



**Upper Tribunal  
(Immigration and Asylum Chamber)**

**Appeal Number: DA/00799/2013**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 February 2019**

**Decision & Reasons Promulgated  
On 28 February 2019**

**Before**

**UPPER TRIBUNAL JUDGE FINCH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**-and-**

**GD**

**(ANONYMITY ORDER MAINTAINED)**

**Respondent**

**Representation**

For the Appellant: Ms J. Isherwood, Home Office Presenting Officer

For the Respondent: Mr. J. Rene of counsel, instructing by Littlestone Cowan Solicitors

**DECISION AND REASONS**

**BACKGROUND TO THE APPEAL**

1. The Respondent is a national of Ghana. She entered the United Kingdom, as a student, on 2 September 2000 and then her leave was extended in the same capacity until 30 January 2006.

Subsequently, on 26 July 2006 she was granted leave to remain as a work permit holder until 28 July 2011.

2. On 14 September 2010 the Respondent applied for indefinite leave to remain on the basis of long residence but on 12 October 2011, she was convicted of causing or allowing the death of a child and sentenced to three years in prison. In his sentencing remarks the Common Sergeant of London noted that the Respondent's daughter had died on 3 March 2010 as a result of being force-fed by her. This led to her daughter breathing food into her lungs and developing pneumonia. As a consequence, the Respondent's application for indefinite leave was refused and on 9 February 2012 she was notified that she was liable to deportation.
3. A deportation order was made in relation to her on 9 April 2013. The Appellant appealed and, in a decision promulgated on 11 February 2014, First-tier Tribunal Judge Woodhouse and Mrs. Cross de Chavannes allowed her appeal. However, on 4 March 2014, First-tier Tribunal Judge Reed granted the Appellant permission to appeal. In a further decision, promulgated on 13 May 2014, The Honourable Mrs Justice Andrew DBE and Upper Tribunal Judge Kebede upheld the initial decision in the First-tier Tribunal.
4. The Secretary of State appealed against the Upper Tribunal's decision and his appeal was allowed by the Court of Appeal and remitted to First-tier Tribunal on 25 July 2017. The appeal then came before First-tier Tribunal Judge Clark and she allowed the Respondent's appeal in a decision promulgated on 15 August 2018. The Appellant appealed and First-tier Tribunal Judge Pickup granted him permission to appeal on 20 November 2018. The Respondent filed and served a Rule 24 response on 4 February 2019.

## **ERROR OF LAW HEARING**

5. Both the Home Office Presenting Officer and counsel for the Appellant made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

## **ERROR OF LAW DECISION**

6. First-tier Tribunal Judge Pickup granted the Appellant permission to appeal on a number of different grounds. The primary one was that it was arguable that First-tier Tribunal Judge Clark had made a material misdirection in the application of the considerations under paragraph 399(a) of the Immigration Rules and, in particular, failed to identify what, in addition to the harshness that may well follow deportation, made it unduly harsh for the children to either follow the Respondent to Ghana or, more particularly, to remain in the United Kingdom without her.
7. The grant of permission also noted that the issue may have to be re-considered in the light of the recent decision in *KO (Nigeria) & Others v Secretary of State for the Home Department* [2018] UKSC 53.
8. The Respondent had been sentenced to three years imprisonment and therefore section 32 of the UK Borders Act 2007 applied and she was subject to automatic deportation unless to do so would amount to a breach of the European Convention on Human Rights.
9. In keeping with this statutory provision, paragraph 397 of the Immigration Rules states that:

“A deportation order will not be made if the person’s removal pursuant to the order would be contrary to the UK’s obligations under the Refugee Convention or the Human Rights Convention...”
10. However, this statement is qualified by the contents of paragraphs 398 and 399 of the Immigration Rules. Paragraph 398 states that:

“Where a person claims that their deportation would be contrary to the UK’s obligations under Article 8 of the Human Rights Convention, and

- (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least 12 months...

the Secretary of State in assessing that claim 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 deportation will be outweighed by other factors”.

