Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08829/2017

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 7 December 2018	**On 17 December 2018**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

L
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms Mair, Counsel
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. In this decision I remake L's appeal against a decision dated 2 August 2017 to refuse to revoke a signed deportation order dated 23 September 2009.

Error of law decision

2. In a decision sent on 12 September 2018 I outlined the reasons for concluding that the decision of the First-tier Tribunal ('FTT') dated 28 March 2018, allowing L's appeal, contains an error of law such that it should be remade in the Upper

Tribunal. It is to be noted that judgment in KO Nigeria v SSHD [2018] UKSC 53 was handed down after I decided the FTT committed errors of law. Although KO Nigeria calls into question the first error of law I identified at [11] of my decision, the second error of law identified at [12] is entirely consistent with the guidance given by the Supreme Court in KO Nigeria. Ms Mair accepted that analysis.

Background facts

3. L is a citizen of Angola who came to the UK in 1990 when he was just 10 years old, with his uncle. L was granted refugee status as a dependent of his uncle in 2002. L has a history of criminal offending dating between 1998 and 2008, which has resulted in 23 convictions for 34 offences. These include six custodial sentences. The most recent criminal conviction related to an offence of attempted robbery for which he was sentenced to two years' imprisonment on 12 November 2008. It follows that there has been a lengthy period, in excess of 10 years, during which time L has not offended. On 22 September 2009 a deportation order was signed against L. On 23 September 2009 a decision was made to cease his refugee status. Appeals against these decisions were ultimately unsuccessful and L became appeals rights exhausted in June 2010.

4. L's application to revoke the 2009 deportation order, focused upon the family life he has with his partner ('E') and her two children ('A' who was born in 2005, and is 13 years old; 'B' who was born in 2011, and is 7 years old), and the submission that he meets the requirements of paragraphs 399(a) and (b) of the Immigration Rules.

Issues in dispute

5. It was undisputed before the FTT that all the requirements of 399(a) and (b) were met save in one respect each. The SSHD did not accept that it would be unduly harsh for A and B (for the purposes of 399(a)) or E (for the purposes of 399(b)) to remain in the UK without L.

6. In my error of law decision, I made it clear that the FTT's comprehensive findings of fact as set out in bullet points taking up some five pages of the decision at [44] are preserved, and the decision shall be remade in light of those findings but subject to any changes in the factual matrix, as at the date of hearing. In summary, the FTT accepted the evidence that E has medical difficulties and requires L to be her caregiver; and that because of those medical difficulties and the lack of any meaningful contact with the children's respective biological fathers, L is to all intents and purposes the children's primary carer.

Hearing

7. At the hearing before me there was initially no Portuguese interpreter, but we were able to begin the evidence later on in the day with the benefit of an interpreter for E. L did not require an interpreter.

8. At the beginning of the hearing, the parties agreed with my summary of the issues set out at [5] and [6]. L relied upon two forms of updated evidence, not

available to the FTT: (i) letters dictated on 10 October and 16 October 2018 from Dr Sussman, E's treating Consultant Neurologist, together with a letter dictated on 16 October 2018 to E's GP from Dr Sussman; and (ii) an updated report dated 27 November 2018 from an independent social worker ('ISW'), Ms Brown.

9. The more up to date medical evidence from Dr Sussman cast a very different light on E's medical condition. In the letter dictated on 10 October, Dr Sussman described E as having been seen in clinic in May 2018 when it was recorded that "*she has been doing very well and has no symptoms of myasthenia*". Dr Sussman then said this:

> "The likelihood is that her condition will remain in good control. In view of her stable condition I have no reason to believe that she requires support in activities of daily living from her partner at present. Myasthenia tends to be a very treatable condition, with a vast majority of patients doing extremely well…"

10. In the second letter dictated on 16 October, Dr Sussman said that he reviewed E in clinic that day when she was reporting symptoms that require help from her partner getting the children to school and bathing. Dr Sussman made it clear that patients stable on E's medication (Azathioprine) do not relapse and it was therefore unclear why her symptoms have deteriorated. For this reason, further investigations were recommended. In his letter to the GP, Dr Sussman set out the symptoms E was now describing as follows:

> "She can get diplopia, but without ptosis, at the time of her periods. On those occasions she can have difficulty to the point where she can't take her children to school and can't bathe them. Her partner has to do this for her."

