Upper Tribunal
(Immigration and Asylum Chamber)
DA/00853/2014

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 December 2015	**On 4 January 2016**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SF
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Unrepresented
For the Respondent: Ms Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order. Unless the Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Introduction

1. The appellant is a citizen of the Democratic Republic of Congo (DRC). He has a wife and three minor children. The children were born in 2005, 2007 and 2009 in the United Kingdom (UK). I have made an anonymity order in order to protect the privacy of the

children.

Background

2. The background to this appeal is lengthy and complex. The appellant claimed asylum on arrival in 2002. After unsuccessfully appealing against the refusal of his asylum claim he became appeals rights exhausted in 2004. On 18 January 2008 the appellant was convicted of two counts of possessing false identity documents and was sentenced to 12 months imprisonment with a recommendation for deportation. After the appellant unsuccessfully appealed against a deportation decision following this, a deportation order was signed against him on 21 October 2008. The appellant's wife entered the UK in 2004 and claimed asylum in 2005. Her appeal against the refusal of her asylum claim was also unsuccessful.

3. There then followed an extended period in which the appellant and his wife made a number of submissions as to why he should not be deported to the DRC, and why they should be granted leave to remain together with their three children. On 16 April 2014 the SSHD treated the appellant's representations as an application to revoke the deportation order and refused to do so. On that same date the SSHD refused to treat the appellant's wife's submissions as a fresh claim, together with those of their children.

4. The appellant appealed against the SSHD's decision to refuse to revoke the deportation order to the First-tier Tribunal (FTT). In a decision dated 14 August 2015, I allowed the appeal against the FTT decision dated 10 September 2014 to a limited extent. I accepted that the FTT was entitled to find that the appellant did not face a real risk of harm for reasons relating to his political activities and / or his failed asylum seeker status but that the FTT erred in law in failing to consider paragraph 399(a) of the Immigration Rules. I decided that I should remake the decision myself at an adjourned hearing

The issues

5. It has been agreed that the issues before me are now limited to the following:

    (i) As the appellant was sentenced to a period of imprisonment of 12 months and it is accepted that he has a genuine and subsisting relationship with his eldest child, P, who is under the age of 18 and has lived in the UK continuously for at least seven years immediately preceding the date of the immigration decision, consideration must be given to whether it would be unduly harsh for P to live in the DRC and if yes, whether it would be unduly harsh for P to remain in the UK without the appellant (para 399(a) of the Immigration Rules);

(ii) As the appeal is against a refusal to revoke a deportation order if para 399 does not apply it whether there are exceptional circumstances such that the public interest in maintaining the deportation order is outweighed by other factors (para 390A).

6. In defining the above issues I have taken into account the fact that P was born in the UK and has lived here continuously for the first 10 years of her life. She may therefore register as a British citizen pursuant to section 1(4) of the British Nationality Act 1981 as amended, upon making the necessary application. P is however not a British citizen at present.

7. At the last hearing I carefully explained to the appellant the relevant legal issues to be addressed and the nature and extent of the evidence likely to be necessary in order to establish undue harshness as defined and explained in MAB (para 399; "unduly harsh") USA [2015] UKUT 435 (IAC). I provided copies of this case to the appellant and highlighted that in order to determine whether the consequences for P will be unduly harsh, evidence will need to demonstrate that the consequences for her will be excessively severe or bleak taking into account all the circumstances. This requires a high threshold to be met and involves something more than uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging consequences. The hearing was adjourned to give the appellant an opportunity to provide further up to date evidence and for the respondent to consider it.

Evidence

8. The appellant has provided a number of letters to support his claim that he should not be deported. He has sought to distinguish his position from the appellant in MAB.

9. He has however provided very limited evidence regarding his children. A recent letter from the children's school repeats that which has already been said: the children are in the same primary school and are in years 6, 4 and 2 respectively; they have a good attendance and have made lots of friends; their parents are actively involved with the school.

10. I also heard evidence from both the appellant and his wife. They claimed that the children suffered from coughs and exzema. They did not provide any medical evidence to support their assertions that the children are 'unwell'. The appellant's wife also told me that she has found it very difficult to cope since she lost a baby a few years ago. She described herself as 'walking dead' but confirmed that she has been able to work as a cleaner for 16 hours a week since last year.

11. After hearing evidence from the appellant and his wife I heard submissions from Ms Brocklesby-Weller. She invited me to find that

the evidence came no where near to meeting the high threshold required by the 'undue harshness' test. I then heard from the appellant who emphasised that upon return to the DRC he would have no job, accommodation and no contacts and this would mean that the family would be living in extremely difficult circumstances.

12. At the end of submissions, I reserved my decision which I now provide with reasons.

Legal framework

13. The relevant legal framework to be applied is not in dispute and can be stated briefly. The decision under appeal is a refusal to revoke a deportation order. The appropriate starting point under the Immigration Rules is therefore to be found at paragraph 390.

