adequately explained why it would not be proportionate, taking into account the weight that must be attached to the public interest, to maintain the status quo.
  23. I conclude that the FtT erred in consideration of ‘unduly harsh’ and public interest.”

12. The hearing was adjourned for the decision to be re-made by the Upper Tribunal. I noted that the FtT conclusion that the Claimant and his stepson have a father/son relationship was not challenged, and that finding was therefore preserved. Also preserved was the finding by the FtT that the effect of refusing to revoke the deportation order would not be unduly harsh in relation to the Claimant's wife and daughter.

## **Re-making the Decision - Upper Tribunal Hearing 27<sup>th</sup> April 2017**

### **Preliminary Issues**

13. I ascertained that the Tribunal had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed. The Tribunal had received the following documentation;
- Home Office bundle with Annexes A-H.
  - Claimant's bundle comprising 61 pages.
  - Claimant's bundle comprising 15 pages.
  - Claimant's skeleton argument.
  - Claimant's wife's employer letter dated 8<sup>th</sup> November 2016.
14. The Tribunal was provided with a bundle prepared on behalf of the Claimant for a previous hearing on 7<sup>th</sup> April 2014 which comprised the Claimant's wife's statement dated 24<sup>th</sup> February 2014 together with photographs.
15. Mr Mills submitted case law, NE-A (Nigeria) [2017] EWCA Civ 239, VM (Jamaica) [2017] EWCA Civ 255, Assad [2017] EWCA Civ 10, IT (Jamaica) [2016] EWCA Civ 932, and YM (Uganda) [2014] EWCA Civ 1292.
16. Miss Rutherford indicated that the Claimant's wife (DA) would be giving oral evidence and there were no other witnesses.
17. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

### **Oral Evidence**

18. DA gave her evidence, adopting her witness statements dated 7<sup>th</sup> May 2013, 24<sup>th</sup> February 2014, and 28<sup>th</sup> April 2015. She was questioned by both representatives. I have recorded all questions and answers in my Record of Proceedings and it is not necessary to reiterate them in full here. If relevant, I will refer to the oral evidence when I set out my conclusions and reasons.
19. In brief summary, DA indicated that she has now qualified as a nurse, having completed her degree. She works as a nurse within an haemodialysis unit. A letter

from her employer indicates that as at 8<sup>th</sup> November 2016 her annual basic salary is £22,458.

20. DA has brought up both children singlehandedly. She has managed to do this initially while undertaking a degree, and thereafter while maintaining full-time employment, which involves shift work. This has been extremely difficult.
21. Regular contact is maintained with the Claimant via modern methods of communication. There have also been visits to Ghana, the last visit being in July 2016 for a period of five weeks. The Claimant had to take some unpaid leave to stay for that length of time and would not be able to repeat a visit of that length.
22. The Claimant stated that the children miss their father, and in particular her son is finding it very difficult without his father.
23. DA stated that although in the past she had indicated that she would consider moving to Ghana she has now decided that this would be too disruptive, and her son has indicated that he enjoys school and does not wish to leave this country. Both children are British as is DA, although initially she was a Ghanaian citizen.
24. DA stated in her oral evidence that at the last parents' consultation at school, her son's teacher had asked if there was a problem as he seemed withdrawn.
25. When cross-examined, DA indicated that there was no evidence from her son's school more recent than July 2015.

### **The Secretary of State's Submissions**

26. In brief, Mr Mills submitted that the FtT had found that it would not be unduly harsh in relation to DA or her daughter, if the deportation order remained in force. Therefore the issue was whether it would be unduly harsh in relation to the Claimant's stepson. I was asked to find, taking into account all the circumstances, that it would not be unduly harsh for the stepson to join the Claimant in Ghana, together with his mother and sister, but if the family preferred to remain in the United Kingdom, it would not be unduly harsh for the stepson to remain here without the Claimant. The deportation order would generally be in force for a period of ten years from the date it was made, that being 10<sup>th</sup> February 2009, and evidence had not been submitted to show that the effect on the Claimant's stepson would be unduly harsh taking into account the deportation order would be in force for just less than another two years.
27. Mr Mills submitted that the unduly harsh test was a high threshold, and the Claimant would need to show a material change of circumstances, rather than simply rely upon the passage of time.
28. I was asked to note the lack of any independent evidence to show that the stepson had suffered adversely because of the Claimant's absence. Mr Mills submitted that

the evidence indicated that because of the high level of care provided by DA, there were no such adverse consequences for the stepson. Therefore the appeal must fail.

