Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00144/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th December 2018	**On 08th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[J O]
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr. S. Whitwell, Home Office Presenting Officer
For the Respondent: Mr. D. Jones, Counsel instructed by Sutovic & Hartigan Solicitors

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Griffith, promulgated on 20th July 2018, following a hearing at Hendon Magistrates' Court on 29th June 2018. In the decision, the judge allowed the appeal of the Appellant, whereupon the Respondent subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me. For convenience I will refer to the parties as they were referred to in the First-tier Tribunal.

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The Appellant

2. The Appellant is a citizen of Cameroon, and was born on 7th November 1975. He is married to a Mrs RKO, a British citizen, and they have one child, “J”, who was born on 2nd November 2008, and is a British citizen. The Appellant also has two young adult stepdaughters, M and JA, who are the children from his wife’s former marriage, and who are also British citizens. He also has an adult daughter who is now living in Belgium, after leaving Cameroon some time in 2014.

The Appellant’s Claim

3. The essence of the Appellant’s claim is that in Cameroon he was arrested and detained on four occasions between 1997 and 2002 on account of his membership of the Social Democratic Front (SDF) and Southern Cameroon National Council (SCNC). He also relies on Article 8 in respect of his family life, and in particular his relationship with his son, “J”, who suffers from autism and ADHD. The Appellant has suffered for many years from mental illness as a result of his experiences in Cameroon.

4. A feature of this appeal was that there had been a previous hearing in 2012 when the judge had found against the Appellant.

The Judge’s Findings

5. In a lengthy decision, the judge had regard to the previous decision, noting the implications of **Devaseelan [2002] UKIAT 00702**, with respect to which the judge stated that, “I must take as my starting point the findings of the judge in the previous appeal promulgated in October 2012” (paragraph 80). The judge reminded himself how the previous decision should be taken into account (see paragraphs 80 to 81). He then went on to say that “A significant new factor that was not before the Tribunal in 2012 concerns the Appellant’s son J” (paragraph 82). Consideration was then given to this son’s situation, and it was noted that “One of the things mentioned was his need for routine and predictability, and that he would be stressed by sudden changes or unexpected events and tend to react negatively at those times”, as mentioned in the medical report (paragraph 82). The judge went on to say that “When the Tribunal made its decision in 2012, the medical evidence was confined to a report from Dr Hogwood, who examined the Appellant in 2006, six years before the appeal” (paragraph 83). The judge went on to say that, “The Appellant has since provided additional medical evidence for the purpose of this appeal in the form of a report form Dr Steen dated 19 March 2014, prepared at a time when he was detained” (paragraph 85). Regard was also had by the judge to the expert report from a Professor Walker-Said, dated 1 May 2018, and the judge observed that “It is a lengthy and detailed report, which concludes that the Appellant would likely be in grave danger should he be returned to Cameroon …” (paragraph 86).

6. The judge then went on to make findings that were in the Appellant's favour (see paragraphs 94 to 99) before also concluding in favour of the Appellant in relation to Article 8 (see paragraphs 100 to 109).

7. The appeal was allowed.

Grounds of Application

8. The grounds of application state that the judge did not apply the strictures of **Devaseelan** in the correct manner. Moreover, the judge also applied the wrong legal test in relation to the "unduly harsh" test, which according to **MM (Uganda) [2016] EWCA Civ 450**, meant that the effect on the children has to be balanced against the public interest, which increases in the light of the Appellant's repeated offending behaviour.

9. On 7th November 2018, permission to appeal was granted by Dr. H. H. Storey, on the basis that "in relation to the Appellant's Article 8 claim [the judge] failed to properly balance the public interest factors when considering the issue of undue harshness". It was also said that the judge gave inadequate reasons. Moreover, the expert report appears to have been given added credibility purely on account of the expert's academic qualifications rather than the contents of what was being said.

The Hearing

10. This appeal was by the Respondent Home Office, and that being so Mr. Whitwell, submitted that the judge had erred, not only in providing inadequate reasons for allowing the appeal, but also for implying that, whilst the public interest could not be factored into undue harshness, that did not mean to say that the best interests of the child automatically equated with "undue harshness". Having said that, however, he would have to concede that reliance upon **MM (Uganda) [2016] EWCA Civ 450** was now misconceived, in the light of **KO (Nigeria) [2018] UKSC 53**.

