Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16648/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 November 2018	**On 12 December 2018**

Before

THE HONOURABLE LORD MATTHEWS
UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HASSAN SAMRANI

Claimant/Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Ms A Child, Counsel instructed by Duncan Lewis & Co Solicitors (Harrow Office)

DECISION AND REASONS

1. This is an appeal of the Secretary of State, against a decision of the First-tier Tribunal allowing the appeal of the claimant (the respondent in this appeal) against a decision to deport him. The First-tier Tribunal allowed the appeal on Article 8 grounds.

2. The Secretary of State submitted two grounds of appeal, the first of which was that there was a failure correctly to apply the unduly harsh test as identified by the Court of Appeal in **MM (Uganda) [2016] EWCA Civ**

450, and the second being to the effect that a material misdirection of law was made in relation to the FTT's consideration of unduly harsh outcomes for the appellant's children. Reference was made to **BL (Jamaica) [2016] EWCA Civ 357**.

3. We will come in a moment to the permission which was granted by the First-tier Tribunal, but at the outset of the hearing before us we were told that the Secretary of State had lodged amended grounds of appeal and that there had been a prior hearing before UT Judge Dawson on 30 May. He dealt to some extent with a new ground, namely one of bias on the part of the First-tier Tribunal Judge. It was said that the FTT judge had made certain remarks at the outset of the hearing and, his general conduct of the hearing was such, as to indicate to the informed observer that he had effectively made up his mind. The whole hearing was unfair or at least appeared to be so. That ground now falls to be disposed of by us

4. We were provided with what was said to be an *aide-memoire,* which is a minute of the hearing before the FTT prepared by the Presenting Officer As well as that, we have a brief statement by her, which she has signed. On the other hand, we have been provided with a statement by Counsel, who represented the appellant at the first hearing as well as comments made by the Judge himself.

5. Mr Jarvis very helpfully drew our attention to the case of **Singh [2016] EWCA Civ 492** and we have also been provided by Miss Child with the case of **PA (Protection claim, Respondent's enquiries, Bias) [2018] UKUT 337 (IAC)** and the case of **Ortega (Remittal; Bias; Parental relationship) [2018] UKUT 298 (IAC)**. We find the case of **Singh** of more assistance to us. In that case what was provided was a statement by Counsel who conducted the hearing on behalf of the appellant who was alleging bias. For some reason there was no statement on the part of the Home Office Presenting Officer. The Upper Tribunal considered the issue of bias and had the benefit of a note from the presiding First-tier Tribunal Judge which somehow or other disappeared, so what was said verbatim by that judge in the note is in the ether. The Court of Appeal made a number of comments about the process which should be followed in cases of this nature and made a number of criticisms of the actual approach which was adopted in that case. They were not persuaded that the statement of Counsel was sufficient to overcome the burden on the person alleging bias to prove there was actual or apparent bias. We find ourselves in the same position here. We have a statement by the Presenting Officer, which is in our opinion somewhat vague and is based on her impression. While we have the benefit of her minute it does not take us much further. While it is said that it could be regarded as an *aide-memoire* we do not really have a full statement containing a *memoire* to which it could be an *aide*, and the position as far as we can see it is somewhat ambiguous. The presenting officer could have been presented as a witness and her vague statement will not do. The burden is on the Secretary of State to establish apparent

bias and we are not satisfied that the burden has been discharged, so we refuse that ground of appeal.

6. The second primary issue which arose relates to the grant of permission. In this case, as we have indicated, there are two grounds over and above the third one to which reference has just been made. In granting permission to appeal the usual form was filled in by the Judge of the First-tier Tribunal who granted permission on 22 January of this year. At the top of it the unambiguous words "permission to appeal is granted" appear. There then appear four paragraphs setting out the "Reasons for Decision" in the following terms:-

> "1. The Respondent seeks permission to appeal, in time, against a decision of First-tier Tribunal (Judge Cohen) promulgated on 08 January 2018 whereby it allowed the Appellant's appeal against the decision to refuse his human rights claim made following a deportation order.
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> 2. It is argued that the Tribunal erred in its consideration of the 'unduly harsh' test in that it considered only the impact on the Appellant's children and his rehabilitation without factoring in the Appellant's adverse criminal and immigration history. This ground is arguable.
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> 3. It is further argued that contrary to the evidence, that (sic) the Tribunal had speculated that Social services (sic) involvement would be required to support the family should the Appellant be removed and that any such involvement would be contrary to the children's best interests and unduly harsh. This ground is not arguable.
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> 4. There is an arguable material error of law."

7. Mr Jarvis has submitted that given what was said in the top of the form, namely that permission to appeal was granted, it meant that all grounds of appeal might be argued. He referred to the case of **Safi and others (permission to appeal decisions) [2018] UKUT 00388 (IAC)**, a decision which resulted from a hearing on 12 October of this year. Miss Child on the other hand submitted that permission had only been granted in relation to the first ground and that there was no ambiguity in the grant of permission. The Judge has made it perfectly plain that ground 2 was not arguable, therefore this Tribunal should not entertain it. We have considered the case of **Safi** presided by the President and Upper Tribunal Judge Dawson and in our reading of it we cannot see any material distinction between what was said in that case and the position we find ourselves in today. The facts are almost indistinguishable. We consider particularly the fact that in the grant of permission the unambiguous words that permission to appeal was granted appeared in that case as in the case before us. Paragraph 6 of the Reasons for Decision were in the following terms:-

> "While I am not persuaded that there is an arguable error of law in the First-tier Tribunal decision in relation to duress or its finding that the 'crime' was not a political crime, I do consider it arguable that the Tribunal may have

erred in its consideration of whether Article 1F(b) was applicable at all given that the Appellants had all been acquitted after trial."

