Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12616/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 September 2019	**On 16 September 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

EK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Aitken
For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 24 May 2019, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons were as follows:

> "1. I shall refer to the appellant as the respondent and the respondent is the appellant, as they appeared respectively before the First-tier Tribunal. The appellant was born in 1980 and is a male citizen of Cameroon. On 8 June 2009, the appellant was sentenced to 18 months imprisonment for obtaining pecuniary advantage by deception and making false representations for gain and money laundering. The appellant had, over a period of time, abused his position as a

ticket barrier officer for Virgin Rail to steal £15,000 using credit cards taken from passengers. By a decision dated 24 January 2011, the appellant was informed that he was subject to deportation as a foreign criminal and his human rights and protection claims were refused. He appealed against that decision but his appeal was dismissed by the First-tier Tribunal on 25 May 2011. He became appeals rights exhausted on 7 June 2011. On 12 May 2012, he submitted an application for leave to remain as the spouse of a settled person. That application was refused by the Secretary of State on 11 October 2018. The appellant appealed against that decision to the First-tier Tribunal, which, in a decision promulgated on 21 March 2019, allowed the appeal on human rights grounds (Article 8). The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. In the grounds of appeal, the Secretary of State acknowledges that the appellant may rely upon paragraph 399(a) of HC 395 (as amended):

> '(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
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> (i) the child is a British Citizen; or
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> (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;'

The Secretary of State does not dispute that would be unduly harsh for the appellant's British children to be expected to move to Cameroon. However, he argues that it has 'not been shown to the required level' that it would be unduly harsh for the children to remain in the United Kingdom without the appellant. In essence, the grounds challenge the judge's analysis as regards the issue of delay and that issue was the sole focus of the oral submissions made to me at the initial hearing by both representatives.

3. The judge made it clear in his decision [54] that, but for the delay on the part of the Secretary of State, 'deportation would have been unavoidable.' It was delay alone, therefore, which led the judge to conclude that the deportation of the appellant, whilst his minor children remained in the United Kingdom, would have an effect upon them which would be unduly harsh.

4. The judge has produced cogent and detailed analysis. He has, however, in my opinion, fallen into error. At [46], he writes, in a passage in part quoting verbatim from the opinion of the House of Lords in EB (Kosovo) [2008] UKHL 41, as follows:

> "It is hard to overstate the drip, drip effect of such delay. At any time, when reporting to the police, he could have been detained again for deportation. It appears to be a power line case of the type referred to by the House of Lords – where months pass and months become years and years succeeds year so that the sense of impermanence fades and the expectation grows that the authorities do not intend to remove him. That expectation will have grown in his wife to, and in the two children. The shadow of

> deportation will have faded. In those circumstances, to now insist on his removal, having allowed hopes to grow in this way, does involve some additional hardship, beyond that necessarily involved by their separation."

5. Here, the judge relies heavily upon EB at [15]. I have emphasised in the quotation set out below passages of particular relevance:

> "Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in R (Ajoh) v Secretary of State for the Home Department [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see Boultif v Switzerland (2001) 33 EHRR 50, para 48; Mokrani v France (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal."

6. The difficulty is that, as the grounds point out, this is not a case where months or years passed 'without a decision to remove being made' still less one any expectation should have arisen that the authorities 'had they intended to remove the appellant … would have taken steps to do so.' The appellant was well aware that a deportation order had been made and also that the order remained in force as it had not been revoked or cancelled in any way. Moreover, as the First-tier Tribunal judge acknowledged [45], the period between the making of the deportation order in the hearing before him had not been one in which there had been no activity in the appellant's case; the appellant had made further submissions in September 2013, February 2016, July 2016 in September 2018. Such submissions are not consistent with the suggestion that the applicant genuinely believed that the threat of deportation had been lifted. I do not agree with the judge that delay in this case can or should have allowed the appellant's 'hopes to grow' that he would not be deported. It is clear from what the judge says at [46] that his misunderstanding of the relevance of delay in these particular circumstances has led him incorrectly to assess the extent of hardship relevant in the test which he had to apply. As a consequence, is analysis has been flawed by legal error.

7. I discussed with the representatives the best course of action should I find that the First-tier Tribunal's decision required to be set aside. I have considered remaking the decision on the existing evidence but have concluded that the

> Upper Tribunal would be assisted in remaking the decision if it were to hear further submissions and also updating evidence concerning the appellant's family life.
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> **Notice of Decision**
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> The decision of the First-tier Tribunal promulgated on 21 March 2019 is set aside. None of the findings of factual stand. The decision will be remade in the Upper Tribunal (Upper Tribunal Judge Lane) at or following a resumed hearing at Field House on a date to be fixed. Both parties may adduce fresh evidence provided copies of any documentary evidence (including witness statements) are sent to the Upper Tribunal and to the other party no less than 10 days prior to the resumed hearing."

2. At the resumed hearing on 6 September 2019, the appellant and his wife adopted their witness statements as evidence in chief. They were not cross-examined. Having heard the submissions of both representatives, I reserved my decision.

