Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01288/2014

THE IMMIGRATION ACTS

Heard at Newport **Decision & Reasons Promulgated**
On 16 November 2018 **On 19 December 2018**

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

AHMED [A]
Respondent

Representation:
For the Appellant: Ms C. Howells, Senior Home Office Presenting Officer.
For the Respondent: Mr C. Yeo, instructed by Duncan Lewis & Co. Solicitors.

DETERMINATION AND REASONS

1. We can deal with this appeal quite shortly, given its history. The respondent, whom we shall call "the claimant", is a national of Somalia. Following his convictions for offences committed in 2008 and 2010 he became liable to deportation. He invoked the protection of the European Convention on Human Rights but the Secretary of State rejected his claim and on 7 May 2014 made a deportation order against him.

2. He appealed. In the First-tier Tribunal Judge Britton allowed his appeal on the basis of article 8. The Secretary of State appealed to this Tribunal on three grounds, of which the first was not pursued at the hearing. The

© CROWN COPYRIGHT 2018

others were that the judge had wrongly applied s 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) in concluding that the effect on the claimant's partner and children would be "unduly harsh" if the claimant were deported, and that the judge had erred in assessing the best interests of the children and in concluding that it would be unduly harsh to expect the claimant's wife and children to integrate into Somali society and in making that error he had failed to have sufficient regard to the public interest.

3. In this Tribunal Judge Grubb held that the First-tier Tribunal had not dealt adequately with these issues. His decision to that effect was given on 18 June 2015. He directed adjournment to a further hearing at which these aspects of the case could be canvassed again. That hearing took place on 2 September 2015. Judge Grubb's decision, again allowing the claimant's appeal, was given on 14 September 2015.

4. In making his decision Judge Grubb noted the effect of the evidence he had heard, which he accepted almost without reservation. He found that there was a deep and genuine relationship between the claimant, his wife and the children. The Secretary of State had conceded that it would not be reasonable to expect the other family members to relocate to Somalia; and Judge Grubb decided that it would also not be reasonable to envisage them making visits there given the situation in that country and FCO advice. The effect of the claimant's deportation would therefore not be merely to remove the claimant from the home where in Judge Grubb's view his influence and support would be positive and beneficial: it would deprive the children of any real paternal contact and influence. The claimant's wife would also be likely to become a full-time carer for another family member, which would further reduce the maternal attention she could give to the two children and to another then about to be born. Applying the approach in MAB [2015] UKUT 00435 Judge Grubb concluded that the impact of the claimant's deportation on his wife and children would be unduly harsh because it would be excessively severe; and that the assessment of that feature of the case did not require balancing against the public interest.

5. The Secretary of State sought permission to appeal to the Court of Appeal on two grounds. The first was that Judge Grubb had erred in failing to appreciate that the consequences to the claimant's family were no more than the ordinary consequences of deportation and could not properly be characterised as "unduly harsh". The second was that Judge Grubb had failed to take into account the public interest in determining whether any harshness was "undue". Permission was refused by Judge Grubb but on renewal was granted by Laws LJ in the Court of Appeal. It is clear that the grant of permission was directed to the second ground, because it refers to MM (Uganda) and others v SSHD [2016] EWCA Civ 450, in which the Court of Appeal held that MAB was wrongly decided and that an assessment of what would be unduly harsh required "regard to be had to all the circumstances including the criminal's immigration and criminal history" (at [26]).

6. In an appeal by KO (one of those others whose appeal was heard by the Court with MM) the Supreme Court has now held that the interpretation in MAB was correct and that the evaluation of what is unduly harsh for the purposes of s 117C of the 2002 Act and associated Immigration Rules is not affected by considerations of the public interest in the criminal's removal : KO v SSHD [2018] UKSC 53 at [28]-[32]. In the mean time the proceedings in the Court of Appeal were settled on the basis of MM in the form of an Order remitting the appeal to this Tribunal "for the reconsideration of the [Secretary of State's] appeal". Following the decision of the Supreme Court, however, it is now clear that that reason for doubting the conclusion of Judge Grubb has vanished.

7. There remains the task of carrying out the terms of the Order. Mr Howells told us that it is still the position of the Secretary of State that the consequences to the claimant's children are no more than those of the family of any deportee. We reject that submission. It was not suggested that we should hear or consider any further evidence. It is clear from the evidence before Judge Grubb, which is part of the history of this case and which it is not suggested should be disbelieved, is that the family is exceptionally close-knit and has benefitted from increasing the depth of the claimant's relationships as husband and father since his release from prison in February 2013, which, given the delays in awaiting the judgments of the higher courts, is now five and three-quarter years ago. This is quite different, therefore, from a case where at the time of the hearing the family relationships have to be considered through the prism of the appellant's currently serving or having very recently finished a period of custody, which ought to be the usual factual situation in a deportation appeal.

8. Although the effect of the Order of the Court of Appeal is that Judge Grubb's determination has been set aside, we see no reason at all to depart from his assessment of the evidence before him, the record of which is the evidence before us. We are reinforced in that conclusion by noting that although the grounds of appeal against his decision raised the issue of the rationality (for that is what the challenge would have to be) of his assessment, there is no suggestion that permission was granted or ought to have been granted on that ground, and, frankly, we do not see that it realistically could have been. Although Mr Howells did not by any means concede the appeal he intimated that on this issue there was no good reason for us to make findings differing from those Judge Grubb made. We adopt them as our own.

9. The appeal before us is that of the claimant, to be redetermined following the setting aside of the decision of Judge Britton. For the reasons given above we allow the appeal.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 26 November 2018.