Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08949/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 June 2019	**On 2 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR M M
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondent: Mr E Raw, Counsel instructed by Caulker & Co solicitors

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of the DRC born on 3 April 1981. He arrived in the UK on 3 July 1991 aged 10 as a dependent of his mother who made an asylum claim. His mother was subsequently granted indefinite leave to remain along with her three children two of whom now have British nationality. The Claimant applied for naturalisation as a British citizen on 5 November 2003 but this application was refused due to his criminal convictions at that time on 24 April 2003 and 27 May 2003.

2. On 2 August 2004, the Appellant was sentenced to nine months' imprisonment for obtaining property by deception, handling and possession of a class B drug. On 2 February 2005, the Claimant was convicted of attempted robbery committed on 7 December 2004 and he was sentenced to three years' imprisonment on 28 April 2005. However, on 9 May 2006 the Respondent wrote informing him that he had decided not to take any deportation action against him. The Claimant subsequently had a child by a former partner who was born on 24 April 2008 and a different child to a second partner on 20 November 2011. The Claimant had four further convictions for six offences between 29 August 2008 and 22 December 2011. On 7 November 2012 the Claimant was convicted of common assault at North East London Magistrates' Court and he was convicted of further offences during the operational period of the suspended sentence and was thus sentenced to twelve months' imprisonment.

3. On 8 February 2013, the Claimant was sentenced to two months for common assault and the suspended sentence of ten months was activated, resulting in fourteen months' imprisonment. On 7 January 2015, a decision was made to deport the Claimant with reference to the conviction of 7 November 2012. On 10 June 2014, the Secretary of State made a deportation order together with a decision refusing the Claimant's human rights claim. The last conviction was for assault on 10 July 2017, as a result of which the Claimant was fined and subsequently detained.

4. On 15 June 2015, the Secretary of State refused the Claimant's human rights claim and certified it. This decision was subsequently withdrawn and a new decision was issued. The Claimant appealed against that decision on 21 August 2018. The extant refusal decision is that dated 21 August 2018.

5. The Claimant's appeal came before Judge of the First-tier Tribunal Samimi for hearing on 5 December 2018. The appeal was adjourned for further submissions and relisted on 23 January 2018 for submissions in respect of Article 8 and the Claimant's relationship with his new partner who is a Polish national and their son, who was born in 2017.

6. In a decision and reasons promulgated on 29 March 2019, the judge allowed the Claimant's appeal finding at [20]:

> *"I find that notwithstanding his antecedent history the Appellant has integrated to a life in the United Kingdom both socially and culturally. The Appellant speaks English as a native speaker and it has become his primary language. He does speak limited Lingala but does not read or write. It is accepted that the English language is not one of the recognised languages in DRC. He has no knowledge of any extended family in DRC. He would arrive in a country where he has not lived since the age of 10 and where he would not be able to read or write the language. I do not find that the aforementioned factors by themselves constitute very*

> *significant obstacles to his integration to a life in DRC. The Appellant is a qualified bricklayer and after a period of adjustment would be able to find work in DRC."*

7. At [21] the judge accepted that the Claimant is in a genuine and subsisting relationship with his partner, Ms S, and he plays an active role in his son's care by looking after him and seeing him on a daily basis.

8. At [22] the judge held:

> *"There has been no challenge to the fact that Ms S is a Polish national who has been residing in the UK in accordance with EEA Regulations. It is accepted that Ms S was working from 2011 to 2017 and therefore exercising treaty rights. Accordingly, I find that Ms S is settled in the UK within the meaning of Section 33(2A) of the Immigration Act 1971."*

At [22] the judge consequently went on to find that the Claimant's partner is a qualifying partner and ordinarily resident for the purpose of Exception 2 of Section 117C.

