Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number:
HU/11076/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 November 2019	**On 13 December 2019**

Before

THE HON. MR JUSTICE NICOL
UPPER TRIBUNAL JUDGE BLUNDELL

Between

EMMANUEL [D]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Ms Patyna, instructed by Bail for Immigration Detainees
For the Respondent:	Mr Bramble, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Sierra Leonean national who was born on 5 May 1979. He appeals, with permission granted by Upper Tribunal Judge Owens, against a decision which was issued by the First-tier Tribunal (Judge Walker) on 2 May 2019. In that decision, the judge dismissed the appellant's appeal against the respondent's refusal of his human rights claim, having concluded that his deportation

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from the United Kingdom would not be in breach of Article 8 ECHR in either its private or family life aspect.

2. The judge set out the appellant's immigration and offending history in full. For the purposes of this decision, it suffices to note the following. The appellant entered the UK in 2003 and claimed asylum. He did not pursue that application, however, and remained in the UK unlawfully. He was granted Discretionary Leave (on family life grounds) for three years on 25 August 2011. That is the only leave to enter or remain he has enjoyed.

3. Between 11 December 2003 and 5 December 2018, the appellant was convicted of 38 offences, which the judge summarised at [83] of his decision as follows:

> "Of these 8 were offences of driving whilst disqualified. There were 16 other driving offences including one of driving with excess alcohol. There were 7 offences of dishonesty, 5 offences of assault or public order offences and two offences of obstructing police. He has been sentenced to immediate imprisonment on a total of 7 occasions with this total sentence amounting to 9 months plus 52 weeks plus 120 days, an overall total in excess of 2 years. He has also been sentenced to suspended sentences of imprisonment on 4 occasions totalling 10 months and 16 weeks – a period in excess of 1 year. All but one of these suspended sentences has been activated in full or in part. His antecedent history shows that he has used 15 different names when apprehended for these various offences and four different dates of birth."

4. The appellant's offending caused the respondent to initiate deportation action against him in 2013. He pursued an appeal against that proposal, in which he relied primarily on his relationship with his wife [SD], a British citizen of Liberian origin, and their children. That appeal was dismissed by the FtT because it did not accept that the appellant had a genuine and subsisting relationship with his wife and children. Permission to appeal was refused by the FtT and the Upper Tribunal and, on 9 December 2013, the Secretary of State signed a deportation order against the appellant.

5. The appellant did not leave the UK. In 2016 and 2018, he made representations against his deportation, contending that he was in a genuine and subsisting relationship with Ms [D] and their children and that it would be contrary to Article 8 ECHR for him to be deported. On 15 May 2018, the respondent refused to revoke the deportation order. Although she accepted that there was sufficient evidence to show that the appellant, his wife and their children enjoyed a genuine and subsisting relationship, she

considered the appellant to be a persistent offender whose deportation from the United Kingdom would not be contrary to Article 8 ECHR. It was against that decision that the appellant appealed to the First-tier Tribunal for a second time. As before he relied upon his relationship with his wife and children. They now have five children: [L] (aged 14), [Hm] (aged 7), [M] (aged 4), [A] (aged 2) and [Ha] (aged 1).

The Appeal to the First-tier Tribunal

6. The appellant was represented by Ms Patyna before the judge. She called the appellant and his wife and three other witnesses. She relied on a volume of documents which need not be listed here. Amongst those documents was an expert report from an Independent Social Worker named Peter Horrocks. Having considered all of that material, Judge Walker produced a lengthy and thorough decision in which he drew the following conclusions. He did not accept that the appellant was a changed man and he had no doubt that he was a persistent offender: [86]-[92]. He did not accept that the appellant could meet any of the requirements of paragraph 399A of the Immigration Rules. He had not been lawfully resident in the UK for most of his life: [95]. He was not socially and culturally integrated into the UK: [96]. Nor would there be very significant obstacles to his reintegration to his country of nationality: [97]-[101].