> "Revocation of deportation order
> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
> (i) the grounds on which the order was made;
> (ii) any representations made in support of revocation;
> (iii) the interests of the community, including the maintenance of an effective immigration control;
> (iv) the interests of the applicant, including any compassionate circumstances.
>
> 390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors."

14. Paragraph 398(a) applies here because the appellant has claimed that his deportation would be contrary to Article 8 of the ECHR and he has been sentenced to between 12 months and less than 4 years imprisonment.

15. It is then necessary to consider paragraph 399(a) (the only potentially relevant provision). This applies if:

> "the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
> (i) the child is a British Citizen; or
> (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…"

16. The question for me is whether or not it would be unduly harsh for P to live in the DRC, the country to which her father is to be deported.

If the answer to that is yes I must also then consider whether it would be unduly harsh for her to remain in the UK without her father. Although at the time of the decision a different and more generous version of the relevant rule applied it is common ground that I must apply the version I have just summarised, which has been in force since 28 July 2014.

17. Since MAB was promulgated another Tribunal decision addressing the identical issue has been promulgated – KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 00543 (IAC). KMO takes the same approach to the high threshold to be applied when considering the meaning of 'unduly harsh' but finds that the word 'unduly' requires consideration of the public interest considerations contained in section 117C of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). I prefer the approach set out in MAB and apply its reasoning to the instant case. I am satisfied that the MAB approach is more consistent with the ordinary meaning of the wording of the relevant rule. If there is ambiguity then the stricter reading should not be adopted without particularly good reason. Furthermore in my view the MAB approach reflects the proper construction of section 117C. This provides at (3) that the public interest requires C's deportation unless Exception 2 applies. Exception 2 applies where "…*the effect of C's deportation on the… child would be unduly harsh*". It follows that where Exception 2 applies the public interest does not requires C's deportation. The reason for this is that the public interest has already been factored into the parameters of the relevant 'Exceptions' as reflected within the Immigration Rules.

Discussion

18. The appellant attempted to reargue before me that there was no deportation order or at least should not have been one because the sentencing judge and his criminal barrister at the time indicated that his offence was not suitable for deportation. This claim is inconsistent with the judge's sentencing remarks in which he recommended deportation. The appellant has also sought to explain that his offending was not serious and there were mitigating circumstances. The sentencing judge bore this in mind but nonetheless sentenced the appellant to 12 months impronment for possessing a false identity document with intent. In any event the SSHD undoubtedly signed a deportation order against the appellant in October 2008 and was entitled to do so.

19. The appellant believes that he will be imprisoned upon return to the DRC because of his perceived political opinion. This has already been considered and rejected, most recently by the 2014 Tribunal. The appellant has placed reliance upon a letter from 'Congo Support Project' dated 26 August 2015. This claims that he has been a prominent member of the Congo Support Project since 2007, and has been at the 'forefront of our campaigning'. This letter also refers to the general insecurity, lawlessness in the DRC which will be

damaging to the well-being of the children. This letter merely repeats the appellant's claimed political activities, much of which has already been rejected.

20. The appellant's wife wished to highlight in her evidence to me that they believed that they were wrongly refused leave to remain pursuant to the SSHD's 'legacy' exercise. This has already been comprehensively addressed and rejected by the 2014 Tribunal at [27-31].

21. I now turn to P's likely circumstances in the DRC if removed alongside her family members. P was born in the UK in June 2005 and has remained in the UK ever since. This means that she has been continuously resident in the UK for over 10 years and can apply to be registered as a British citizen.

22. It is not disputed that the appellant has a genuine and subsisting relationship parental relationship with P. The issue that divides the parties is whether or not it would be unduly harsh for P to live in the DRC with her family, who the SSHD confirms will be removed together as a family unit. The fresh claim submissions on the part of the appellant's wife and the three children have been refused. This means that P's parents and siblings have no entitlement to remain in the UK. If the appellant is deported, the family will will be returned as a family unit.

