Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09242/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 November 2018	**On 13 December 2018**

Before

THE HON. LORD MATTHEWS
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R B
(ANONYMITY DIRECTION MADE)

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves child welfare issues. We find that it is appropriate to continue the order. 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 his family. This direction applies both to the appellant and to the respondent.

Representation:
For the appellant: Mr N. Bramble, Senior Home Office Presenting Officer

For the respondent: Ms J. Rothwell, instructed by BMAP

DECISION AND REASONS

1. For convenience, we shall refer to the parties as they were before the First-tier Tribunal although technically the respondent is the appellant in the appeal before the Upper Tribunal.

Background

2. The appellant entered the UK on 22 December 2007 and applied for asylum. The claim was refused and a subsequent appeal dismissed. From April 2003 he remained in the UK unlawfully. On 12 July 2004 he was convicted of conspiracy to make a false oath or declaration with reference to marriage. He was sentenced to two years' imprisonment on 16 February 2005, which was reduced to 12 months on appeal. The appellant was served with a Notice of Intention to Deport on 23 May 2006. He did not appeal the decision. A deportation order was signed on 21 July 2006. On 17 July 2008 the appellant was listed as an immigration absconder. On 21 June 2010 the appellant submitted representations to the respondent, which were treated as an application to revoke the deportation order. Further evidence was sent in 2011, but it appears that no decision was made in response. Nor is there any evidence to show that the respondent sought to enforce the deportation order. On 03 January 2015 the appellant contracted an Islamic marriage with a British citizen. Their daughter was born on 04 November 2015. The appellant applied for leave to remain on human rights grounds on 17 February 2016. The subsequent decision to refuse the claim was eventually withdrawn and a fresh decision giving rise to a right of appeal was made on 14 August 2017.

First-tier Tribunal decision

3. The appellant appealed the respondent's decision dated 14 August 2017 to refuse a human rights claim in the context of deportation proceedings. First-tier Tribunal Judge A. M. Black ("the judge") allowed the appeal in a decision promulgated on 19 September 2018. The judge outlined the appellant's immigration history and antecedents in detail [2-11]. She summarised the evidence before the Tribunal and the case put forward by both parties [16-19]. She set out the correct legal framework in some detail [20-25].

4. The judge went on to analyse the facts of the case with reference to the relevant legal framework. She noted that the appellant had lived in the UK for 20 years. He was in a relationship with a British citizen. She observed the focus of the case was on the children (his wife's son from a previous marriage involving domestic violence and their daughter). She correctly identified the 'unduly harsh' test with reference to paragraph 399(a) of the immigration rules and section 117C of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") [43-45]. The judge referred to *MM*

(Uganda) v SSHD [2016] EWCA Civ 450 and was clearly aware of the stringent nature of the 'unduly harsh' test [44]. She correctly identified the fact that the threshold, while stringent, was not as high as the 'very compelling circumstances' test contained in paragraph 398 of the immigration rules [48]. The judge considered the best interests of the children in some detail without reference to the appellant's immigration history [52-68]. She concluded that it was in the interests of both children to remain in the UK with their mother and father, and in the case of the older child, with the appellant as his step-father.

5. The judge devoted a whole section of the decision to "The Appellant's Criminality and the Public Interest" [69-78]. She considered and quoted the judge's sentencing remarks. She accepted that the appellant was remorseful for the offence. Prior to the offence he had been of good character. There was no evidence to suggest that he had come to the attention of the police since he was released from prison. The judge correctly identified the fact that the offence came within the category identified in paragraph 398(b) of the immigration rules of "less than 4 years but at least 12 months". She was entitled to take into account the fact that the offence was at the lowest end of that scale [73]. The judge went on to consider various aspects of the appellant's history. She found that he had "an extremely poor immigration history" but accepted that he was remorseful and that there was no risk of reoffending.

6. After having devoted two detailed sections of the decision to the two crucial aspects of the case for and against the appellant the judge moved on to make detailed findings on the evidence [79-115]. She began her conclusions by stressing that she had given "considerable weight to the public interest in the appellant's deportation" and reminded herself that she needed to take into account the statutory public interest considerations as part of an evaluative assessment. She went on to give weight to those considerations with reference to the appellant's immigration history and the criminal offence [80-84]. The judge then evaluated the evidence relating to the appellant's family circumstances. She gave weight to the unchallenged social work report [85-87], which concluded that deportation would have a "significant emotional and educational effect" on the children. The judge gave proper weight to the best interests of the children. She considered the best interests of the children as a 'primary consideration' [90]. She reminded herself of the nature of the 'unduly harsh' test once again. In assessing whether it would be 'unduly harsh' to expect the children to live in Algeria she took into account the fact that they were both British citizens and that the oldest child had regular contact with his father. There was cogent evidence from the oldest child's father to indicate that he would not allow his son to live in Algeria. There was no requirement for British citizens to leave the UK in any event [92].