7. The judge analysed the appellant's family life claim under paragraph 399 of the Immigration Rules over the course of [102]-[126]. At [102]-[115], he gave reasons for concluding that it would not be unduly harsh for the appellant's wife and children to follow him to Sierra Leone. At [116]-[126], he gave reasons for concluding that it would not be unduly harsh for the appellant's family to remain in the United Kingdom without him. At [128]-[134], the judge concluded that there were no very compelling circumstances over and above those described in the two exceptions to deportation which sufficed to outweigh the very strong public interest in deportation.

The Appeal to the Upper Tribunal

8. Ms Patyna advanced two grounds of appeal against the judge's decision. The first was that the judge had failed to take account of relevant considerations in concluding that it would not be unduly harsh for the appellant's family to live in Sierra Leone with him. The second was that the judge had erred in his consideration of Mr Horrocks' expert evidence, in that he had reached an irrational or

inadequately reasoned decision to attach weight to this report. Upper Tribunal Judge Owens granted permission on both grounds.

9. In submissions before us, Ms Patyna indicated that she had spoken to Mr Bramble, who was prepared to accept on behalf of the respondent that the judge had erred in law in his consideration of the question of whether the family could relocate to Sierra Leone. She submitted that this concession was correct, as the judge had failed to consider the accepted vulnerability of the appellant and his wife when assessing how the family would be able to manage in Sierra Leone. It had been accepted throughout that they both had a very limited education and that they had difficulty with reading. Their vulnerability was relevant to their ability to manage as adults in Sierra Leone but it was also relevant to the assessment of the children's best interests on relocation. The judge had considered their vulnerability in parts of the decision but not when it came to this aspect of the assessment. The judge had also failed to consider [L]'s best interests by reference to anything other than her education and had, in particular, failed to consider the discrimination against women in that country. These points were made at [27]-[28] of Ms Patyna's skeleton, with which she understood Mr Bramble to agree. It followed that there was an unlawful assessment of the question posed by paragraph 399(a)(ii)(a)[1] of the Immigration Rules.

10. In respect of the judge's consideration of paragraph 399(a)(ii)(b)[2], Ms Patyna submitted that the judge had erred in his consideration of Mr Horrocks' report, in that he had given inadequate reasons for going behind the assessment undertaken by the expert. She relied on what was said by Sedley LJ (with whom Arden and Moses LJJ agreed) in Y & Z (Sri Lanka) v SSHD [2009] EWCA Civ 362; [2009] HRLR 22. At [11] of his judgment in that case, Sedley LJ stated that a Tribunal must give acceptable reasons for rejecting the evidence of an expert. At [32] of her skeleton argument, Ms Patyna also relied upon dicta to similar effect at [21] of SS (Sri Lanka) v SSHD [2012] EWCA Civ 155, per Stanley Burnton LJ, with whom Maurice Kay and Lewison LJJ agreed. The report had highlighted [L]'s particular relationship with her father and it had been said that he was an integral part of her life. The report considered the risk to the children in the event of the appellant's deportation and, in particular, the problems which would likely be brought about by long-term separation. The reality, Ms Patyna submitted, was that the reasons given by the judge for rejecting the expert's opinion, did not undermine what he had said. The result was that the judge had left out of account the child-specific

[1] Whether "it would be unduly harsh for the child to live in the country to which the person is to be deported"

[2] Whether "it would be unduly harsh for the child to remain in the UK without the person who is to be deported"

considerations which he was required to assess as a result of Zoumbas [2012] UKSC 74; [2013] 1 WLR 3690.

11. At the start of his submissions, we asked Mr Bramble to clarify the extent to which the respondent was prepared to accept that the judge had fallen into error. He accepted that the judge's assessment of whether it would be unduly harsh for family life to continue in Sierra Leone was vitiated by a failure to take material matters into account. It was accepted, in particular, that the judge had erred in failing to provide adequate reasons for concluding that the appellant's wife, of Liberian heritage and British nationality, would be able to secure employment. Further, it was accepted that the judge's assessment of the impact of relocation to Sierra Leone on [L] was too narrow, in that the judge had focused on her education without considering her nationality and the discrimination against women in that country. Nor had there been any adequate consideration of the fact that [L] had long-established roots in the United Kingdom.

