Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06734/2017

THE IMMIGRATION ACTS

Heard at Newport	**Decision and Reasons Promulgated**
On 26th October 2018	**On 23rd November 2018**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

[K I]
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs Aboni, Home Office Presenting Officer
For the Respondent: Mr Jowett instructed by Irving & Co

DECISION AND REASONS

1. The appellant is a national of Somalia born on [~] 1983. In a determination dated 22nd of November 2017, Judge of the First Tier Tribunal Solly, refused the appellant's appeal against deportation on asylum, humanitarian protection and Article 3 grounds but allowed the claim on Article 8 grounds. The Secretary of State appealed that decision in relation to Article 8.

2. The appellant was convicted in 2012 of 2 counts of possession of a Class A drug, Heroin, with intent to supply and sentenced to 3 years and 2 years concurrently on each count.

3. The appellant is married with 2 British citizen children and the First-tier Tribunal judge found the appellant fulfilled the exception under paragraphs 398(c) and 399(a)(i) (a).

> 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 7 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; or …

4. I set out the litigation history for clarity. The Secretary of State made an application for permission asserting that the judge had allowed the appeal, on Article 8 grounds, by finding that the appellant's deportation would lead to unduly harsh consequences for his children Ah aged two and Ay aged one. In coming to that conclusion, the judge had materially erred in law. The judge had failed to give sufficient weight to the public interest and although the risk of reoffending was low as referred to in paragraph 62 the judge failed to consider the deterrent effect as illustrated in **AM v SSHD** [2012] EWCA Civ 1634 at paragraph 24. The assessment of unduly harsh was incomplete with the judge not conducting a comprehensive balancing exercise.

5. The factors identified by the judges in considering 'unduly harsh', either singularly or cumulatively, failed to meet the high threshold of being 'unduly harsh'. It was acknowledged at paragraph 64 of the determination that it was accepted that it was in the best interests of the children for the appellant to remain in the United Kingdom but in deportation appeals the test was significantly higher and reliance was placed on **AJ (Zimbabwe)** EWCA Civ 1012 at paragraph 31 which states

> '*it was not open to the FTT to find that the separation of the children from the father/stepfather was a compelling reason to allow the respondent to remain. Far from being an exceptional circumstance, this is an everyday situation as the authorities I have set out demonstrate. They show that the separating parent and child cannot, without more, be a good reason to outweigh the very powerful public interest deportation. No doubt the FTT was right to say that these children would unfortunately suffer from the separation but for the reasons I have already explained, if the concept of exceptional circumstances can apply in such case, it would undermine the application of the immigration rules*'.

6. That the family were likely to require state benefits was a neutral factor. There was significant number of one parent families in the UK and that did not signify that they would suffer unduly harsh conditions. It was also submitted that the social worker's report was emotive rather than objective. The judge referred to a significant detrimental effect of the appellant being deported at paragraph 69 of the determination but that was akin to the normal consequences of deportation, and, failed to identify what was unduly harsh if the appellant was deported, and, had additionally failed to deal with paragraph 84 of the decision letter that is in effect the respondent's skeleton argument. This identified that the children would continue to benefit from the rights and privileges that are entitled to by remaining in the UK. There was a wider family unit by way of paternal extended family members. Those members could continue to provide support for the mother and children in the UK. There were financial support mechanisms in place for British citizens.

7. The judge failed to give clear reasons why the appellant's deportation would result in 'unduly harsh' consequences for the children

8. There was no OASys report. The Secretary of State also submitted that the judge, in reaching his conclusions had treated the public interest too narrowly. Court of Appeal authorities had emphasised that Parliament approved automatic deportation of foreign criminals convicted and sentenced to imprisonment of over a year and if an appellant received a sentence of over one year very significant weight was required to outweigh deportation.

9. The judge failed to acknowledge the deterrent effect in deportation which contributed to the public confidence in the system. This was despite the fact that the sentence was some time ago. Mr Mills relied on **MM (Uganda)v SSHD** [2016] EWCA Civ 617 and **AJ (Zimbabwe) [2016] EWCA Civ 1012**. The decision was unsafe. The test in relation to "unduly harsh" had a high bar and the judge had not recognised that. That separation would significantly upset the children as outlined by the social workers report was recognised but something more than that was required in order to outweigh the imperative of deportation.