11. In her most recent ISW report Ms Brown observed L at the family home with A and B. At the time, E was visiting family in Portugal for a 5-week stay. Ms Brown was able to observe a growing closeness between the children and L over the four times she met them between June 2015 and November 2018. Ms Brown described L as having brought "*settlement, continuity, consistency and importantly, a calmness to the family unit*".

12. Ms Mair asked L and E to confirm the truth of the statements before the FTT. These statements did not address the medical evidence from Dr Sussman post-dating the FTT's decision. Mr Tan therefore squarely focussed his cross-examination upon the inconsistencies to emerge regarding the impact of E's medical condition upon her daily life and need for care.

13. Having heard from both L and E, I then heard submissions from the representatives.

14. Mr Tan relied upon the decision letter and an updated position statement dated 5 December 2018. He invited me to find that Dr Sussman's updated evidence is such that L and E did not tell the truth either before me or before the FTT. Dr Sussman's evidence was entirely different to the evidence provided by L and E and they completely failed to provide any explanation for this.

15. Ms Mair relied upon her skeleton argument. Ms Mair submitted that L has become the father figure and primary caregiver for A and B. She placed particular reliance upon Ms Brown's reports and the GP assessment from 2017 that without L's help, E would not be able to manage and invited me to find that although E's medical condition improved earlier in 2018, it has since worsened. Ms Mair submitted there was no real change in the medical evidence because E continued to have day to day difficulties, that peaked in seriousness from time to time. Ms Mair submitted that the high threshold required by the unduly harsh test was met in this case. Alternatively, L's very strong private life in the UK extending back to his childhood was such that he met the requirements of 399A of the Immigration Rules. Further in the alternative, Ms Mair invited me to find that when all the circumstances are viewed cumulatively, there are very compelling circumstances going beyond the statutory exceptions, such that the appeal should be allowed on Article 8 grounds.

16. I reserved my decision, which I now provide with reasons.

Legal framework

17. The Immigration Rules apply where a person applies for a revocation of a deportation order made against him – see paragraphs 390 to 399A. In so doing they make provision for the application of Article 8 of the ECHR. This will arise if a foreign criminal contends that the maintenance of the deportation order will constitute a disproportionate interference with his right to respect for his family or private life. Paragraph 391A states that:

> "revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order."

18. Paragraphs 399 and 399A are reflected within section 117C of the Nationality, Immigration and Asylum Act 2002. This states:

> "(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."

19. It is to be noted however that the question whether "the effect" of C's deportation would be "unduly harsh" is broken down into two parts in paragraph 399, so that it applies where:

> "(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."

20. In the instant case it is not in dispute that there has been a change in circumstances since the 2009 deportation order or that it would be unduly harsh for the children to live in Angola. As such, it is only the second limb of 399 set out at (b) above, as reflected in section 117C(5) that requires consideration, as far as the children are concerned.

21. The correct approach to paragraphs 399(b) and section 117C of the 2002 Act has recently been considered by the Supreme Court in KO Nigeria. In the only judgment, Lord Carnwath said this at [23]:

> "One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence."

22. Lord Carnwath also approved of the following guidance relevant to the term "unduly harsh" at [27]:

> "Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:
>
> > "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the

> antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

23. It is therefore now clear from KO Nigeria that the assessment of "unduly harsh" does not require a balancing of the relative level of severity of the parent's offence. The assessment solely requires a careful consideration of whether the elevated threshold is reached from the point of view of ether the child or partner. If that threshold is met then deportation would be a breach of Article 8 of the ECHR and no further analysis is required.