12. Mr Bramble nevertheless submitted that the error disclosed by ground one was not material to the outcome of the appeal. It was to be recalled, he submitted, that it was incumbent upon the appellant to show that it would be unduly harsh on the children to follow him to Sierra Leone **and** that it would be unduly harsh on them to remain in the UK without him. He submitted that it was apparent from the judge's assessment that these two questions had been dealt with separately and that, contrary to the assertion in ground two, the judge's assessment contained no legal error. The judge had concluded that there was a paucity of evidence to show that [L] had suffered an adverse reaction to her father's absence during his two later terms of imprisonment. In so concluding, the judge had clearly taken account of the witness statements before him and the periods of imprisonment which the appellant had actually served. He had been entitled to attach less weight to the expert report for the reasons he had given.

13. Mr Bramble submitted that the judge plainly understood the law which applied to the determination of the appeal. Paragraphs [113] and [125] contained model self-directions on KO (Nigeria) [2018] UKSC 53; [2018] 1 WLR 5273. He had considered the expert report in detail and had been entitled to conclude that it was deserving of less weight than had been submitted by Ms Patyna. In summary, it was accepted by the respondent that the judge had erred in law in his consideration of the first of the two questions posed by paragraph 399 but not in respect of the second. The assessment of the second limb stood and the error in respect of the first limb was immaterial.

14. In reply, Ms Patyna accepted that she was required to establish that the judge had erred as alleged in grounds one *and* two if the

decision was to be set aside. She submitted that although there was an absence of medical evidence concerning [L]'s reaction to her father's more recent periods of imprisonment, there was evidence provided about her reaction in her parents' statements. She submitted that [11] of the judge's decision contained what was, on any proper view, a legally flawed assessment of the expert report and an inadequately reasoned rejection of the same. Those flaws tainted the judge's overall conclusion, at [125], that the appellant's deportation would bring about nothing more than the 'inevitably harsh consequences' which are to be expected from deportation.

Discussion

15. As we have recorded above, it is accepted by the respondent that the judge fell into error in his assessment of whether it would be unduly harsh for the appellant's family, and in particular the appellant's children, to live with him in Sierra Leone. That concession is properly made and we agree with the reasons given by Mr Bramble for not opposing the first ground, as set out at [10] above. Ms Patyna accepted orally, however, that she was also required to establish that the judge had fallen into the error alleged in ground two if she was to show that the overarching Article 8 ECHR analysis could not stand.

16. For the reasons which follow, we do not accept that the judge fell into legal error in his assessment of whether it would be unduly harsh for the appellant's family to remain in the UK without him. As Mr Bramble noted in his submissions, the judge's starting point was an accurate self-direction with reference to KO (Nigeria) at [113] and [125]. In the former paragraph, the judge directed himself in the following way:

> "Neither the nature of the appellant's offending nor his immigration history are relevant. [KO (Nigeria)] makes it clear that for something to be unduly harsh it must go beyond what would necessarily be involved for any child faced with the deportation of a parent, which will inevitably involve some degree of harshness for the child. However, it is not necessary at this stage for the appellant to show that there are very compelling reasons why he should not be deported."

17. Having so directed himself, the judge embarked upon a detailed consideration of the claim made by the appellant and his wife, which was that the size of their family and the difficulties they have suffered in the past meant that the appellant's deportation would give rise to a degree of harshness going beyond what would

necessarily be involved for any child faced with the deportation of a parent. In support of that claim, the appellant relied particularly upon the report of Mr Horrocks.

