Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00916/2013
DA/00917/2013

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reason Promulgated**
On 17th December 2018	**On 2nd May 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

MJ & DO

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Salam, Salam & Co solicitors
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellants in this determination identified as MJ and DO. This direction applies to,

amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. The first appellant is a Nigerian Citizen born on 28th May 1983. She is the mother of the second appellant who was born in the UK on 7 November 2005. He is a Nigerian citizen through his mother. MJ claims she arrived in the UK in June 2004; there is no corroborative evidence of her entry. In June 2005 she attempted to leave the UK to travel to Canada using a false passport. She was charged with document offences, convicted and sentenced to 12 months' imprisonment. The trial judge recommended she be deported. In December 2005 she claimed asylum. That application was refused, and her appeal was dismissed in April 2006. On 26th January 2007 the respondent took a decision to deport her. Her appeal against that decision was dismissed and she was refused permission to appeal to the Court of Appeal. She became appeal rights exhausted at the end of June 2007. A deportation order was signed against MJ dated 6th August 2007. She did not leave the UK and absconded.

2. In June 2011 she sought leave to remain in the UK with her child who at that time was 5 years old. That application was treated by the respondent as an application to revoke the deportation. It was refused on 24th April 2013. On the same date the SSHD took a decision to make a deportation order against the child, DO, as a family member of a person who is liable to deportation. Both MJ and DO appealed and their appeals were dismissed by the First-tier Tribunal in a decision promulgated on 8th July 2013. They were granted permission to appeal to the Upper Tribunal and in a decision promulgated on 19 December 2013 their appeals were dismissed by UTJ Lane. They sought permission to appeal to the Court of Appeal and, because of MJ's claim that she had been trafficked and that the claim had been inadequately dealt with, the paper application was adjourned to an oral hearing. At the oral hearing it was acknowledged that there was nothing in that point, but a fresh issue was raised in connection with DO and the lack of consideration of his best interests. By consent, the Court of Appeal allowed the appeals and remitted them to be determined by the Upper Tribunal on that issue alone. The appeals came before me and, at a case management hearing on 10th September 2018, I made directions for the future conduct of the appeals.

3. On 17th December 2018 I heard submissions from both representatives.

4. This case proceeded on the basis that there was a material error of law in so far as there had been no or inadequate determination of the circumstances of the child by the First-tier Tribunal in the appeal against the decision to refuse to revoke the deportation order made against MJ and in his appeal against the decision to make a deportation order. I set aside the First-tier Tribunal decision accordingly.

5. There was some discussion before me as to which were the relevant Immigration Rules under which the appeal before me was to be decided: the Rules in force at the date of the hearing before the First-tier Tribunal namely

27th June 2013[1] (that decision was promulgated on 8th July 2013 as referred to above) or the Rules in force on the date I heard the appeal[2]?

6. Mr Salam submitted that the relevant Rules were those in force on 27th June 2013 for both appeals. After some consideration Mr Bates, agreed (with some hesitation) with this submission. I concurred with this submission before the parties, but noted that I had not been provided with relevant caselaw. Both parties agreed that I could consider the relevant case law and would insert such references as were relevant in my decision.

7. As discussed with the parties, I subsequently considered the relevant case law which was not before me on the day of the hearing; I had some doubt that Mr Salam's submission was correct. In particular I noted that the implementation paragraph of HC532 (which amended the 'deportation' Rules to substitute the phrase 'unduly harsh' for 'not be reasonable') states that this amendment shall "take effect on 28 July 2014 and apply to all ECHR Article 8 claims from foreign criminals which are decided on or after that date."

8. There is also the issue of the possible different framework applicable to both appeals – the appeal of DO is an appeal against a decision to make a deportation order; the appeal of MJ is an appeal against a decision to refuse to revoke a deportation order. The statutory framework has changed since those decisions were made such that an appeal would not lie against either of those decisions if they were taken after 28th July 2014.