### **The Claimant's Submissions**

29. Miss Rutherford relied upon her skeleton argument which is comprehensive. In brief, Miss Rutherford submitted in oral submissions that it would be unduly harsh for the stepson to relocate to Ghana. He is a British citizen and has grown up in this country. He is settled in school and has friends and there is evidence that he is involved with the church. Although he has visited Ghana, he has never lived there. Because of his age and length of residence in the UK he is in a very different position to his sister.
30. While agreeing that the unduly harsh test represents a high threshold, Miss Rutherford submitted that the Tribunal must balance the public interest against the effect of maintaining the deportation order on the family.
31. I was asked to accept DA's evidence that a teacher had remarked upon her son being withdrawn, and DA's evidence that her son was missing his father, and wanted to be able to carry out activities with his father just as his friends did with their fathers.
32. While the offences committed by the Claimant were serious, they were not of the most utmost seriousness, and there was no evidence that he had re-offended.
33. Miss Rutherford submitted that to maintain the deportation order would be unduly harsh. If that was not accepted, I was asked to find that there are compelling circumstances for allowing the appeal outside the Immigration Rules, because DA had studied and been trained at public expense in this country, and if she decided that she must relocate to Ghana, this would not be in the public interest, as the public in the UK would not have the benefit of her skills as a nurse. I was therefore asked to allow the appeal.

### **My Conclusions and Reasons**

34. I have taken into account all the evidence placed before me, and taken into account the submissions made by both representatives.
35. I set out the facts which are not in dispute. The Claimant entered the United Kingdom as a visitor and overstayed without leave. He committed criminal offences which resulted in him receiving a sentence of eighteen months' imprisonment. He satisfied the definition of a foreign criminal.
36. He was made the subject of a deportation order dated 10<sup>th</sup> February 2009. He applied under the Facilitated Return Scheme, and returned to Ghana on 19<sup>th</sup> February 2009.
37. The Claimant and DA married in Ghana on 28<sup>th</sup> October 2010. DA has a son from a previous relationship, who has no contact with his biological father. He was born on 26<sup>th</sup> September 2008, and is therefore now 8 years of age. The Claimant and DA have

a daughter born on 17<sup>th</sup> April 2013. DA was originally a Ghanaian citizen but is now a naturalised British citizen. Both children are British citizens and were born in this country and have always lived here although they have visited Ghana.

38. The Claimant has a genuine and subsisting relationship with DA and the children.
39. I now set out the preserved findings made by the FtT. It is in the best interests of the children to grow up with both parents in the United Kingdom.
40. The Claimant and his stepson have a father/son relationship, and the stepson has no contact with his biological father. He regards the Claimant as his father.
41. It would not be unduly harsh in relation to DA and her daughter, for the deportation order to remain in force.
42. I set out below the relevant Immigration Rules;

'390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of an effective immigration control;
- (iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course;

- (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than four years, unless ten years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or
- (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least four years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

- (b) 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;

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.

399. This paragraph applies where paragraph 398(b) or (c) applies if –

- (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; and
    - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported.'

43. Paragraph 399A of the Immigration Rules is not relevant in this case.

44. I set out below section 117C of the Nationality, Immigration and Asylum Act 2002;

'117C(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 would 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.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.



- (7) The considerations in subsections (1) to (6) are to be taken into account where a court or Tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.'