24. In BL (Jamaica) v SSHD [2016] EWCA Civ 357 the Court of Appeal concluded that the Tribunal did not undertake a sufficient inquiry into whether there was any other family member who could be able to care for his children and emphasised the need to consider the extent to which social services would be able to assist in reducing the adverse impact of the children losing their father to deportation at [53].

> "What the UT did in the course of their detailed and no doubt conscientious decision was to accept KS's son's evidence that KS could not manage her money and drank more that was good for her and made the inference that without BL the family would descend into poverty and require the support of social services. As against this, however, KS had looked after the family while BL was in prison or immigration detention and the UT had not made any findings that the family had then descended into poverty or required the support of social services, or that if that were to happen, there would not be adequate support services for these children. The UT were entitled to work on the basis that the social services would perform their duties under the law and, contrary to the submission of Mr Rudd, the UT was not bound in these circumstances to regard the role of the social services as irrelevant. The Secretary of State had made the point in the decision letter that there was no satisfactory evidence that KS had not coped with the children's upbringing in BL's absence and so the UT were aware that this point was in issue. KS's son's evidence was an insufficient evidential basis for the UT's conclusion on this point. His evidence was in reality uncorroborated and self-serving hearsay on this issue."

Findings

25. In reaching my findings, I have used applied the preserved factual findings made by the FTT, but updated these findings in the light of the significant new medical evidence available to me, but not the FTT.

E's medical condition

26. The FTT completely accepted the evidence from L and E and a GP's letter dated 4 August 2017, in relation to the impact of E's medical condition on her day to day activities at [44]. The FTT therefore accepted that E felt weak and tired all the time and required L's help on a day to day basis, to assist her personally, do the household chores and look after the children. The GP's conclusion that without L's support, E would find it difficult to cope at home appears to be largely based upon reporting from L and E. It is important to note that the

FTT's findings are not based upon evidence from a Consultant Neurologist. The FTT considered that a letter dated 7 April 2015 from E's treating Consultant Neurologist, Dr Sussman did not advance the case to any significant degree because it was nearly three years old and Dr Sussman indicated back then that E was improving and he was optimistic there would be further improvement.

27. There can be no doubt that E suffers from a serious condition of a long-standing nature. She has been treated with medication and is under the care of a Consultant Neurologist.

28. When the FTT's findings are considered in the round with the updated evidence, I am satisfied that the medical evidence before me paints an entirely different picture to that before the FTT. In his first October 2018 letter Dr Sussman clearly stated there was *"no reason to believe that [E] requires support in activities of daily living from her partner at this point"*. This was based upon her presentation in clinic in May 2018. Dr Sussman's optimism in 2015 that there would be further improvement appears to have been proven correct and is consistent with the objective evidence that "*Myasthenia tends to be a very treatable condition, with a vast majority of patients doing extremely well."* Whilst a second October 2018 letter from Dr Sussman records E as *"now describing symptoms"*, it is clear that Dr Sussman was not convinced this related to the diagnosed condition of myasthenia. It is significant that there was no change proposed for her treatment, rather further investigation recommended. When describing the symptoms to the GP in October 2018, Dr Sussman solely recounts difficulties at the time of E's periods i.e. only for a few days each month. During her evidence E confirmed that this lasts for four days per month.

29. Both L and E were unable or unwilling to explain why Dr Lilliker recorded at a clinic in May 2018 that E was doing very well and had no symptoms of myasthenia. E explained that she did say that things were "so-so" but did not go into detail regarding the reality of her difficulties. E's evidence regarding the practical impact of her medical condition was vague, evasive and inconsistent with the evidence provided by Dr Sussman. E explained that her condition worsened in 2017 and appointments moved from being 3 to 6 months apart then. She was wholly unable to resolve this with her symptom-free presentation at clinic in May 2018. Dr Sussman appears to regard the claimed deterioration in symptoms to be inconsistent with the objective evidence to the effect that the condition is managed by medication.