11. The relevant part of paragraph 399, at the date of the decision under appeal, stated that:

“This paragraph applies where paragraph 398(b) applies if

- (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
  - (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 not be reasonable to expect the child to leave the UK; and
    - (b) there is no other family member who is able to care for the child in the UK”

12. Section 117A of the Nationality, Immigration and Asylum Act 2002 states that:

“(1) This part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts-

- (a) breaches a person’s right to respect for private and family life under Article 8, and
- (b) as a result, would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard-
  - (a) in all cases, to the considerations listed in section 117B, and
  - (b) in cases concerning the deportation of foreign criminals to the considerations listed in section 117C”.

13. Section 117C states:

“Article 8: additional considerations in cases involving foreign criminals

- (1) The deportation of a foreign criminal is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, that greater is the interest in deportation of the criminal.
- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C’s deportation unless Exception 1 or Exception 2 applies.
- (4) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child, and the effect of C’s deportation on the partner or child would be unduly harsh”.

14. The Home Office Presenting Officer submitted that the Respondent had failed to identify which factors rendered the effect of the Respondent’s deportation unduly harsh. Counsel for the Appellant submitted that First-tier Tribunal Judge Clark clearly had this test in mind.

15. First-tier Tribunal Judge Clark did remind herself of *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 where in paragraph 50 Lord Reed found that:

“In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament’s and the Secretary of State’s assessments of the strength of the general public interest in the deportation of foreign offenders, as explained in paras 14, 37-38 and 46 above, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed”.

16. Therefore, a tribunal or court must apply relevant immigration rules and statutes. This included section 117C of the Nationality, Immigration and Asylum Act 2002.
17. In the current case it is not disputed that the Respondent has three children under the age of 18 who are living in the United Kingdom and with whom she has a genuine and subsisting parental relationship.
18. In paragraph 57 of her decision, First-tier Tribunal Judge Clark stated that “whilst a deportation case is clearly different from routine immigration cases, where it is the public interest in firm immigration control which is balanced against the private or family life rights of a child – the threshold is much higher than “unreasonableness” and is expressed in the current rules as “unduly harsh”. However, she had earlier said that the previous version of the Rules applied and when providing her reasons for her decision she did not explicitly refer to section 117C (4) of the Nationality, Immigration and Asylum Act 2002. She also adopted this approach in paragraph 60 of her decision where she stated that she found that the children’s “integration in the UK and their prospects in Ghana are such that it would be unduly harsh (to borrow the language of the current Rules) to expect them to uproot and live there”.
19. She also accepted, in paragraph 46 of her decision, that paragraph 399(b) could not apply, as at the date of decision, the Respondent’s children were not yet British citizens. She did find one of the three children had lived in the United Kingdom for the necessary continuous period of over seven years but also noted that the evidence indicated that, if the Respondent were deported from the United Kingdom, his father would be able to care for him. Therefore, her focus should have been on whether the test in section 117C (4) was met.
20. Nevertheless, she relied on the reasonableness test contained in the previous version of paragraph 399 of the Immigration Rules, in paragraph 57 of her decision, where she found that “the longer a child has lived in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK”.
21. In paragraph 57 of her decision, the First-tier Tribunal Judge did list a number of factors, which would have an adverse effect on the children’s best interests. These included the length of time the children had lived in the United Kingdom, the stage which they had reached in

their education, the death of their sister, the loss of friends and community links in the United Kingdom and the possibility that the family would be economically precarious in Ghana. However, the latter factor was somewhat undermined by her later finding, in paragraph 59 of the decision, that the Respondent had a father and sister in Ghana and that she was apparently fit and healthy and capable of work. Furthermore, in paragraph 58 of her decision First-tier Tribunal Judge Clark also accepted that, if the children were to remain here with their father, the continuity of their private life and their education would be preserved.

22. First-tier Tribunal Judge Clark did not refer to any definition of in what circumstances it would be “unduly harsh” on the children for the Respondent to be deported. She went no further than finding later in paragraph 57 that “the consequences of either separation from their mother or relocation to Ghana with her for these children would be extremely serious”. This did not comply with the test already adopted by the Upper Tribunal and which was then confirmed in paragraph 27 of *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, where Lord Justice Carnwath found that:

“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.”

23. In paragraph 23 Lord Justice Carnwath also found that:

“... the expression “unduly harsh” seems clearly intended to introduce a higher hurdle than that of “reasonableness” under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word “unduly” implies an element of

comparison. It assumes that there is a “due” level of “harshness”, that is a level which may be acceptable or justifiable in the relevant context. “Unduly” implies something going beyond that level”.