9. Case law relevant to which Rules are applicable to each decision as it is in appeal before me includes:

KD (Jamaica) v SSHD [2016] EWCA Civ 418;

Edgehill v SSHD [2014] EWCA Civ 402;

Singh v SSHD [2015] EWCA Civ 74;

YM (Uganda) v SSHD [2014] EWCA Civ 1292.

10. I considered I would be assisted by submissions by both parties as to the relevant statutory and Immigration Rules framework within which I am required to determine this appeal.

11. I therefore directed both parties to file and serve written submissions on the relevant Immigration Rules and Statutory framework that each of these appeals is to be determined in by 4pm Wednesday 6th February 2018. I received written submissions from both representatives.

12. In his written submissions, Mr Salam stated that at the end of the hearing I allowed the appeal, with the agreement of Mr Bates. This is not correct. It may be that Mr Salam misunderstood what I said which was that there was an error of law in the decision of the First-tier Tribunal, as identified by the Court of Appeal, such that the decision was to be set aside to be remade but restricted to the issue of the impact of the child in the proceedings. It was clear that, with

[1] Paragraph 276ADE, paragraph 398 399 and 399A as of 27th June 2013

[2] Paragraph 276ADE, paragraphs A398, 398, 399 and 399A as of 17th December 2018

the agreement of the parties, I could consider the issue of which Rules were applicable given that neither party had provided relevant case law.

Which Rules

13. The Secretary of State submitted that the relevant Rules were those in force at the date of the remaking of the appeal decision. Mr Salam submitted that the relevant Rules were those in force on the date of the respondent's decision to refuse to revoke the deportation order and the making of the deportation order.

14. Mr Salam submits that the 'decision' in question is the date of the Secretary of State's decision. Although he seeks to distinguish the case law referred to above, he is incorrect. As stated in *YM* the Tribunal is required to determine whether the decision to deport (and by extension the decision not to revoke a deportation order) is a breach of Article 8. That decision is to be taken on the basis of the facts in existence at the date of the Tribunal hearing. If Mr Salam were correct, nothing that has happened since the Secretary of State's decision could be taken in to account. That would include the increased age of the child (or any other children born to an appellant). The circumstances in play at the date of the SSHD's decision could mean that individuals who had resided in the UK for some considerable time after their criminal offence and the extent of their family and private life would not be relevant.

15. There has been no clear statement by the Secretary of State that the implementation of the Immigration Rules does not have effect for decisions made by him prior to the amendment to the Rules. As said in *YM*, it follows that the Rules in force at the date of the SSHD's decision are the relevant Rules for that decision; the Rules in force at the date of the Tribunal's decision are the relevant Rules for that decision. It follows that the relevant Rules for the purpose of my decision are those in force in December – see also *MF (Nigeria)* [2013] EWCA Civ 1192.

16. The Immigration Rules under which I am required to take a decision on the remaking of the appeal are thus those in force as of the date of the hearing.

17. Mr Salam in his written submissions requested that if the legal framework were under the Rules in force on the date of the hearing, then the hearing should be reconvened for further submissions because none had been made on the higher threshold. The respondent did not seek the reconvening of the hearing. I decline to reconvene the hearing.

Statutory framework

18. The Secretary of State submitted that whilst the statutory framework for appeals lodged against decisions made in 2013, "the basis upon which the appeals were lodged and are to be decided remains materially the same, namely whether the decision made constitutes a breach of Article 8."

19. Mr Salam did not address the issue of the statutory framework.

20. I am satisfied that the matters to be taken into account in determining the two appeals are to all practical intents and purposes the same and are governed by the Rules; this includes an assessment of the best interests of the child.

These appeals

21. The Secretary of State, in the decisions, accepted that the child DO had been born in the UK and had lived in the UK all his life. Mr Salam informed me that an application had been made for the child to be registered as a British Citizen, but it had been rejected on the grounds of lack of evidence of residence. I was not provided with any documents relating to this. Mr Salam informed me that the decision to refuse to register the child had not been challenged.