11. Mr. Whitwell also submitted that the judge's treatment of **Devaseelan** (at paragraph 81), and in its efforts to distinguish the previous decision of October 2012 (see paragraphs 8 to 27) was not made out. Furthermore, as far as the expert was concerned, the judge was unduly impressed by the expert's report. This was important because the Respondent had taken the position that "it was submitted that the country expert did not have the expertise to make robust findings and her report was speculative". However, the judge dealt with this by stating that, "A reading of her credentials, however, suggests the opposite" (paragraph 95). Just because the expert's credentials were impressive, did not mean to suggest, submitted Mr. Whitwell, that an opposite conclusion could be reached, when the complaint against the expert was that no robust findings had been made.

12. For his part, Mr. Jones submitted at the hearing before me on 17th December 2018, a well compiled Rule 24 response. He made two fundamental submissions. First, the judge's approach in relation to the Rule in **Devaseelan** was entirely correct, and the judge properly distinguished the earlier 2012 decision from the current changed circumstances of the Appellant, before concluding in his favour. Second, the case of **KO (Nigeria) [2018] UKSC 53**, now meant that the challenge on Article 8 grounds, on the basis that **MM (Uganda) [2016] EWCA Civ 450**, stated that when looking at "unduly harsh" test, it was important to balance in the public interest, alongside the effects of removal on the children, was plainly now wrong. The effect of **KO (Nigeria)** was that once it was decided that the best interests of the child suggested that it would be "unduly harsh" for the removal to take place, no public interest consideration fell to be applied. To that extent paragraph 10 of the grounds of application was wrong. To that extent also, the grant of permission by the Upper Tribunal, in terms that the judge had "failed to properly balance the public interest factors when considering the issue of undue harshness", was also wrong.

My Decision

13. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that it falls to be set aside. My reasons are as follows. First, it is plain that the reference to **MM (Uganda) [2016] EWCA Civ 450**, is misconceived, both at paragraph 10 of the grounds of application, and in the grant of application by the Upper Tribunal when it is stated that the judge arguably "failed to balance the public interest factors when considering the issue of undue harshness". This is because on the question of "undue harshness" only the best interests of the child remains a relevant consideration, and the public interest in favour of removal is not a factor to be considered. This flows from the decision in **KO (Nigeria)** (see paragraph 32, and also paragraph 23).

14. In fact, as has been submitted Mr. Jones, the Secretary of State in his refusal letter (at paragraph 12) had conceded that the removal of the Appellant would be "unduly harsh". Given that that is the case, the appeal could not now succeed on the part of the Respondent Secretary of State, because the best interests of the child required that the Appellant remain in this country, with the child, who could not himself be required to leave this country, given his medical needs, and his British citizen status, as well as the British citizen status of his mother and his siblings.

15. Second, as far as the application of **Devaseelan** is concerned, it is plain that the judge gave very careful attention to this case (at paragraphs 80 to 81), before explaining why it was necessary to depart from the October 2012 decision, this was done on the basis of "a significant new factor" which was not before the Tribunal in 2012, and this was to do with the child's medical condition, who required stability, and who "would be stressed by sudden changes or unexpected events and tended to react

negatively at those times" (paragraph 82). There was also further medical evidence (paragraph 83) as well as additional further evidence in relation to the Appellant (paragraph 85). Accordingly, the judge had ample grounds, which were demonstrated as such, for him to be able to depart from **Devaseelan**.

16. Third, insofar as it is said that the judge failed to give critical consideration to the expert report by Dr. Walker-Said, this complaint also, on closer inspection, falls away. It is true that the judge does initially meet with the explanation that, "a reading of her credentials, however, suggest the opposite", when dealing with the Respondent Secretary of State's concern that "the country expert did not have the expertise to make robust findings and the report was speculative" (paragraph 95). However, all that the judge was stating here was that "I consider I am entitled to attach considerable weight to her conclusions" (paragraph 95). That is the same as saying that the expert is a person of some substance, who has the expertise to declare upon matters that fall within the expert's knowledge and expertise. Moreover, the judge went on to explain that the expert had given specific regard to the appellant's mental health issues, and quoted from the report by WHO, before pointing out that there are only seven psychiatrists in a country of 22 million people in Cameroon (paragraph 96). The conclusion of the expert was that "the Appellant would not be able to access advance medicine required to treat his depression and mental health issues" (paragraph 96). That was a conclusion that stood quite aside from the expert's credentials.

Notice of Decision

17. The decision of the First-tier Tribunal did not involve the making of a material error of law. The decision shall stand.

18. No anonymity order is made.

19. The appeal of the Secretary of State is dismissed.

Signed Date

Deputy Upper Tribunal Judge Juss 4th January 2019