10. In response, the appellant's representative pointed out that this was not a sentence over four years and the judge had considered the concept of "unduly harsh", specifically at paragraphs 65 and 66. Reliance had been placed on the witness statements together with the social worker's report and that was not challenged by the Home Office. Nor was there challenge to the section 72 findings. This appellant was not in a higher category of offender and there was no error of law

11. The social worker report of Diana Harris dated 22 September 2017 prepared a balance sheet of the benefits and burdens to the children of the father's return to Somalia. She noted that the appellant was a primary attachment figure for both children and actively involved in basic day-to-day care. She outlined that

the children would be likely to experience feelings and behaviours associated with grief and loss akin to the death of a parent and their routine and stability would be disrupted and would be likely to impact on developmental and educational progress. Further, lack of family resources would place limitations on the ability of the children to participate in social activities.

Conclusions on the Error of Law

12. I have set out the terms of the application for permission to appeal and the competing arguments before me in relation to the error of law stage in order to set the context for the resumed hearing and consequent decision. I did not set aside the findings of the First-tier Tribunal but the conclusions as I found the reasoning inadequate. Subsequent to my error of law decision the Supreme Court has Case law has published **KO (Nigeria)** [2018] UKSC 53. I record what I said in my error of law decision below the following:

> *'Caselaw has emphasised the test of "unduly harsh" is a high test and the separation of parent and child in deportation is an everyday situation and, without more, cannot be a good reason to outweigh the very powerful public interest in deportation.*
>
> *There was no challenge to the social worker's report or to the evidence of the appellant's wife, that evidence, in itself, as reflected in the decision of the first-tier Tribunal did not support undue harshness, when considering the conviction of the appellant for intent to supply class A drugs, or even approach the required threshold of "unduly harsh" with regards fulfilment of paragraph 399(a) (see **MM (Uganda)**. **DW (Jamaica) [2018] EWCA Civ 797** has confirmed that 'The new rules [the immigration rules as amended] were an index of the enhanced importance the Secretary of State attaches to the public interest in the deportation of foreign criminals' and that the public interest is to be given due weight'. The children's interests are a primary factor but need to be stronger the more pressing the more serious the offence. The task is to balance the interests. The phrase 'unduly harsh' is to be determined by reference to context with due weight given to the public interest.*
>
> *In this instance, at best, from reading the decision, the judge identified only difficulties as to how the children and wife would cope without the appellant, and that the interests of the family would be better served when he was present, but there was nothing which demonstrated, even in the social worker report, that the removal would be 'unduly harsh' in the context of deportation. As such the public interest was accorded insufficient weight and that approach to the public interest was an error of law'.*

The Resumed Hearing

13. At the resumed hearing I heard evidence from the appellant, his wife and his witness Mr NA. His children were present. His wife explained how much the appellant did for the children.

14. Before me Mrs Aboni, submitted that the particulars of the appellant and his children were not such as to constitute an unduly harsh result. That the wife would be solely reliant and reliant on public benefits was a neutral factor.

15. Mr Jowett referred me to his skeleton argument and paragraph 23 of **KO (Nigeria)** [2018] UKSC 53 which alluded to a degree of harshness over and above what would necessarily be involved for any child faced with deportation.

Conclusions

16. At the outset I note that although I found fault with the First-tier Tribunal judge's assessment, the findings in relation to the evidence were not set aside. As identified, the Secretary of State did not challenge the expert report save to state in the application for permission to appeal that it was 'emotive'.

17. Between the Error of Law stage and the resume hearing **KO (Nigeria)** was promulgated by the Supreme Court which now explains that the approach to be taken with regard to Section 117C, (which is similar to that of paragraph 399, which in turn sets out the exceptions to the rule of deportation under paragraph 398). The approach does

> '*not require a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section*'.

My Error of Law decision referred to and relied on precisely the approach adopted in **MM (Uganda)** and that approach has subsequently been disapproved.

18. Paragraph 399 and Section 117C read as follows

> *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 7 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; or*
>
> *(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and*

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported

117C Article 8: additional considerations in cases involving foreign criminals

(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.