22. Mr Bates accepted that given the decisions by the respondent the subject of this appeal did not dispute that the child had been resident in the UK since birth, it was reasonable for me to proceed on the basis that such was the case. DO does not, however, have lawful leave to remain in the UK despite being in the UK for more than 13 years.

23. Revocation of a deportation order will not normally be authorised unless there has been a material change in circumstances since the order was made or fresh information has come to light. In this appeal, MJ's child is now aged over 13 and has lived in the UK all his life. The child was born after the appellant's criminal offence. Since that criminal offence, MJ has made an unmeritorious asylum claim and has absconded. She lost her deportation appeal when the child was only 2 years old but failed to leave the UK. She gained permission to appeal to the Court of Appeal on a claim that she had been trafficked which was no longer relied upon but, before the Court of Appeal, the circumstances and age of her child were prayed in aid and thus the appeal came before me.

24. In both these appeals the underlying issue is whether the deportation of the appellants would result in a breach of Article 8 ECHR.

25. Section 117C[3] lies within Part 5A of the Nationality, Immigration and Asylum Act 2002. In brief, section 117A explains when Part 5A applies. In deciding whether an interference with a person's right to respect for private and family life is justified under Article 8(2) of the ECHR, courts and tribunals must have regard to the "general" considerations listed in section 117B and, in cases concerning the deportation of foreign criminals (as defined in section 117D), to the considerations listed in section 117C. Section 117B provides that the maintenance of effective immigration controls is in the public interest. As well as defining "foreign criminal", section 117D contains definitions of "qualifying child" and "qualifying partner". DO is a qualifying child. He is not a foreign criminal.

26. Mr Salam accepted that if it were not for the child, MJ would not succeed in her appeal. These appeals can be approached by considering the child's appeal first or by considering the mother's appeal first. In writing a decision one has to come before the other, but in reaching my decision I have not considered their appeals in isolation. This is particularly the case given that the child bears no blame or fault for his mother's criminality or her decision to abscond or fail to leave the UK. I also note, although I place very little weight upon it, that there have been delays within the Court and Tribunal system which have led to a delay in these appeals being heard. Whichever appeal is considered first, there are issues from each that impact upon the other.

DO

27. The deportation of DO cannot be seen in isolation to the deportation of his mother. There is no question that if his mother did not go, he would not have to go. Even though I am considering his appeal first in this decision, I have reached my conclusions on the basis that, absent anything that would prevent MJ going other than him, then his mother would be deported – a real world scenario.

28. DO is now 13 years old. He knows no other country but the UK; he is attending school and has reached the age where he has developed his own sphere of friends and he has a significant private life outside the family unit of him and his mother. He speaks no language other than English. He has no relatives, other than his mother, in the UK. Although he can be expected to have some knowledge of his heritage and the culture of his mother, this will,

[3] 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.
(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.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

simply because of the time that has passed since she came to the UK, have been 'watered down'. He is now a 'Manchester' child. If his mother were to leave the UK, there is no identifiable adult who would be able, never mind willing, to care for him in the UK. He would fall into the care system. It is trite that, were his mother not subject to the potential of deportation, he himself would not be the subject of a decision to deport. An application for leave to remain would be decided by the respondent and a decision on whether he should remain in the UK would be taken on the basis of s117B 2002 Act and paragraph 276ADE of the Immigration Rules. In terms of paragraph 276ADE, he has been in the UK all his life, is under the age of 18 and the question arises whether it would be reasonable for him to leave the UK. It must be borne in mind that his mother is subject to a deportation order and as such he would be leaving the UK with her, his only relative; he would retain this very important family unit and it is plainly in his best interest to be with his mother. On the other hand, he is of an age where, as referred to earlier, he is no longer dependant totally on his mother for his home life. He is at secondary school and the disruption to his private life, even though with his mother, would be extensive, significant and would be greatly unsettling. Nevertheless, it would not be reasonable for him to remain in the UK without his mother. For this reason, it is necessary to consider the position of his mother.