9. At [24] the judge found noting that the Claimant's child was born in 2017 that:

> *"Whilst the Appellant himself would clearly have to endure some hardship in adjusting to a life in DRC the degree of hardship would be magnified to the extent that it would cause the Appellant, his partner and small child undue hardship if they were to relocate to DRC as a family. The Appellant and his partner would arrive in DRC where he has not lived since the age of 10 and where they have no home or support network. In considering the issue of the welfare of the Appellant's child I have had regard to Section 55 of the BCIA 2009. I find that the Appellant's removal would mean that his partner would either have to remain in the UK by herself and become a single parent to their son who will be deprived of the emotional relationship with his father or relocate to DRC where she would have no cultural or social support. It would be extremely difficult for his partner to care for and support the couple's child in the DRC."*

10. The judge then went on to conclude at [28]:

> *"I find that having had regard to the Appellant's previous history of criminal offences, the Appellant clearly has been a persistent offender. However, the Appellant is culturally and socially integrated in the United Kingdom and has spent most of his life here. The Appellant's current family life with his partner and child are factors that would render his deportation to DRC unduly harsh in that there would be very significant obstacles to the family's integration to a normal life in DRC for the reasons I have provided."*

11. The judge went on in the alternative at [30] to find that his removal from the UK would be disproportionate.

12. Permission to appeal was sought, in time, by the Secretary of State on the basis that the judge had materially misdirected herself in law in that the judge erred in finding that the Claimant met the requirements of the Immigration Rules and had failed to give adequate reasons for finding that it would be unduly harsh for the Claimant's partner and child to live with him in the DRC or to remain in the UK without him.

13. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 7 May 2019, on the basis that it was arguable that the judge materially erred in finding that it would be unduly harsh on the Claimant's family if he were deported and in finding that the very significant obstacles to integration in the DRC test was met on the facts presented.

14. Prior to the hearing on 4 June, Mr Kotas on behalf of the Respondent made an out of time application to vary the grounds of appeal on the basis that; firstly, the judge had acted in a manner that was procedurally unfair, in that based on the hearing minutes of the Presenting Officer at the hearing on 8 December 2018, the judge accepted that neither the Claimant's partner nor their child were settled and thus Exception 2 of Section 117C did not apply. However, as is apparent following the hearing on 23 January 2019, the judge went on to find that Exception 2 did apply and this finding went behind the agreed position between the parties at the first part of the part heard hearing. Secondly, it was asserted that the judge erred in finding that the Claimant's child is a qualifying child in the absence that there is no evidence that the child is British or has been resident in the UK for seven years and therefore he was not a qualifying child. This application was served on the Claimant's solicitors.

Hearing

15. At the hearing before the Upper Tribunal, Mr Raw of Counsel submitted that he had had sufficient time to consider the application and he did not object to permission being granted for Mr Kotas to argue the amended grounds of challenge. In respect of the amended grounds, he accepted that the Claimant's partner is Polish, she is not settled and neither is their child.

16. I then heard submissions from Mr Kotas on behalf of the Secretary of State. He sought to rely on the decision in Binbuga [2019] EWCA Civ 551 at [58] and [60]. He submitted the judge's finding at [28] was unsafe and clearly required more reasoning and that there was a tension between her findings. Mr Kotas further sought to rely on his amended grounds containing the additional grounds of challenge as to the procedural fairness point. He submitted that, in essence the Judge's findings were contradictory in that at [20] the judge found the factors by themselves did not constitute very significant obstacles but then at [28] went on to find in respect of the family unit as a whole, i.e. the Claimant, his partner and

child, that there would be very significant obstacles to integrating in the DRC. He submitted the judge had failed to deal with the very elevated threshold as set out in KO (Nigeria) [2018] UKSC 53 and whilst the case was a nexus style deport, this had not really been addressed by the judge either.

17. In his submissions, Mr Raw on behalf of the Claimant submitted that the judge was correct to allow the appeal on the basis of paragraph 399A of the Rules and Section 117C(4) of the NIAA 2002. The Claimant has resided in the UK for most of his life, he is now 38 and has lived here since the age of 10. Albeit he is a persistent offender, he is one who is essentially English. He submitted that there clearly would be very significant obstacles to his integration in the DRC and that [14] of Kamara [2016] EWCA Civ 813 applied. At [20] the judge found the Claimant was socially and culturally integrated and at [24] that the degree of hardship will be magnified to the extent it will cause his partner and child undue hardship. He submitted that the judge's decision should be upheld on this basis or with regard to Article 8 outside the Rules. However he accepted that there was an error in relation to Section 117C(2) but that did not detract from the safety of the judge's findings on Section 117C(4) and paragraph 399A. There was no reply by Mr Kotas.