30. I am satisfied that L and E have exaggerated E's symptoms and the FTT's findings must be revisited in the light of Dr Sussman's evidence. I note that E claims to receive <u>lower rate</u> DLA, and ESA, but when asked by Mr Tan was quite unable to answer any questions to clarify the basis of this. E gave evidence that her condition fluctuates from day to day and sometimes she can be in bed for a week. This is of course entirely inconsistent with what she said in clinic in May 2018 and October 2018. Even when reporting an increase in symptoms this was limited and specific to when she is on her period, which she clarified as lasting for four days. E was plainly well enough to travel abroad

recently for an extended five-week period without her partner to provide her with any care and support.

31. I am prepared to accept only those symptoms E has reported to Dr Sussman i.e. an increase in symptoms for four days per month when she has her period. I reject the oral evidence provided by E and L, that E requires L to act as a carer. Their evidence was inconsistent with Dr Sussman's evidence. They were unable to refer to any documentary evidence to support their claims. There was no updated GP evidence. There was no documentary evidence relating to E's benefits. I accept that E may currently need help and support for four days a month. Given the limited time when she needs support, and the ability to predict and plan for this, it seems to me that E's sister together with the statutory agencies would be able to provide that support. I appreciate that E's sister has her own commitments and children to look after. However, she is still able and willing to assist from time to time. By way of example, I was told that she left the hearing to collect A and B from school. It is important to note that A and B are no longer toddlers. It is very difficult to see why as E maintains they require assistance with bathing. It is also difficult to see why A cannot be responsible for getting himself to and from school as he is 13.

Family life and children's best interests

32. I entirely accept that L has a very close relationship with A and B that has strengthened over time, in the light of Ms Brown's observations over the course of a number of years. I am not prepared to accept that L is the primary carer for the children. This aspect of Ms Brown's assessment is in part based upon L and E's account of L having to provide care for E on a day to day basis. That is inconsistent with the updated medical evidence. The children are jointly cared for by both E and L.

33. The children's best interests clearly support the continued presence of L in their lives in the UK. These are to be treated as a primary consideration. A and B have been living with L since the beginning of 2014 when they were 8 and 3 respectfully. They have not had any other father figure for any significant sustained period in their lives and L has been a positive influence in their lives. L's deportation will adversely impact their best interests, but I do not accept that it would involve a degree of harshness going beyond what would necessarily be involved for any child face with deportation of a parent. There are no particularly compelling or compassionate circumstances. Contrary to her evidence, E is able to adequately care for the children. For a few days a month, she may require support, but she can obtain this from her sister in combination with planning in advance. In addition, she can pre-plan for those days by making meals in advance and organising for A to take on additional responsibilities. Although A has had behavioural concerns in the past, these have been resolved. L may have played a role in this but there is insufficient evidence that L's deportation would lead to a resurgence in A's behavioural difficulties. A has matured and will have the support of his mother and aunt. The updated ISW report makes no suggestion the children have any significant

current health, developmental or behavioural difficulties. The children will be deprived of the only meaningful father-figure in their lives, having each already lost contact with their biological fathers. They will undoubtedly find this difficult and painful. However, the family members have each demonstrated a degree of resilience in the past. I acknowledge that L has played an important role in family life over recent years. I do not however accept that the effect of L's deportation will be unduly harsh on the children.

34. There is no dispute that E and L have a genuine and subsisting relationship. However L is not her carer, and she has no genuine need for a carer albeit she requires additional support for four days a month. I do not accept that the effect of L's deportation on E would be unduly harsh in these circumstances. Ms Mair focussed her submissions on the effect of deportation on the children rather than E.

Private life

35. The consideration of 399A and section 117C(4) involves three elements. The SSHD accepted the first two but disputed the third.