23. The appellant's status upon return will be that of a failed asylum seeker. It has already been decided that he does not face a real risk of harm for any reason if deported. The appellant and his wife have pointed out that they have no family or support in the DRC having been in the UK since 2002 and 2004 respectively. Their residence in the UK has undoubtedly been lengthy but their previous residence in the DRC was even more lengthy. The appellant's wife has been employed in the UK as a cleaner notwithstanding the health concerns that she described to me. Those health concerns were not supported by any medical evidence before me and were rejected by the 2014 Tribunal. Even if the appellant's wife does suffer from the difficulties she claims they are not sufficiently severe to prevent her from working. I am satisfied that the appellant's wife has been able to work as a cleaner since 2014, when she claims she was granted permission to work by the SSHD. The appellant clarified that he is able to work and has a LGV licence. I do not accept their evidence that they will be unable to obtain jobs in the DRC. In so finding I note that the economic conditions are difficult. As noted in BM and others DRC CG [2015] 293 (IAC) the DRC is one of the poorest countries in the world and life expectancy is amongst the lowest in the word [7]. However the present situation in the DRC is one of relative peace and stability [10]. The appellant and his wife have relevant experience in jobs that are available in the DRC. Their experience in the UK and English language skills should serve them well. They may not have family or recent contacts to turn to in the DRC but they have demonstrated resilience over a number of

difficult and uncertain years in the UK, with few contacts and in a country with a different language and society. I am satisfied that they will be able to financially support themselves and their children if returned to the DRC.

24. I am satisfied that P belongs to a loving family unit who will be able to support her emotionally and financially in the DRC, notwithstanding the absence of any recent ties between the family members and the DRC. I accept that the human rights reports depict human rights abuses and difficult social and economic conditions in the DRC but note from the DRC policy bulletin that the UNHCR has been facilitating returns to the DRC, and that the present overall situation is one of relative peace and stability – see BM (supra).

25. I fully accept that having never been to the DRC and given the obvious differences between the DRC and the UK, and the prevailing conditions in the DRC, it is likely to be difficult for P to live in the DRC, even as part of her loving family unit. She is likely to find her living and educational environment strange and bewildering. Her quality of life may well be less in the DRC. Access to healthcare is likely to be more difficult. The status quo will abruptly and significantly change. Life will be more uncertain for the whole family including P.

26. The appellant has claimed that the children do not speak Lingala or French well. This is suprising given their parents both come from the DRC and are likely to have used those languages to communicate at home. In any event I am satisfied that P's parents will be able to assist her to integrate into the DRC in all facets, including linguistically, educationally, culturally and socially. Her parents have told me that P does not wish to go to the DRC and wants to remain in the UK with her friends and in the only community she has ever known. They also submitted that she will be deprived of an education in the DRC because they will be unable to pay for it. I note from the information contained in the SSHD's decision which is sourced to the US State Report for 2013 that the constitution and law provide for free and compulsory primary education to the age of 16, albeit that contributions are expected to teachers' salaries. This provides that on average 11% of family spending goes to education. I am satisfied that at least one of P's parents will be able to obtain a job and that she will be able to access education in the DRC, albeit their will be some disruption to her education as she changes between the systems in place between the two countries and the education she receives in the DRC may be of a lesser quality.

27. Having considered all the relevant matters in the round I accept that the impact upon P being removed from the only community she knows in the UK and having to live in the DRC with the inevitable uncertainty and hardship that this will entail is likely to have adverse effects upon her and to be harsh. I accept that it would be

preferable and in P's best interests for her to remain in the UK. I do not however find that this is a case in which it can be said that P's best interests overwhelmingly favour remaining in the UK – see EV Philippines v SSHD [2014] EWCA Civ 874.

28. The test that I must apply is a stringent one. I am satisfied that P's parents shall be able to assist her and her siblings to adjust to life in the DRC and they will be able to access appropriate adequate accommodation and education in the DRC. Whilst the effect of leaving the UK after such a lengthy period of residence having been born in the UK is likely to be harsh upon P, I am not satisfied that it will be unduly or excessively harsh taking into account all the circumstances of P including those individual to her as well as those she will have in common with her family members once residing in the DRC. I therefore do not find that 398(a) applies.

29. I must go on to consider whether it would be proportionate to deport the appellant under the rubric of very compelling circumstances over and above those described in 399 (when applying the second stage for the purposes of para 398) or exceptional circumstances (when applying 390A as this is a refusal to revoke a deportation order case), for the purposes of Article 8 in light of the matters set out within section 117 of the 2002 Act. That this is the correct approach has been explained in MAB at [32]. The decision under Article 8 must be made through the lens of the Immigration Rules but I must nevertheless apply the five-stage Razgar [2004] UKHL 27 test.

30. As explained above family life will not be interefered with because the family unit shall move together. Private life of the family members will undoubtedly be interfered with. The crucial issue in this appeal is whether that interference is justified in the public interest given the appellant's offending under Article 8(2). There is no doubt that the decision is in accordance with the law and for a legitimate aim, namely the prevention of disorder or crime and for the protection of the rights and freedoms of others as well as the economic well being of the country.

31. The public interest is entitled to be given great weight. As set out in SSHD v AJ (Angola) [2014] EWCA at [40]:

> "The requirement of assessment through the lens of the new Rules also seeks to ensure the decisions are made in a way that is properly informed by the considerable weight to be given to the public interest in deportation of foreign criminals, as declared by parliament in the 2007 Act and reinforced by the Secretary of State (as the relevant Minister with responsibility for operation of the immigration system), so as to promote public confidence in that system in this sensitive area."