18. Mr Horrocks qualified as a Social Worker in 1988 and has been in the field, including at senior management level, since then. Mr Horrocks was provided with a number of documents connected with the appeal and he interviewed the family in their home on 20 November 2018. Having considered that material, he produced a report which extends to 31 pages of double-spaced type. We do not propose to rehearse the contents of the report. We have read and considered it in its entirety, just as the judge clearly did. The key conclusion upon which Ms Patyna relied, however, was that the family would struggle to function in various ways in the event of the appellant's deportation.

19. Mr Horrocks' report set out the organisational difficulties caused by the fact that there were five children of varying ages and that [L], the eldest, was 'severely impacted by the separation from her father on the last occasion when he was sent to prison: [4.15] refers. He expressed concern about the appellant's wife's mental health problems and recounted that she and the appellant had suggested that she might 'have some form of breakdown' if he was removed from the UK. Mr Horrocks considered that there were 'significant risks' that [L] would develop long-term eating problems as a reaction to the stress of her father's deportation: [4.22]. He noted that there were 'only three children in the family' when the appellant was in prison and that the addition of a further two children would render it less likely that the appellant's wife would be able to manage, including with respect to being able to meet the children's needs in terms of food and accommodation: [4.23] and [4.24]. He considered that there was a 'major risk' of family breakdown and of the children being taken into care and requiring 'long term placement homes': [4.25]. In his conclusions, Mr Horrocks also noted that the appellant's wife 'has physical health problems as a result of four caesarean operations and is unable to lift or to do any heavy work'.

20. As will be immediately apparent, the judge would have been bound to conclude that there would be a degree of harshness beyond what would ordinarily be expected if he had accepted Mr Horocks' report in its entirety. We have no doubt that the test of undue harshness, as construed by KO (Nigeria), would be satisfied if it was accepted that the absence of the appellant would cause [L] to develop long-term eating difficulties and the children to be taken into long term care. The judge did not suggest that Mr Horrocks was not a proper expert or that he had assumed the role of an advocate. The reasons he gave for rejecting the conclusions we have mentioned above were, instead, as follows:

(i) The report was based on inaccurate information, the most striking of which was the suggestion that the appellant's wife would particularly struggle to manage now that she had five children, whereas she had only had three children when the appellant was last imprisoned. In fact, as the judge noted at [119], the appellant and his wife had four children when he was last in prison; [A] was only six months old when he was sentenced to a term of imprisonment by East Kent Magistrates' Court in 2017. Mr Horrocks had seemingly considered the position during the appellant's 2013 term of imprisonment, but not the more recent terms.

(ii) That weakness was also revealed in Mr Horrocks' conclusions in respect of [L]: [120]. The eating problems which she had developed when the appellant was in prison, which had necessitated counselling, had developed in 2013 and there was no other evidence to show that such problems had developed during the appellant's subsequent periods of imprisonment. There was consequently little basis, the judge concluded in this paragraph, for Mr Horrocks' assessment that [L] would be at major risk of developing long term eating problems. The judge also noted that that conclusion was inconsistent with Mr Horrocks' earlier acceptance that there had been no further concerns about [L] since 2013.

(iii) Mr Horrocks had accepted what he had been told by the appellant and his wife, which was that it was always the appellant who took [Hm] to school and picked him up. That statement was inconsistent with the letter from the school, however, in which it was stated that the appellant 'periodically' collected [Hm] from school: [121]. This inconsistency was thought by the judge to undermine Mr Horrocks' concern that the appellant's wife would be unable to collect the older children herself: [121].

(iv) The judge also considered Mr Horrocks' report to be speculative in parts. He noted that there was little reason to suppose, as had Mr Horocks, that the appellant's wife would be unable to provide food and accommodation for the children in the event of the appellant's deportation: [122]. She was dependent upon social housing and welfare benefits and the judge could see no reason why that entitlement would not continue if the appellant was deported. For the same reasons, he considered the conclusion that the children would suffer harm to their physical development was speculative.