36. L has been removable from the time he became appeals rights exhausted in 2010. Removal directions have been set on numerous occasions – see [44] to [74] of the decision letter. L was lawfully present when he was granted refugee status as a dependent in October 2002. L most probably had temporary admission in the period before this, and as leave was subsequently granted can be taken to have been lawfully resident at the time – see SC (Jamaica) v SSHD [2017] EWCA Civ 2112 and Tirabi (Deportation: "Lawfully Resident": S.5(1)) [2018] UKUT 199 (IAC). That means L was lawfully present from 21 August 1990 when he arrived until the date he became appeals rights exhausted on 14 June 2010: just short of 20 years. L is 39 and he has therefore been lawfully present in the UK for most of his life.

37. There was no dispute before me that L is social and culturally integrated into the UK.

38. The dispute therefore turns on the third element. On his own account, L has no nuclear family in Angola, and it is of course fair to say that he has no real life experience of being there, having left as a young child. L's uncle returned to Angola. Even if they have not been in contact in recent years they have a long history and it is difficult to see why contact cannot be resumed.

39. Having undertaken a broad evaluative judgement (see SSHD v Kamara [2016] EWCA Civ 813), I do not accept that L has established that there would be serious obstacles to his integrating himself in Angola. It is undeniable that L has been resident in the UK for a lengthy period and this began when he was still a young child. After a lengthy period of criminal offending and the abuse of illegal drugs, L has demonstrated resilience and a sustained ability to completely turn his life around. Those traits and that experience can be applied to his advantage in Angola. There is no suggestion that he cannot easily make friends. There is no reason why, initially at least, he should not be supported by

his relatives in the UK. His brothers have supported him in the past and L has described an extensive family network in the UK.

40. Ms Mair placed reliance upon L's account of his early life in Angola and his fears for return. I acknowledge that life was probably very difficult for L in Angola given the conflict at the time and associated family and other difficulties with this. Life in Angola is likely to be very different from the UK and there will be initial challenges. However, the civil war in place during L's childhood has ceased. I do not accept that L's family in the UK will completely abandon all support of him such that he will be homeless. L accepts that he speaks some Portuguese. It is likely that he speaks this well. This is the language that L and E speak to each other in. E required a Portuguese interpreter before me. It is also likely that L grew up speaking Portuguese in Angola and that continued when living with his uncle. This together with his English skills and proven resilience will put in a decent position to obtain employment.

41. In order for the exception in paragraph 399A or section 117C to apply, L would need to establish all three elements. In my judgement he fulfilled the requirements of the first two, but not of the third. The exception therefore does not apply to him. Ms Mair clarified that she did not rely on private life aspects over and above the exception on their own but did rely on these to support her submission that there are very compelling circumstances over and above the statutory exceptions.

Very compelling circumstances

42. L has been unable to meet any of the statutory exceptions. I have gone on to consider all matters in the round and whether viewed cumulatively, these are sufficient to give rise to very compelling circumstances – see Hesham Ali v SSHD [2016] UKSC 60 and KE (Nigeria) v SSHD [2017] EWCA Civ 1382.

43. L came to the UK at a young age and has spent most of his life lawfully in the UK. He had a troubled youth and began offending when he was young but has not re-offended in over 10 years. The evidence demonstrates that the risk of L reoffending is low. There are also protective factors to assist in the maintenance of the low risk of offending. He has demonstrated resilience and rebuilding his life. He is clearly committed to and has a close relationship with E and her children. They will find his deportation difficult. These are matters that demonstrate L's clear commitment to living a good and law-abiding life in the UK. Even when viewed cumulatively, they do not amount to very compelling circumstances. Whilst E and the children will find L's deportation difficult, its effect does not come close to meeting the threshold to be unduly harsh. They will cope with time and support. L will find life in Angola initially difficult but has the requisite skills and resilience to integrate into Angola. L has demonstrated over time that he has rehabilitated, and his risk of reoffending may be low, but he has a lengthy and serious criminal record in the UK. The public interest in his deportation may have lessened over time but it still remains.

Decision

44. I remake the decision by dismissing L's appeal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed	Date
Upper Tribunal Judge Plimmer	10 December 2018