32. In considering whether there are very compelling circumstances or exceptional circumstances, I must consider the best interests of the appellant's three minor children as a primary consideration but those best interests may be outweighed by sufficiently weighty

matters of the public interest - see ZH (Tanzania) v SSHD [2011] UKSC 4. As set out above I accept that the appellant's deportation would not be in the P's best interests. I make a similar finding regarding the other two children. I note that the children have spent the entirety of some of their most formative years in the UK. It will be in their best interests to preserve the status quo they have in the UK after such lengthy residence. On the other hand they shall be together as a loving family unit in the DRC with a family able and willing to care for them and financially support them.

33. In carrying out my assessment of proportionality, I must have regard to the factors set out in section 117C of the 2002 Act. First, the deportation of the appellant as a foreign criminal is in the public interest (s.117C(1)). Secondly, the more serious the offence committed by the foreign criminal the greater the public interest in his deportation. The public interest is reflected in the well-known three facets, namely the seriousness of the offence, the expression of society's revulsion at serial criminal offending; and in deterring those from committing serious offences, (see, e.g. OH (Serbia) v SSHD [2008] EWCA Civ 694). I acknowledge that the appellant's offending was not at the most serious end of the spectrum and included some mitigating features as noted by the sentencing judge, and this resulted in a sentence of 12 months duration. Such a sentence cannot be regarded as insignificant and is demonstrative of society's revulsion at identity fraud. The appellant has not reoffended. He has been bailed recently in relation to concerns regarding the asylum support he receives but I attach little weight to that given that there has been no finding / conviction / charge regarding those allegations. The appellant has however been found to have consistently told untruths regarding his asylum claim.

34. Thirdly, section 117C(3) of the 2002 states that, in the case of a foreign criminal such as the appellant who has not been sentenced to a period of imprisonment of four years or more, "*the public interest requires [that individual's] deportation unless Exception 1 or Exception 2 applies*." Exception 1 in section 117C(4) does not apply. It requires that the appellant has lived lawfully in the UK for most of his life, which he clearly has not. I have found that the effect of the appellant's deportation on P (the only qualifying child) would not be unduly harsh and therefore Exception 2 does not apply.

35. Fourthly, I must also have regard to any relevant factors under section 117B. I note that the maintenance of effective immigration control is in the public interest. I also note that it is in the public interest that an individual speaks English as does the appellant and his children (and his wife to a lesser extent). Likewise, it is in the public interest that an individual is financially independent. I accept that, in due course, the appellant will be employed if he remained in the UK as I have already found, he will in all likelihood, on return to the DRC. I accept the family has the potential to be financially independent. It is self-evident that the private lives of the appellant and his wife have been established at a time when their immigration

status was precarious and little weight should be given to this private life.

36. Whilst the appellant's criminal offending is not very serious, he remains a foreign criminal and his deportation is in the public interest. The maintenance of effective immigration control is also in the public interest. The appellant is unable to meet the Immigration Rules. There remains a significant public interest in deporting the appellant and in removing his wife with him. Having considered all the relevant circumstances, which of course are not limited to the matters set out in sections 117B and 117C and also include the best interests of the children, I am satisfied that the circumstances relied upon by the appellant in this appeal to demonstrate very compelling circumstances do not rise over and above those described in 399(a). The substance of the appellant's claim is, in effect, that his circumstances fall within 399(a). As I have already held for reasons set out above the appellant cannot succeed under this provision. For similar reasons I am not satisfied that there are exceptional circumstances such that the public interest in maintaining the deportation order is outweighed by other factors for the purposes of 390A.

37. I am not satisfied that there are very compelling or exceptional circumstances such as to outweigh the significant weight which must be attached to the public interest in this appeal, even when the best interests of the children are taken into account. Thus I am satisfied that any interference with the private and family life of the appellant and his family members is proportionate. The appellant has therefore failed to establish a breach of Article 8 of the ECHR.

38. I have made clear that in reaching my findings I have noted that P is entitled to make an application to be registered as a British citizen. I cannot of course treat her as a British citizen because she is not such at present. The appellant may be able to apply for a derivative residence card under regulation 18A of the Immigration (EEA) Regulations 2006 if P is registered as a British citizen. A primary carer of a British citizen will qualify for a derivative right of residence under regulation 15A(4A) where they satisfy the conditions set out in that paragraph. However as P is not a British citizen at present I need say no more about this.

Decision

39. Having already found that the decision of the First-tier Tribunal should be set aside to a limited extent, I remake the decision by dismissing the appellant's appeal under the Immigration Rules and Article 8 of the ECHR.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
16 December 2015