29. There is no provision, at least my attention was not drawn to any, that relates to children in the situation of DO. It cannot be, looking purely at DO, that he is subject to s117C, but he is subject to a decision to deport. I have, by analogy considered whether he falls within Exception 1 (s117C(4)). He has been resident in the UK for the whole of his life; he is not lawfully in the UK. He is socially and culturally integrated in the United Kingdom. Although he would be returning to Nigeria with his mother, he would be entering a school system and a society with which he has no knowledge other than that which his mother has told him and even that is considerably out of date. This is not a case of a young child whose reference points are those of his parent; this is an adolescent who is already entering into his own world. The fact that his mother has behaved in the way in which she has, is not relevant save that if the criteria in Exception 1 did have to be met there would have to be very significant obstacles to his integration in Nigeria. For a child of his age with his experiences, although he would be going with his mother, I am satisfied that overall, there would be very significant obstacles to his integration into a new school system, a new culture and a new society.

30. In terms of Exception 2 (S117C(5)), it is not disputed that MJ has a genuine and subsisting relationship with a qualifying child. The question of whether Exception 2 is met is whether MJ's deportation would be unduly harsh on DO. DO would, for the reasons given above, have to leave the UK with his mother, through no fault of his own. The evidence before me which was not contested was that they would be returning to a country where there was no family to provide assistance, even in the short term. The child would be entering a society, culture and education system of which he has no knowledge or experience.

31. The test of unduly harsh is a high test. It must be more than severe and is higher than very significant obstacles. There is a dual aspect to the test: would it be unduly harsh for DO to live in the UK without his mother; would it be unduly harsh for him to leave the UK with his mother. That his mother ought to be deported is incontrovertible – her criminality is such that the public interest requires her deportation even though the offence took place a considerable time ago and was before her child was born. The fact that she has managed to evade removal for such a lengthy period does not, in her case, render the public interest in her removal any the less. But it does not impact upon the "unduly harsh" test – see *KO (Nigeria)* [2018] UKSC 53, *AB and AO* [2019] EWCA Civ 661, *JG* [2019] UKUT 00072 (IAC).

32. But if his mother is deported, DO would be left alone in the UK save for the safety net of the care system. He was born after her criminal act. This is not a case where there would be someone available to take care of him – because although he is an adolescent he remains a child. It cannot be other than unduly harsh to separate DO from his mother and to leave him, as an adolescent, in the care system.

33. That is not the only issue: is it unduly harsh to, in practice, require DO to accompany his mother on her deportation. I have already found that he would face very significant obstacles to his integration (not reintegration) into Nigeria. That is not the same as unduly harsh. Unduly harsh is more than 'bleak' or 'severe'. It is more than very significant obstacles which relate to the obstacles the child would face. Unduly harsh in this context must mean the full effect on DO – emotionally, practically, financially, culturally, educationally and economically. In the circumstances of a child brought up by a mother who for some time was an absconder, who has lived all his life in the UK and is now over 13 years old, going to a country where he and his mother know no-one and from where his mother left almost 20 years ago, can only be unduly harsh even though he is travelling with her. It does not need, in this case, a social worker's report or psychologist report to be able to draw such a conclusion. To require the departure of DO from the UK would be a significant, unjustifiable and disproportionate interference with his Article 8 rights.

MJ

34. MJ does not meet the criteria in Exception 1. She has not been lawfully resident in the UK for most of her life.

35. She has a genuine and subsisting relationship with her child DO. If she were to be deported without her son, the impact on him would, as I have set out above, be unduly harsh. To, in practice, require him to leave the UK with her would be unduly harsh for the reasons I have set out above. Apart from this he would, in effect, be being punished for his mother's criminality which occurred before his birth.

Conclusion

36. Drawing all this together I find that

(a) It would be unreasonable for DO to leave the UK;

(b) It would be unduly harsh on DO for him to leave the UK with his mother;

(c) It would be unduly harsh for DO to remain in the UK without his mother.

37. It follows therefore that the appeal by DO is allowed and the appeal by MJ is allowed.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 24th April 2019

Upper Tribunal Judge Coker