19. At Paragraph 21 of **KO (Nigeria)** [2018] UKSC 53, Lord Carnwath specifically observes with regard the exceptions under paragraph 399 that

> *'for a sentence of less than four years, they are enough, if they are met, to remove the public interest in deportation. For sentences of four years or more, however, it is not enough to fall within the exception, unless there are in addition "very compelling circumstances"*

And in relation to exception 2

> *'22. … although the language is perhaps less precise that that of exception 1, there is nothing to suggest that the word 'unduly' is intended as a reference back to the issue of relative seriousness introduced by subsection (2). … 'exception 2 appears self-contained'.*
>
> *23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. 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 Page 11 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. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more*[1].

20. This concludes that a higher hurdle, 'unduly harsh', is set in relation to foreign criminal as defined under Section 117D compared with those not classified as foreign criminals. (Foreign criminals are described thus in Section 117D

> *(2) In this Part, "foreign criminal" means a person –*
>
> *(a) who is not a British citizen,*
>
> *(b) who has been convicted in the United Kingdom of an offence, and*
>
> *(c) who –*
>
> *(i) has been sentenced to a period of imprisonment of at least 12 months,*
>
> *(ii) has been convicted of an offence that has caused serious harm, or*
>
> *(iii) is a persistent offender.*

21. As Lord Carnwath explains, the test involves a relativity or comparison with the harshness that would be for any child faced with the deportation of their parent. This begs the question as to what is this standard level of harshness? It is clearly more than reasonable and is described in terms of 'due harshness'.

What is clear, however, is that the test does not required a balancing of the levels of severity of the parent's offences over and above the distinction drawn by the section itself.

22. **MK (Sierra Leone) v Secretary of State for the Home Department** [2015] UKUT 223 (IAC), gives authoritative guidance in relation to the standard for 'unduly harsh' and laid down that an "evaluative assessment" was 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. The focus must be on the child and not involve a balancing exercise with regard the offending of the parent which has already been factored in through the delineation of the test by virtue of the sentence. The approach taken in **MM (Uganda)** was that *'the more serious he offence committed by a foreign criminal the greater is the public interests in deportation*' and that unduly harsh should incorporate consideration of all the circumstances including the offending of the foreign criminal not merely the impact on the child or partner. This approach in **MM** was disapproved by the Supreme Court.

24. The appellant entered the United Kingdom with his father at the age of 12 with his father and brother and he was granted Indefinite Leave to Remain on the basis of family reunion. The appellant was educated here. Following his conviction for two drugs offence committed in 2011 he was served with a notice of liability to automatic deportation on 10th December 2012. His representatives raised protection and Article 8 grounds. The appellant had married his partner MDO on 27th April 2014. Following judicial review proceedings in 2014 the appellant was permitted to work. He has two British citizen children, both boys, born on 6th April 2015 and 18th April 2016. They are now 3½ and 2½ years old.

25. I will rehearse the findings of the First-tier Tribunal and with which, on my own analysis, I concur. I repeat that I did not set aside these findings. The judge accepted

> (i) the appellant's income is the sole source of income and if she leaves her studies and the appellant is deported she will become dependent on benefits
>
> (ii) on the basis of the probation report the appellant did not constitute any danger to the community. There were no aggravating factors identified by the sentencing judge. There have been no offences since 2012 and the appellant has married, settled down and become a father. [62]

(iii) the Home Office accepted that it is in the best interests of the children for the current domestic arrangements to remain intact. [64]

(iv) the appellant and his wife were in a stable and secure marriage and rely on one another for emotional support

26. There was no OASys report to indicate a risk of re-offending. The letter from the Wales Probation dated 5th March 2014 confirmed that the appellant was a '*motivated individual who is working towards successfully completing his licence later this year'*. The letter dated 24th October 2017 from the Wales Probation office confirmed that the appellant's licence ended on 16th November 2014, and he was assessed as posing a low risk of both re-offending and harm.

27. The Guidance of the Secretary of State on Criminality: article 8 ECHR cases, states that Section 55 of the Borders and Citizenship Act 2009 is reflected in paragraph 399(a). The guidance nonetheless confirms that regard must be had to the best interests of the child as a primary consideration (but not the paramount consideration). It is in the child's best interests to be cared for by both parents. This guidance states that consideration must be given to the history of offending and any expert evidence that the best interests are *not* served by the child being with the parent.