Findings and Reasons

18. I find material errors of law in the decision of First tier Tribunal Judge Samimi, for the reasons set out in the grounds of appeal and amended grounds of appeal by the Secretary of State.

19. The first ground of appeal asserted that the Judge erred at [24] in failing to give adequate reasons for her finding that it would be unduly harsh for the Claimant's partner and child to live with him in the DRC or for them to remain in the UK without the Claimant. Whilst it is clear that the Judge make a finding that it would cause the Claimant, his partner and child undue hardship if they were to relocate to the DRC as a family and I find did provide adequate reasons for this finding, there is no clear finding that it would be unduly harsh for the Claimant's partner and child to remain in the United Kingdom without him. Whilst the Judge makes reference to the Claimant's partner being a single parent and their child being deprived of the emotional relationship with his father, I find that these reasons are not in themselves sufficient to show that it would be unduly harsh for them to remain in the United Kingdom without the Claimant.

20. The second ground of appeal asserted that the Judge erred in allowing the appeal on the basis that there were very significant obstacles to the Claimant's integration in the DRC. I find that this ground of challenge is also made out. At [20] the Judge expressly found that, whilst the Claimant had integrated to a life in the United Kingdom both socially and culturally, the material factors in his case did not by themselves constitute "very significant" obstacles to his integration to a life in the DRC. However, at [28] the Judge went on to find that, whilst the Claimant has clearly been a

persistent offender, his current family life with his partner and child are factors which would render his deportation to the DRC unduly harsh in that there would be very significant obstacles to the family's integration to a normal life in the DRC. I find that this is a material error, both because these findings are contradictory and because I do not consider that the existence of a family life in the United Kingdom can properly be utilised to constitute a very significant obstacle to the integration of the Claimant in his home country.

21. I further find that there is merit in the amended grounds of challenge, as submitted by Mr Kotas, without objection from Mr Raw, on behalf of the Claimant. It would appear, regrettably, that owing to the fact that the hearing went part-heard, that the Judge's record of what took place at the first hearing was incomplete or flawed. This is based on the hearing minutes of the Presenting Officer at the hearing on 8 December 2018, which were adduced in evidence before the Upper Tribunal, where it is recorded that the judge accepted that neither the Claimant's partner nor their child were settled and thus Exception 2 of Section 117C did not apply. However, as is apparent following the hearing on 23 January 2019, the judge went on to find that Exception 2 did apply and this finding went behind the agreed position between the parties at the first part of the part heard hearing, which was procedurally unfair as this issue was considered settled by the Presenting Officer. I find that this was procedurally unfair in that, had the Presenting Officer, Mr Williams been on notice that this was a live issue, he could have made submissions on the point, which may have made a material difference to the outcome of the appeal.

22. Secondly, it was asserted that the judge erred in finding that the Claimant's child is a qualifying child, in the absence that there is no evidence that the child is British or has been resident in the UK for seven years and therefore he was not a qualifying child. Whilst there is no direct finding to this effect by the Judge, I find it was implicit in her finding at [22] and [24] that his mother had been exercising treaty rights in the United Kingdom from 2011 to 2017 (when he was born) thus she was entitled to permanent residence and consequently, entitled to be treated as having settled status and thus the child, F, was born British. Thus I find no material error of law in this respect, however, there is no direct finding on this point, which I find would clearly have been material to the outcome of the appeal.

Notice of Decision

For the reasons set out above, I find material errors of law in the decision of First tier Tribunal Judge Samimi. I set the decision aside and remit the appeal for a hearing *de novo* before the First tier Tribunal.

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 Rebecca Chapman Date 28 June 2019

Deputy Upper Tribunal Judge Chapman