21. Drawing those threads together, at [123], the judge decided to attach little weight to Mr Horrocks' conclusions, firstly, that there was a major risk of family breakdown in the absence of the appellant and, secondly, that the appellant's wife would be likely

to develop mental health problems as a result of the appellant's absence.

22. Ms Patyna submitted that the reasons given by the judge for so concluding were inadequate, when set against what was said by Sedley LJ and Stanley Burnton LJ in the two authorities we have cited above. In SS (Sri Lanka), Stanley Burnton LJ underlined that the weight, if any, to be given to expert evidence is a matter for the trial judge. He stated that a judge's decision not to accept expert evidence does not involve an error of law, provided he approaches that evidence with appropriate care and gives good reasons for his decision. He stated that the two aspects of the test were inter-related, and that the judge's 'reasons demonstrate his care': [21]. In that case, the Senior Immigration Judge was held to have given full and cogent reasons for rejecting the view of a Consultant Psychiatrist. Those reasons included the 'fundamental differences' between the account given to the doctor and the findings reached by the Tribunal: [24].

23. In concluding that the Senior Immigration Judge in SS (Sri Lanka) had not erred in his approach to the medical evidence in that case, Stanley Burnton LJ drew on what had been said by Sedley LJ in Y & Z (Sri Lanka). Like Stanley Burnton LJ, we consider the following sections of Sedley LJ's judgment to be worthy of reproduction in the context of this appeal:

> "[11] While no tribunal is bound simply to accept everything that such experts say because they have gone uncontradicted, it is well established that the tribunal must have, and must give, acceptable reasons for rejecting such evidence. …
>
> [12] … where the factual basis of the psychiatric findings is sought to be undermined by suggesting that the appellants have been exaggerating their symptoms, care is required. The factuality of an appellant's account of his or her history may be so controverted by the tribunal's own findings as to undermine the psychiatric evidence. This happens from time to time, but it did not happen here. What happened here was that the designated immigration judge himself formed the view that the appellants (who had not given oral evidence before him) had been calculatedly exaggerating the symptoms they recounted to the expert witnesses. That is in the first instance a matter for the experts themselves, a fundamental aspect of whose expertise is the evaluation of patients' accounts of their symptoms: see *R (M) v IAT* [2004] EWHC (Admin) 582 per Moses J. It is only if the tribunal has good and objective reason for discounting that evaluation that it can be modified or – even more radically - disregarded."

24. Adopting that approach, we have no difficulty in concluding that the judge in this appeal gave legally acceptable reasons for attaching little weight to Mr Horrocks' report. He concluded, as had the Senior Immigration Judge in SS (Sri Lanka) that the factual basis of Mr Horrocks' report was incorrect. Mr Horrocks had been concerned that the appellant's wife was in a drastically different position from that which obtained when she was last deprived of his assistance, but that was not so. Mr Horrocks had been particularly concerned by the eating problems [L] had developed when the appellant was imprisoned but there was no medical evidence to show that these had occurred again when he was imprisoned on two subsequent occasions. The evidence from [Hm]'s school gave an account which differed from that provided to Mr Horrocks by the appellant and his wife. And there was no basis in fact, the judge held, for Mr Horrocks's suggestion that the appellant's wife would be less able to provide food and shelter for her children in the event that the appellant were to be deported. These were legally adequate and logical reasons, in our judgment, for the ultimate conclusion reached by the judge. The weight to be attached to the expert report was a matter for him and he was entitled to attach little weight to Mr Horrocks' report for the reasons that he gave.

25. It follows that we do not accept Ms Patyna's submission that the judge's assessment of the 'harshness' of the family remaining in the UK without the appellant is flawed by legal error. As she accepted, the fact that ground one is made out does not suffice, in those circumstances, to undermine the judge's ultimate conclusion that the appellant's deportation would not be contrary to Article 8 ECHR. The decision to dismiss the appeal will accordingly stand.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed. The decision of the FtT will stand.

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

11 December 2019