8. In our opinion there is no material difference between that and what was said in paragraph 3 of the Reasons for Decision in the instant case. It is made plain we think from paragraphs 30 to 35 of the decision in **Safi** that the mere fact that the reasons indicate that a ground is not arguable is not in themselves enough to indicate that permission is not granted. If that is to be the case of the granting section of the form should say so in terms. We are satisfied therefore that it is open to the Secretary of State in the instant case to argue ground 2.

9. We turn now to the merits of the appeal. The appellant was the subject of a deportation order of 18 May 2016. He sought to challenge that order raising the issue of his human rights and contending that to remove him from the jurisdiction would breach those rights and indeed the rights of his family. He was married to a British citizen in 2012 and has six children, four arising from that relationship and two stepchildren.

10. The matter came by way of appeal before First-tier Tribunal Judge Cohen on 12 December 2017 and, in a decision promulgated on 8 January 2018, the appeal was allowed applying the test set out in paragraph 399 of the Rules, and particularly having regard to the requirement as to whether or not it would be unduly harsh for the child to remain in the UK without the person who is to be deported. It was on that basis that the judge found that it would be unduly harsh for all or some of the children to remain in the United Kingdom without the particular support of the appellant.

11. The Secretary of State has sought to challenge that decision. We have already dealt with a number of preliminary points. The first ground of appeal is that the FTT is said to have made a material misdirection of law, a failure to correctly apply the "unduly harsh" test as defined in the Court of Appeal in **MM (Uganda) [2016] EWCA Civ 450**, that is not placing it correctly within the criminal and immigration history of the appellant. Of course matters have moved somewhat in the light of the decision of the Supreme Court in **KO [2018] UKSC 53**. The court has raised the question as to whether or not it is right to visit the sins of the fathers upon the children in relation to assessment of unduly harsh. Clearly, in applying the test of unduly harsh it is important, as indeed Mr Jarvis rightly submits, to consider it within the context of the public interest of removing a foreign criminal and it is apparent from the decision that that criminality was recognised by the judge. It is said that there is no express articulation by the judge as to how the test should be applied. Nevertheless, the judge has recognised the appropriate test in paragraph 399. It cannot be said in our view that, looking at the decision as a whole, the Judge was unaware of the statutory structure and context in which these matters fall to be considered.

12. The second challenge was in relation to the **BL** approach, if we can put it that way; namely that there had been inadequate consideration of the evidence and report in the light of what assistance may be available to the family through social services. We remind ourselves of course that a consideration of what is unduly harsh is by its very nature a fact-sensitive exercise. The Judge has placed great weight upon the social services report of a Mr John Power of 16 March 2016. We note that the appellant had been in custody for some eighteen months, both as a result of serving the sentence and also under administrative detention, but he was released at the beginning of March of 2016. This is a report which has been prepared, albeit of some antiquity, in the context of the family having been recently reunited. It is a detailed report. One criticism potentially that can be made of the Judge is that there was a somewhat uncritical acceptance of it, but nevertheless it is quite a strongly worded report. It can be summarised as reporting that the mother was unable to cope adequately with all her children in the absence of the appellant; that she was on anti-depressants and she needed counselling. The children were very needy and attention-seeking and demanding.

13. Though it may be a criticism of the mother that she did not always take the help that was provided, it was clear that the absence of the appellant from the family caused particular problems to the son D. He was bedwetting. He was referred to CAMHS. There were problems with behaviour and the strong conclusion by the social worker, who prepared the report, was that the family was entirely focused upon the appellant as being the fulcrum of stability. It was said that it would be a disastrous outcome for the mother and would impact on care for the children were the appellant not to be back as part of their lives. As was made clear in **KO,** there are some consequences of a father leaving the family, which are a natural consequence of separation which would not fall within the definition of unduly harsh. The conclusion of the writer of the report was that they would be exposed to a significant risk of psychological harm in the situation where the appellant was removed.

14. This is not an appeal against the merits of the decision. It may be considered that perhaps the Judge was somewhat uncritical of the report and that more enquiry could perhaps sensibly have been made, particularly as the hearing was some eighteen months from the preparation of that report. It would have been helpful to have had an up-to-date report as to how the children were or were not coping, now that the appellant was with them. There was no indication that they were not coping.

15. The real question for us in looking at the comments made at paragraphs 25 to 27 of the determination was whether or not those factors, which were identified by Mr Power in his report, were factors that were capable of meeting the test of unduly harsh. They have gone beyond, as we said, mere upset and the pain of separation. This is a family that simply could not function, it is said, properly without the appellant's presence.

Notice of Decision

16. It seems to us that it would not be open to us to conclude that this was a perverse decision, albeit a very generous decision and perhaps one that we would not have come to ourselves, but that is not the test. looking at what the test is, those findings were properly open to be made, so in those circumstances we do not interfere with the decision. The appeal before this Tribunal by the Secretary of State is dismissed and the decision made by the First tier Tribunal stands allowed on human rights grounds.

17. No anonymity direction is made.

For 

LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)
Date: 7 Dec 2018