28. The children are both British citizens and young but on the evidence of their parents and their appearance at court, they are able to talk and are extremely attached to their father. They have lived all their lives in the UK. It is clearly in the best interests of the children to remain in the care of both of their parents.

29. It was accepted by the Secretary of State at the hearing before me that there was no question that the children would be expected or could relocate to Somalia. Bearing in mind the problems in Somalia, this is a sensible concession. The Secretary of State's own policy guidance cites the UN's description of the humanitarian situation as precarious and that by any global measure it remains very grave.

30. I turn to whether it would be unduly harsh for the children to remain in the UK without their father who is classified as a foreign criminal. The reality is that it is unlikely that these children will see their father again for many years should he be removed to Somalia. Realistically, the cost and the danger of visiting him is likely to be prohibitive. He would not be permitted to enter the United Kingdom. I accept that the father and mother live together. It would appear however that because of the working pattern of the father that he is the day to day carer of the children. It was evident seeing the interaction between the father with the children that he is completely accustomed to caring for them and they are being cared for by him. Separation from their father as their primary carer at this age would have very severe effect on them.

31. The mother is in the second year of an Early Years Education degree which she will complete in 2020 (evidenced in the bundle). She told the court that she has

borrowed money to finance that degree and intends to train as a teacher for a year thereafter. She stated that she could not afford to place the children in child care and thus would have to abandon her studies. I consider this would have an extremely harsh effect on the mother and thus indirectly, too, on the children. As the mother explained there would be significant ramifications for both her and the children if the family unit and present arrangements are fractured. I accept that this his however is not a determinative factor.

32. The assessment to be conducted is at the date of the hearing before me. The social worker (expert) report of Diana Harris was conducted in 2017 when the children were much younger. As Mr Jowett submitted, however, and I agree, a year in the life of a child is very significant. I turn to the expert report. Diana Harris is an independent Social Worker. She is registered to practice with the Health Care Professions Council and a member of the British Association of Social Workers. She has a history of working in Children's Statutory Social Care Services from March 2001 until April 2016. From that date, she has predominantly worked in a statutory Fostering team where she has supervised foster carers, supervised adoption and fostering assessments and delivered training. She has also had experience of children's Duty Social Work, completed Children in Need cases and chaired multi-agency meetings. She has addressed the compulsory training in social work which includes the study of Lifespan Psychology, study of Social Work with Adults and Social Work with children. Finally, she has experience of Early Intervention in a Youth Justice Team which involved in work including preventative interventions and engaging with young people subject to court orders, with the aim of minimising the risk of offending behaviours.

33. I consider the expert to be well qualified and not overly 'emotive' as suggested in the application for permission to appeal. That was not an allegation that Mrs Aboni repeated, and I note that the Social Worker has engaged in Statutory Social Care Services. On a careful reading of her report, she made a thorough and comprehensive assessment of the impact on the family of the deportation of the appellant. There was no challenge to the contents of the report by the Secretary of State.

34. Ms Harris opined that should the father be removed to Somalia the children would lose

> '*a primary attachment figure… [which] would cause them feelings and behaviours associated with grief and loss…akin to the death of a parent. At their young ages the effects of this are likely to be evidence in their emotions and behaviours*'.

35. In her opinion, this would have an impact on '*their developmental and educational progress*'. She also concluded that a lack of finances and resources would place limitations of their ability to visit and maintain contact over the short and longer term.

> *'Their family composition would change to a single parent family, placing significant limitations on the family resources and this would have an impact on their identity formation'*.

36. I accept that placing this family on public benefits would be a neutral factor, but she was clearly of the opinion that removal at their young age this would a particular effect.

37. Information on attachment theory was also provided which highlighted the importance of early years attachments and the result of interruption which was said to lead in later life to, inter alia, aggression and depression.

38. She recorded that the appellant's own difficult experiences had led him to volunteer for and support a number of community projects for young people and disadvantaged individuals such as a homeless project which he regularly supports, namely, Citizens Advice Youth Support Group and Fresh Slate Youth Support Group. This is not just a recent phenomenon and appears to have been ongoing.

