



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/00785/2019**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 26 November 2019**

**Decision & Reasons  
Promulgated  
On 13 January 2020**

**Before**

**HIS HONOUR JUDGE BIRD  
UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

**DA**

**Appellant**

**-and-**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the appellant: Mr Ogunbusola, Counsel

For the respondent: Mr Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant*

Introduction

1. We have anonymised the appellant because this decision refers to the circumstances of his minor children.
2. The appellant appeals against a decision of First-Tier Tribunal (“FTT”) Judge M A Khan sent out on 22 July 2019, dismissing his appeal against the Secretary of State’s decision to deport him as a foreign criminal.
3. The appellant applied to the FTT for permission to appeal on 2 August 2019, permission was refused by FTT Judge Lever on 14 August 2019. On 2 September 2019 the appellant applied to the Upper Tribunal (“UT”). Permission was granted on the papers on 2 September 2019.

#### Preliminary Point

4. At the outset we invited the appellant’s counsel to clarify what his grounds of appeal were (see paragraph 17 below). In doing so, the appellant put forward a new ground, namely that at paragraph 64 of the decision, the FTT Judge had proceeded on the basis that the appellant had only limited leave to remain in the United Kingdom at the relevant time. In fact (as the FTT Judge recorded at para.43 of the decision) the appellant had indefinite leave to remain. It was said that this was a material error as it caused the FTT Judge to wrongly afford the appellant’s private life little weight. No written proposed amendment was produced and no explanation was offered as to why the amendment had not formulated or considered earlier.
5. The Secretary of State resisted the application on 2 grounds: first, even if the FTT Judge had made an error in law, the error was immaterial. On the findings of fact made by the FTT Judge (see paragraph 9 below) the quality of the appellant’s private life rights was minimal and so if they had been given the maximum allowable weight the outcome would have been exactly the same. Secondly, on a reading of the judgment as a whole the FTT judge correctly identified that the appellant had indefinite leave to remain at the relevant time (see para.43).
6. In considering the application, in addition to the points raised by the Secretary of State, we bore in mind:
  - a. the overriding objective set out at r.2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the Rules”) and
  - b. r.21(4)(e) of the Rules which requires grounds of appeal to be set out in the application for permission to appeal to the UT
  - c. the rules-based requirement to have provided grounds of appeal to the UT by 2 September 2019 (the date of the application to the UT for permission)

- d. our general powers of case management set out at r.5(3)(a) giving us a power to extend time
  - e. We have also considered the fact that the appellant had given no notice of the amendment to the Secretary of State or the UT and
  - f. that he had had plenty of time to consider the need to amend his grounds (because both the FTT Judge see paragraph 8 below and UT Judge see paragraph 12 below had noted the inadequacy of the grounds of appeal)
  - g. The grounds were provided to the UT 2 months and 24 days (the delay being from 2 September 2019 to 26 November 2019)
7. Having considered the application we delivered a judgment at the hearing giving brief reasons for our conclusion that the amendment should not be allowed. We said that the reasons would be supplemented in writing. These are those reasons.
  8. It is generally unsatisfactory for an application to amend to be made for the first time during the opening of an appeal without any notice having been provided. Whilst there are circumstances in which such an application might be allowed we are of the view that there should be some explanation for the (in this case lengthy) delay in making the application and that the proposed amended ground should have some prospect of success. Neither appears in this case. We bear in mind that there is a time limit for the submission of appeals (supported by grounds) and that the admission of a late ground might be seen to undermine that limit. We accept the Secretary of State's point that even if the proposed new ground was made out and an error of law was found, that error cannot, given the FTT Judge's findings of fact, be material. In all the circumstances this is not a case in which we feel able to exercise our power to extend time.

### Background

9. The appellant is a citizen of Jamaica born in 1995. He entered the United Kingdom in March 2011 accompanied by his mother with entry clearance to remain until May 2013. On 19 June 2013 he was granted indefinite leave to remain. On 4 July 2017 he was convicted of an assault occasioning actual bodily harm and of possessing a bladed article in a public place. On 17 November 2017 he was sentenced to a term of imprisonment totalling 15 months. The sentencing remarks are set out at paragraph 16 of the FTT decision. On 4 December 2017 he was served with a notice of decision to make a deportation order against him. On 22 December 2017 and 22 October 2018, the appellant made submissions to the Secretary of State setting out why he should not be deported.

Those submissions were rejected and the reasons served on the appellant on 31 December 2018.