3. The issues in the appeal remain those which had been before the First-tier Tribunal. The appellant appeals on human rights grounds (Article 8 ECHR) against the decision to deport him to Cameroon (no protection appeal is pursued). Paragraph 399 (a) of HC 395 (as amended) and Section 117C of the 2002 Act (as amended) both apply. With the exception of sub-section 117B(6), the general considerations applicable in all cases and relating to the public interest contained in section 117 are also relevant. I have had regard to section 55 of the Borders, Citizenship and Immigration Act 2009 and the best interests of the two children as a primary consideration. Neither party suggests that it would be reasonable for the British children of the appellant (aged 10 years and six years respectively) to accompany him to live in Cameroon. The only issue is whether it would be unduly harsh for children and the appellant's wife to be separated from him by deportation.

4. The evidence given by the appellant and his wife is not controversial. There are two fresh items of evidence adduced since the initial hearing: a letter from Sacred Heart Catholic Primary School dated 18 July 2019 and an independent social worker report (Dawn Griffiths) dated 26 June 2019. Both the letter and report express concerns regarding the elder child, L, who has now been told about the precarious nature of her father's continued residence in the United Kingdom. The school letter describes L as 'very emotional' when speaking of her life without a father. It is clear from this evidence also that L is sufficiently mature to appreciate that her mother may struggle to care for the family alone in the absence of the appellant. The social worker report refers to 'emotional changes' in L and the risks which the siblings may face if the negative effect of their father's deportation were to lead them to suffer social exclusion at school.

5. The familiar guidance set out in *MK (section 55 -Tribunal options)* Sierra Leone [2015] UKUT 223 has, in turn, been approved in the Supreme Court in *KO (Nigeria)* [2018] UKSC 53:

> "27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT

223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" 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."

On the facts of that particular case, the Upper Tribunal held that the test was satisfied:

> "Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less that cruel."

This view was based simply on the wording of the subsection and did not apparently depend on any view of the relative severity of the particular offence. I do not understand the conclusion on the facts of that case to be controversial.

6. The appellant's wife and children are, as noted above, British citizens. The appellant and sponsor married in November 2004. I acknowledge that the appellant and his wife are parties to a marriage of considerable duration. The appellant entered the United Kingdom 2003 as an asylum seeker although his application was refused and a subsequent appeal dismissed. His criminal offending led to a sentence of 18 months imprisonment in June 2009. I acknowledge that the appellant's offending is at the lower end of seriousness and, whilst it did not involve violence or drugs did involve dishonesty and deception. The appellant does not appear to have had any legal status in the United Kingdom other than by way of section 3C leave throughout much of his marriage. He made an application in May 2012 for leave to remain as the spouse of United Kingdom citizen and I am aware of the fact that this application was not decided until October 2018. I acknowledge that, throughout considerable periods of the marriage, the appellant was either engaged in appealing unfavourable decisions to the First-tier Tribunal or waiting for an application to the respondent to be processed.

7. Turning to the position of the children, I am in no doubt that the removal of their father from the family home will cause significant emotional pain and, at least in the short term, disruption to their education because they will be distressed. I note that L is receiving weekly counselling sessions at her school in order to enable her to 'cope with her emotions.' However, the fact that L has reacted poorly to news of her father's possible removal is neither surprising nor is it an effect of the appellant's possible deportation which is either surprising or out of the ordinary in terms of its severity. I consider it very likely that any child of L's age being told that her father may be removed from the family home would react in a similar way; such a reaction may perhaps properly be described as a 'duly' harsh consequence of any deportation.

8. Beyond recording the effect of the news of her father's deportation upon L, the independent social worker report otherwise descends into generalisations and an account of the possible, rather than likely, future effects upon L. Such effects are not to be discounted but, understandably, the author of the report is not in a position to offer a 'prognosis' of L's emotional reactions as there is little existing evidence of how she may, in fact, react in the medium to longer term. I am sure that children who suffer the negative effects of a parent's deportation may be at risk of social exclusion if they are not engaging at school, as Ms Griffiths states at 18.9, but this does not mean that such a consequence is likely to occur in L's case. With some hesitation, therefore, I am unable to say that the evidence before the tribunal indicates, on a balance of probabilities, that the effect of the appellant's deportation upon L or upon the other child, E, can properly be described as unduly harsh. In reaching that conclusion, I stress that it is important that the tribunal seeks to apply relevant law to the evidence in the particular case before it; in most, if not all, cases the tribunal will feel much sympathy for a child faced with separation from a much-loved parent but sympathy and the objective application of a test to the evidence are not synonymous. The proper application of the principle of the best interests of the children requires me to give significant weight to the children's relationship with the appellant but, for the reasons I have stated above, I am unable to conclude that the consequences of deportation would have effects upon the children which will be unduly harsh.

9. The appellant also asserts that the effects of his deportation upon his wife would also be unduly harsh. I accept that the couple are been married for 15 years and that they have a close relationship. I acknowledge that the sponsor may be awaiting an echocardiogram and may be suffering from asthma. I am aware that she takes tablets for anaemia. I also have no doubt that the prospect of a husband's removal is causing her anxiety and stress and that part of that stress may relate to the fact that she is the sole breadwinner at the family home from her work as an assistant nursing practitioner; without the appellant to help care for the children, her ability to discharge the duties of that work may be diminished. However, these are all consequences which are very likely to arise in many cases involving deportation of a spouse. I have no doubt that the effects of deportation upon the appellant's wife will be harsh; I am, however, unable to conclude on the evidence that those effects go beyond that and may be described properly as unduly harsh.

10. In the circumstances, the appellant's appeal is dismissed.

Notice of Decision

The appellant's appeal against the decision to refuse his protection and human rights claim following the making of a deportation order is dismissed on all grounds.

Signed Date 6 September 2019

Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.