24. The Respondent’s counsel submitted that in terms First-tier Tribunal Judge Clark did apply this test in paragraph 58 of her decision, where she found that it would be damaging for the children to remain here with their father and that they would be thrown back into the circumstances that they experienced when the Respondent was in prison. However, breaches of Article 8 of the ECHR need to be assessed in the light of the circumstances at the time of the appeal. Instead, First-tier Tribunal Judge Clark placed reliance on a letter from the London Borough of Waltham Forest, dated 10 June 2011, a final statement by the Children’s Guardian in the previous care proceedings in the Family Court, dated 13 February 2012, a letter from Cynthia Franklin, dated 29 January 2012, and information from the National Offender Management Service, which also dated back to the time that the Respondent was in prison. This evidence was not capable of identifying that in 2018 it would be unduly harsh on the children for their mother to be deported.
25. In any event, the Family Court orders disclosed to the Upper Tribunal do not indicate that the Family Court had granted the necessary permission for the Children’s Guardian’s report, the Respondent’s husband’s statement and the independent social workers’ report to be disclosed to the First-tier Tribunal and counsel for the Respondent was not able to confirm that permission had been granted.
26. The Respondent also relied on contemporaneous letters from her children and her husband. In addition, the Respondent’s two oldest children and her husband gave evidence at the appeal hearing. However, counsel for the Respondent was not able to take me to any of this evidence which met the “unduly harsh” test. It was not sufficient that she now took the lead in their day to day care.
27. First-tier Tribunal Judge Clark found in paragraph 59 of her decision that the Respondent’s absence from the United Kingdom would have a serious damaging effect on the children or the family’s relocation to Ghana and “would be more acute than in the majority of cases, given the tragic death of [D] and the children’s perception that their mother was unjustly



punished for it”. However, there was no evidence to suggest that the children had not resolved some of the anger and confusion they experienced when the Respondent was first imprisoned in 2011.

28. Counsel for the Respondent also submitted that the grounds had “cherry picked” aspects of the decision to criticise but that reading the First-tier Tribunal Judge’s decision in its totality the test was met. However, he was not able to direct me to evidence which cumulatively would meet the test. The recent statement by the Respondent does not address the test.
29. There was a letter from Ms Chintoh, who is a retired civil servant and family friend, dated 18 July 2018. However, her evidence merely confirmed that the Respondent had now built a strong base for her family, that she was a doting mother and that her priority had always been her children. It did not address the effect on the children of her being deported. Her comments about the effect on children being brought up in a single parent household were general in nature and did not refer to any evidence base.
30. There was also no evidential basis for her finding in paragraph 60 that “their integration in the UK and their prospects in Ghana are such that it would be unduly harsh ...to expect them to uproot and live there”.
31. In his skeleton argument, counsel for the Respondent submitted that the Respondent’s deportation would create unbearable and exceptional circumstances for her children. In paragraph 57, First-tier Tribunal Judge Clark had reminded herself that “the separation of children from a parent or the requirement to relocate outside the UK is a frequent and unavoidable consequence of criminality by a foreign offender”. However, what Sir Stanley Burnton found in paragraph 43 of *PF (Nigeria) v Secretary of State for the Home Department* [2015] EWCA Civ 251 was somewhat more complex and read:

“In my judgment, the determination of the First-tier Tribunal did not identify, as it should have done, what were the features of the Appellant's case that amounted to compelling reasons, or were exceptional circumstances, justifying the success of his appeal. Indeed, I would go further and state that I have been unable to identify in the determination findings of fact that could properly be categorised as exceptional or amounting to compelling reasons for

him to be allowed to remain in this country, given the seriousness of his repeated criminal conduct. I fully recognise that if the Judge's factual findings are well founded, there will be a real and damaging impact on his partner and the children; but that is a common consequence of the deportation of a person who has children in this country. Deportation will normally be appropriate in cases such as the present, even though the children will be affected and the interests of the children are a primary consideration”

32. For all of these reasons, I find that First-tier Tribunal Judge Clark did make errors of law in her decision.

### **Decision**

- (1) The Appellant’s appeal is allowed.
- (2) The decision of First-tier Tribunal Judge Clark is set aside.
- (3) The appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judges Clark, Pickup or Woodhouse.

## Nadine Finch

Signed

Date 25 February 2019

Upper Tribunal Judge Finch