45. In this appeal Exception 1 is not relied upon.
46. It is common ground that the Claimant satisfies the definition of a foreign criminal, and his stepson is a qualifying child because he is a British citizen under the age of 18.
47. I set out below paragraph 55 of IT (Jamaica);
- “55. Subsections (1) and (2) of section 117C together make manifest the strength of the public interest. In order to displace that public interest, the harshness brought about by the continuation of the deportation order must be undue, i.e. it must be sufficient to outweigh that strong public interest. Inevitably, therefore, there will have to be very compelling reasons. That conclusion is consistent with the MF Nigeria and ZP India even though those authorities are based on different Immigration Rules and statutory provisions.”
48. I set out below in part paragraph 59 of IT (Jamaica);
- “As Underhill LJ held in ZP India, the starting point must be that the assessment of what was in the public interest at the date on which the deportation order was made cannot be of any less weight at the later stage when revocation is sought.”
49. In considering whether maintaining the deportation order is unduly harsh upon the Claimant’s stepson, I must take into account all the circumstances, including the Claimant’s offending and the public interest.
50. I accept that the stepson is missing the Claimant. I do not however find that there is independent evidence to indicate that the separation from the Claimant is having an adverse effect upon him. There is no evidence from his school to this effect, and there is no other independent evidence, such as a social worker’s report. DA appears to be coping very well in bringing the children up on her own, although I fully accept and appreciate how difficult this is.
51. I firstly have to consider whether it would be unduly harsh for the stepson to relocate to Ghana. The burden of proof is on the Claimant. The standard is a balance of probability. There is a high threshold. I do not find that the burden has been discharged in the absence of independent evidence.
52. I accept DA’s evidence that her son does not wish to live in Ghana. He has stated that he is happy at school and doing well and I accept that. I take into account that he is a British citizen born in this country. There would however be no language difficulties if he moved, with his mother and younger sister, to Ghana, and thankfully there are no relevant medical issues. He would leave behind his friends, and this may be disruptive and upsetting. That however does not amount to relocation meeting the high threshold test of being unduly harsh.

53. I do not find it would be unduly harsh for the stepson to remain in the United Kingdom with his mother and sister, without the Claimant for at least the next two years. The stepson was very young when the Claimant was deported, and their relationship has developed while living in different countries. It is of course natural that a son would want his father to be present, and I fully accept that the Claimant and his stepson miss each other. I do not however find that evidence has been produced to prove that continued separation with the stepson remaining in the United Kingdom, would be unduly harsh.
54. I therefore find that this appeal cannot succeed with reference to paragraph 399(a) or section 117C(5) of the 2002 Act.
55. I have considered the submission made by Miss Rutherford that there are compelling circumstances outside the Immigration Rules which would justify allowing the appeal with reference to Article 8. I am afraid that I cannot accept that submission. The fact that DA may choose to relocate to Ghana, and therefore her abilities as a nurse would be lost to the general public in this country, does not in my view amount to compelling circumstances which would justify allowing this appeal. In any event, the evidence given by DA indicated that she would not take such a course of action.
56. I have taken into account the guidance in Hesham Ali [2016] UKSC 60 and in particular paragraph 50 which is set out in Miss Rutherford's skeleton argument and which I set out below in part;
- "The critical issue for the Tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in MF (Nigeria), will succeed."
57. Although the above refers to deportation, in my view the same principle applies to an application to revoke a deportation order, and for the reasons given above, I do not find that the enforced separation between the Claimant and his stepson outweighs the public interest in maintaining a deportation order.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision. The Claimant's appeal is dismissed.

### **Anonymity**

An anonymity order was made by the FtT because the appeal involved considering the interests of two minor children. I maintain the anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a court or Tribunal directs otherwise, the Claimant is granted anonymity. No report of these proceedings

shall identify him or any member of his family. Failure to comply with this direction could amount to a contempt of court.

Signed

Date 3<sup>rd</sup> May 2017

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT  
FEE AWARD**

The Claimant's appeal is dismissed. There is no fee award.

Signed

Date 3<sup>rd</sup> May 2017

Deputy Upper Tribunal Judge M A Hall