



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/01403/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 21<sup>st</sup> May 2019

Decision & Reasons Promulgated  
On 11<sup>th</sup> June 2019

Before

THE HONOURABLE MR JUSTICE MURRAY  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RW

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr S Kotas, Home Office Presenting Officer

For the Respondent: RW in person

**DECISION AND REASONS**

1. This is an appeal against the decision by Judge of the First-tier Tribunal Gaskell (the judge), who allowed the appeal of RW against the decision by the Secretary of State dated 8<sup>th</sup> January 2018 refusing his human rights claim. For the purposes of this decision we will refer to RW as the claimant.

2. The claimant is a national of Guyana, born on [~] 1975. He entered the United Kingdom on 23<sup>rd</sup> April 2002 with entry clearance for the purposes of marriage. He overstayed his entry clearance but married TH, a British citizen. He made an out of time application for leave to remain on the basis of his marriage, but this application was withdrawn and he voluntarily left the United Kingdom. He then re-applied for entry clearance, which was granted, and re-entered the United Kingdom on 20<sup>th</sup> October 2005. He was subsequently granted Indefinite Leave to Remain (ILR) on 15<sup>th</sup> October 2007 based on his relationship with TH.
3. The claimant has a number of criminal convictions. In December 2016 he was convicted of using threatening behaviour and racially aggravated common assault, for which he received a community order of 150 hours. On 28<sup>th</sup> July 2017 he was convicted of possession of a Class A controlled drug, for which he was fined £110. On 31<sup>st</sup> August 2017 he was convicted of two offences, the first in relation to possession of identity documents with intent to defraud, and the second of making false representations to gain, contrary to the Fraud Act 2006. He was sentenced in respect of the first matter to twelve weeks' imprisonment, but this was concurrent with a sentence of 32 weeks' imprisonment for the second offence. The claimant was, however, in breach of the community order made in December 2016. That order was subsequently revoked and replaced with a sentence of twenty weeks' imprisonment to run consecutively. The total sentence was therefore one of 52 weeks' imprisonment. It is important at this stage to note that there was no single sentence imposed on the claimant of 52 weeks' imprisonment.
4. The Secretary of State made a deportation order against the claimant. According to the judge, on 12<sup>th</sup> October 2017 the Secretary of State notified the claimant that he was liable to deportation pursuant to Section 32(5) of the UK Borders Act 2007. This is not accurate. The decision on 12<sup>th</sup> October 2017 was a decision to make a deportation order under Section 5(1) and Section 3(5)(a) of the Immigration Act 1971 on the basis that the Secretary of State deemed the claimant's deportation to be conducive to the public good. It was not an automatic deportation decision. The claimant made representations as to why he should not be deported, which the Secretary of State treated as a human rights claim, and refused the claim in the decision under challenge in the First-tier Tribunal.
5. In his decision the Secretary of State set out the claimant's criminality and stated that his deportation was conducive to the public good because he had been convicted of an offence which had caused 'serious harm'. Other than setting out the bare basis of the offence, the Secretary of State did not explain which offence(s) in particular caused serious harm and did not explain how the serious harm manifested itself. The Secretary of State noted that the claimant had two British children born in 2007 and 2011 who lived with their mother and in respect of whom the claimant claimed to have a parental relationship. The parental relationship was not accepted by the Secretary of State. The Secretary of State concluded that it would be neither unduly harsh for the children to live in Guyana with the appellant, nor for them to remain in the United Kingdom and be separated from their father. The Secretary of State

concluded that there would be no breach of the claimant's private life rights and that there were no very compelling circumstances outside of the Immigration Rules sufficient to warrant a grant of leave to remain pursuant to Article 8.

6. Although the claimant and TH have separated, and a decree nisi was pronounced on 21<sup>st</sup> September 2018, he maintained that he did have a genuine parental relationship with his children, that he played a prominent role in their lives, that he saw them weekly, picked them up from school, provided their evening meals on Tuesdays, that he would see them on Saturdays and that they would occasionally stay the night with him.
7. At his appeal hearing before the First-tier Tribunal the claimant was unrepresented, and he remained unrepresented before the Upper Tribunal. He provided no witness statements from his ex-partner or his children, and, save for a handwritten statement, there was no bundle prepared for his appeal before the First-tier Tribunal. The claimant gave oral evidence and was cross-examined before the First-tier Tribunal judge.
8. The judge found the claimant to be a credible witness. At paragraph 23 of his decision the judge accepted that the claimant has a genuine parental relationship with his children, although the judge did find that the claimant sought to minimise his criminal activities. Under the heading 'Findings of Fact', the judge found that the claimant played a meaningful role in the lives of his children, that he saw them regularly, that he spoke to them on the telephone and that, if he was deported to Guyana, there was no prospect that the children could go with him as there was no reason to suppose that TH would permit the children to relocate to Guyana. The judge additionally found, at paragraph 27, that if the claimant were deported and the children remained in the UK they would be deprived of their relationship with their father and he of his relationship with them.
9. Under the heading 'Discussion and Conclusions', the judge maintained that the claimant was subject to automatic deportation. For reasons we have given, this is inaccurate. The judge then referred to paragraph 398(b) of the Immigration Rules, which relates to the deportation of intermediate offenders - where an individual has been sentenced to at least twelve months but less than four years. The judge found that the claimant's offending was at the very bottom of the scale of offending which would render him liable for mandatory deportation.
10. At paragraph 30 the judge stated:

"In my judgment, the exception provided for in paragraph 399(a) of the Immigration Rules does apply to this case. Despite his offending behaviour I am satisfied on the claimant's evidence that he is a conscientious and caring father to two young children who, in my judgment, would suffer undue hardship if they were deprived of their relationship with their father. For the reasons I have found in paragraph 29 above, my judgment is that the relationship could not continue in Guyana. It can only continue if the claimant remains in the UK"

11. At paragraph 31 the judge noted that he had to take account of the welfare and the interests of the children and found that their best interests would be served by being permitted to continue their relationship with the claimant in the UK. The judge concluded, at paragraph 32, that it would be disproportionate to interfere with his family life, notwithstanding the important public interest served by the deportation of foreign criminals. The appeal was allowed.
12. In seeking permission to appeal the judge's decision the Secretary of State essentially contends that the judge failed to appreciate the high threshold required for the 'undue harshness' test. The Secretary of State relied on the Supreme Court decision in **KO (Nigeria) v Secretary of State [2018] UKSC 53**, which considered the meaning of unduly harsh. The grounds point out that there was no objective evidence to suggest that the claimant's children's physical or emotional needs would not be fully catered for or taken into account if they were separated from their father.
13. In granting permission, the First-tier Tribunal stated:

"The judge appears to have concluded that the effect of the claimant's deportation on his children were unduly harsh merely because they would be deprived of their relationship with him. This is little more than a necessary consequence of the deportation of a parent. Therefore, the judge arguably reached a finding without any basis and/or failed to give adequate reasons for making that finding."
14. We appreciate that RW does not have legal training and is without representation, and we have borne this in mind when taking account of his submissions.
15. In **KO (Nigeria)**, at [23], the Supreme Court stated:

"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. The relevant context is that set by Section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the Section itself by reference to the length of sentence."
16. In **KO** the Supreme Court approved the assessment of undue harshness made by the Upper Tribunal in the cases of **MK** and **MAB**. In **MK** the Upper Tribunal stated:

"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 antitheses of pleasant or comfortable. Furthermore, the addition of the adverb unduly raises an already elevated standard still higher."

What the judge in this particular appeal therefore had to do was to identify a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent.

17. It is not apparent from the judge's factual findings at paragraphs 25 and 27, or his application of the undue harshness test at paragraph 30 of the determination, that he appreciated the high test involved, or indeed that he was even rationally entitled to the findings reached on the basis of the evidence before him. There is abundant authority relating to what would necessarily be involved for a child facing the deportation of a parent and the effects of deportation, see, for example, the Court of Appeal in the case **AD Lee v Secretary of State for the Home Department [2011] EWCA Civ 348**, see in addition **Secretary of State for the Home Department v AJ (Zimbabwe) [2016] EWCA Civ 1012**, which indicate that these cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required even though such separation is detrimental to the child's best interests.
18. It is clear from the Supreme Court decision in **KO**, that the unduly harsh test has a high threshold and that the separation of parent and child, even where this results in emotional damage to the child, would not ordinarily meet the test. In our judgment, the First-tier Judge failed to give adequate reasons for concluding that the undue harshness test was met, at least with respect to the separation of the claimant from his children.
19. We additionally find that the judge impermissibly took account of the nature of the claimant's offending at paragraph 29 of the determination, where he noted that the offending was at the very bottom of the scale of offending that would render him liable for mandatory deportation. This is inconsistent with the conclusion of the Supreme Court in **KO** that the particulars of the criminality and the length of sentence are not relevant when assessing the question of undue harshness.
20. We consequently find that the decision is vitiated by errors of questions of law and must be set aside. We additionally raise, however, the issue of whether the claimant committed offences that have led to 'serious harm'. The definition of a foreign criminal in Section 117D does not include someone who has not been sentenced to a single sentence of twelve months, and the only other ways in which an individual can be defined as a foreign criminal is if they are a persistent offender or if their offences have caused 'serious harm'. It is not immediately apparent to us that the claimant's offending has caused 'serious harm'. We appreciate that he is unrepresented, and we appreciate that this is a point that may not therefore have been apparent to him. We consider this to be an obvious point of law. If any authority is needed, we refer to **R v Secretary of State for the Home Department ex parte Robinson [1998] QB 929**.
21. Having found that the decision contains material errors of law and having set aside the decision, we are minded to remit the appeal back to the First-tier Tribunal for a

full assessment, not only of the claimant's relationship with his children and the impact on that relationship of the deportation decision, but also for the First-tier to consider whether the claimant's offending has caused 'serious harm', the only reason underpinning the Secretary of State's view that the claimant's presence is not conducive to the public good.

22. We set aside the First-tier's decision and remit it back to the First-tier, to be decided by a judge other than Judge Gaskell.

**Notice of Decision**

**The Secretary of State's appeal is allowed**

**The case is remitted back to the First-tier Tribunal for a fresh hearing, to be decided by a judge other than Judge Gaskell.**

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

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



Signed

3 June 2019  
Date

Upper Tribunal Judge Blum