39. The opinion of the Social Worker was in turn supported by two witnesses, one of whom attended the hearing before me and attested to knowing the appellant for some years and who had helped the appellant turn his life around. He described the appellant as the backbone of his family and the impact that his removal would have on the children and his wife. Mr NA stated that the appellant was now a well-respected member of the community whose contribution over the years has seen '*countless of young people['s] lives transformed*' and '*He fills a vital role as a community practitioner*' and undertakes volunteering and community work. Mr NA is the chairman of such a community-based organisation and attested to the numerous good work with young people that the appellant had fulfilled. Indeed, there is a letter from Stephen Doughty MP confirming that the appellant works as a volunteer for a charity for the homeless in Cardiff.

40. The appellant works for British Gas as a Customer Services Team Leader and specifically works late shifts and at weekends in order to undertake a caring role for his children. The evidence recorded that the appellant's mother was killed in Somalia when he was eight years old and his father 'not attached and unemotional with his children'. The appellant's own desire was to be '*a good father, a role model that [his children] can look up to and come to, I want my sons to look at us both and see we are being educated and want to do the same themselves'*. [6.7] Harris report.

41. Mrs I, the appellant's wife, attested to the devastation that the removal of the appellant would have on her life because the appellant was a committed father and so involved with the day-to-day care of the children. She reported this to Mrs Harris and because of her consistency I find her wholly credible and that she '*would not be able to cope without [K]' in her life and that he was engaged in every aspect of their life*'. She added '*it would devastate our children if [K] was no longer in*

their lives'. I can only conclude that the mother of her own children would be in the best position to know what would or would not devastate her children.

42. With regards Section 117 the appellant was in the United Kingdom lawfully and with Indefinite Leave to Remain until the deportation order was made. I should also note that he was first introduced to his wife in 2011 *prior* to the Deportation Order. In other words, their relationship commenced at a time when he was here with settled status. There is no doubt the appellant speaks fluent English and is financially independent although that is not the focus of my deliberations.

43. The deterrent effect of deportation and the public confidence in the system, is not to be under estimated or undermined and Section 117C underlines the powerful public interest considerations in play. There can be no doubt that the appellant committed a serious offence in the supply of Class A drugs and is the subject of an automatic deportation. However, I have considered whether his separation from the children will in the circumstances be 'unduly harsh' and also if they are 'inordinately' or 'excessively' harsh taking into account all of the circumstances in relation to the children.

44. As set out above the appellant has placed himself both in the community and for his own children as a role model. Mr A, a Community Organiser with Citizens Cymru Wales endorsed his work with this commendation, not least that his involvement which steers

> '*young people away from crime and anti-social behaviour'* and that '*his desire to help young people is remarkable and the changes are visible with many finding work or going back into education'*.

45. Indeed, there were numerous character references from community members attesting to the appellant's good nature and works.

46. I conclude on the evidence before me that the impact on these particular children of their father's removal, not least because of his instrumental primary caring role, would indeed be bleak. The father is a primary carer for the children during the week and the separation for the children would be intense. The children are evidently very attached to their father. The mother would not be caring for just one child but two and this would have a further effect on the children. The appellant is a father figure and a role model for them and he is only too aware of the problems of offending and has with effort and success which has been attested to, attempted to rectify this in the community with young people. He clearly, and I accept sincerely, does not wish his own children to follow the same path. Cumulatively the effects of removal on the children will, I accept, be not only severe and harsh but further unduly harsh.

47. I have not ignored the public interest in deportation and am alive to Section 117C which holds that

(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.

48. As set out in **AM**, deportation

> '*has the effect not only of removing the risk of re-offending by the deportee himself, but also of deterring other foreign nationals in a similar position. Furthermore, deportation of foreign criminals preserves public confidence in a system of control whose loss would itself tend towards crime and disorder*'.

I am aware of the exacting test to be applied and have weighed throughout the consequences of deportation against the full import of the legitimate aim being relied upon which is the need to prevent disorder and crime and the protection of health and morals; to be achieved. I do not consider one piece of the evidence with regard the children is determinative but cumulatively I do so find that the effect on the children would be unduly harsh. In my view, however, an evaluation of all the particular circumstances, and strands of evidence, when focussing on and relating to the effect on the children, in accordance with the reasoning in **KO (Nigeria)**, would involve an unduly harsh effect should the children be expected to remain in the United Kingdom without the appellant.

49. I therefore allow the appeal.

Signed *Helen Rimington* Date 21st November 2018

Upper Tribunal Judge Rimington