7. The judge correctly identified the central issue, which was whether it would be 'unduly harsh' to expect the appellant's wife and the children to

remain in the UK without him [93-113]. In making this assessment she took into account evidence showing that his removal would have a detrimental impact on the children. She also identified other compelling and compassionate circumstances over and above the negative effects that deportation usually has on children. In particular, the appellant's wife had a difficult relationship with her first husband, which involved domestic abuse. Although she now had a "reasonable relationship" with him, her evidence was that she was still a "bit scared" of him. The judge accepted that the appellant's presence was a protective factor that gave his wife confidence when she had dealings with her former husband. Her son witnessed violence in the relationship. The child now had a stable home life with his mother and the appellant, whose role is akin to that of a biological father and son. The judge quoted the child's head teacher who said that he "has learnt what a real father should be" [99]. The judge had concerns about the effect on the oldest child of the loss of this stability and whether his mother may become vulnerable without the protective presence of the appellant. In turn, this may have an additional impact on her ability to care for the children [100]. Later in the decision she also took into account the compassionate circumstances surrounding a recent miscarriage. The judge concluded that the appellant's wife was "currently vulnerable and needs the practical and emotional support of the appellant." [113]

8. The judge made clear that the decision was finely balanced [106] She reminded herself of the relevant public interest considerations and weighed them with the compelling and compassionate family circumstances. The judge made clear that she had given the public interest "considerable weight" but concluded that the family circumstances were such that it would be 'unduly harsh' for the appellant's wife and two children to remain in the UK without him if he is deported [111].

Grounds of appeal

9. The Secretary of State seeks to appeal the First-tier Tribunal decision on the following grounds:

   (i) The judge failed to apply the correct threshold in relation to the 'unduly harsh' test with reference to *MM (Uganda)*.
   (ii) The judge failed to take into account relevant considerations and failed to make adequate findings relating to the vulnerability of the appellant's wife. The judge failed to consider the fact that his wife could seek assistance from the school, social services or the wider family.
   (iii) The judge incorrectly applied the mandatory provisions of section 117B of the NIAA 2002. Mr Bramble withdrew the ground at the hearing because it was clear from the face of the decision that the provisions had been considered.

(iv) The judge erred in finding that the public interest was reduced given the passage of time since the deportation order was made.

Decision and reasons

10. We have no hesitation in finding that the First-tier Tribunal decision did not involve the making of an error of law. Our summary of the judge's findings makes clear that the decision is a careful and comprehensive analysis of the competing factors the judge was required to evaluate. The judge repeatedly emphasised the correct legal framework and reminded herself of the stringent threshold required to meet the 'unduly harsh' test. She rightly identified that the test was not as high as the 'very compelling circumstances' test.

11. The judge gave clear, cogent and sustainable reasons to explain the likely impact of deportation on the appellant's wife and children. She identified additional compassionate factors that, in her assessment, took the circumstances over and above the usual negative effects of deportation. It was open to the judge to take into account the impact of the previous history of domestic violence on the appellant's wife and her son and to place weight on the importance of continued stability in light of that history. The judge considered the fact that the appellant's wife might have support from wider family such as the appellant's brother and sister-in-law [98]. We are told that this is not a matter that was raised by the respondent at the hearing either in evidence or submissions. In any event, the judge made clear that it is the appellant who provides the practical and emotional support she needs to continue some form of co-parenting relationship with her former husband. It is not arguable that the appellant's brother (who lives some distance from them) or social services would be able to replicate the kind of support and stability his wife and children need.

12. The first ground amounts to nothing more than a disagreement with the judge's findings, which were properly directed and unarguably within a range of reasonable responses to the evidence. Similarly, the judge's findings about the impact of domestic violence, the vulnerability of the appellant's wife and child, and the need for continued stability, were open for her to make on the evidence. The third ground relating to the length of time since the deportation order is poorly particularised. The judge was entitled to take into account the fact that the appellant's circumstances had changed significantly since the deportation order was made in assessing whether it would be 'unduly harsh' to expect his wife and children to remain in the UK without him. It was open to the judge to observe that, if the public interest in deportation was so compelling, the respondent failed to take any action to enforce the deportation order after the appellant voluntarily brought himself to the attention of the authorities in 2010 (albeit after a period as an absconder).

13. For the reasons given above, we conclude that the decision did not involve the making of an error on a point of law.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The decision shall stand

Signed  Date 10 December 2018
Upper Tribunal Judge Canavan