10. The appellant has 2 children of his own. His partner has a daughter from a previous relationship born in April 2013. His partner has mental health issues. She is mother of the appellant's son who was born in January 2019. The appellant has a son born in June 2017 from a previous relationship whom he did not see at the time of hearing before the FTT. His relationship with his present partner has been ongoing but not continuous since 2013. There was a break in 2016. His partner has no plans to move with her children to live in Jamaica.

#### FTT

11. Grounds of appeal in respect of the Secretary of State's decision were submitted to the FTT on or about 3 January 2019. The appellant sought to argue that the Secretary of State's decision was unlawful because removal would breach his ECHR rights.
12. The grounds of appeal are described by the FTT Judge in his decision as being "expressed in general terms only". It appears from the judgment that he considered the thrust of the appeal to be that the Respondent had wrongly determined that the deportation of the Appellant would not breach any relevant Convention Rights, namely Art.8 rights.

#### The FTT decision

13. The FTT Judge recorded the following findings of fact in respect of the appellant:
  - a. He has no role in the life of his eldest son (para.48) and
  - b. has no plans to live with his partner in the future (once conditions of bail which require him to live with her are lifted) (para.49)
  - c. He occasionally takes his partner's daughter to her grandmother's house so she can take her to school (para.50) and
  - d. is making no financial contribution to his partner's household (para.51).
  - e. He has "very minimum involvement in the lives of his children" (para.52).
  - f. Further his relationship with his partner is "not significantly strong" (para.50).
  - g. He has a brother and sister living in Jamaica who would be able to support him there until he "is able to stand on his own two feet" (para.53) and he has
  - h. "quite memorable links" with Jamaica (para.60).

14. The FTT Judge found “on the balance of probabilities” that paragraph 399 of the Immigration Rules had not been engaged. An out of date version of paragraph 399 is set out in his judgment at para.8. That version was current before 28 July 2014. It makes no reference to undue harshness.
15. The FTT considered section 117C of the Nationality, Immigration and Asylum Act 2002 (“NIAA”) including Exception 2 at section 117C(5) (para.61) and sections 117A and 117B of the same Act (para.62).

#### The Appeal before the UT

16. In giving permission to appeal, Upper Tribunal Judge Stephen Smith noted that the grounds of appeal to the Upper Tribunal were “difficult to follow and poorly particularised”.
17. At the start of the hearing we invited the appellant to clarify what the grounds of appeal were. We have dealt above with an application to supplement the grounds of appeal by way of amendment. Mr Ogunbusola confirmed that there was no appeal in respect of the findings of fact asset out at paragraph 12 above. The grounds of appeal advanced were as follows.:
  - a. The FTT Judge had failed to have regard to the Secretary of State’s duty to discharge his immigration functions having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom (section 55 of the Borders, Citizenship and Immigration Act 2009 “BCIA 2009”)
  - b. The FTT Judge erred in dealing with his assessment under section 117C(5) as to whether the effect of his deportation would be unduly harsh on a relevant partner or a relevant child
  - c. The FTT Judge failed properly to consider if the circumstances of the case, taken in the round raised “very compelling circumstances” sufficient to render the deportation an infringement of Convention rights.

#### The Legal Framework

18. The legal framework has recently been set out by the Court of Appeal in *Secretary of State for the Home Department v KF (Nigeria)* [2019] EWCA Civ 2051 (paragraphs 8 to 15). We respectfully adopt those paragraphs.
19. The appellant is a foreign criminal as defined in section 117D(2) of NIAA. He was sentenced to 15 months imprisonment and so falls within section 117C(3). The public interest requires his deportation unless Exception 1 (section 117C(4)) or Exception 2 (section 117C(5)) applies. The grounds of appeal raise no issue in respect of ground 1. Exception 2 is mirrored by IR 399.

20. It seems to us to be clear that IR 399 and section 117C(5) each require 3 broad questions to be answered:
- a. is the person who is at risk of deportation (“D”) in a genuine and subsisting relationship with a third party (“TP”)? If so,
  - b. is the TP either a “qualifying partner” or a “qualifying child”?
  - c. If so, will the effect of D’s deportation on the TP be “unduly harsh”
21. It is accepted and common ground that the appellant’s partner falls within the definition of “qualifying partner” and that the appellant’s 2 children and his partner’s daughter (the “qualifying children”) fall within the definition of “qualifying child”.
22. The correct approach to the meaning of “unduly harsh” in Exception 2 in respect of children has most recently been set out by the Court of Appeal in *KF (Nigeria)* and *SSHD v PG (Jamaica)* [2019] EWCA Civ 1213. For the purposes of this judgment it is sufficient to note the helpful reminder at paragraph 14 of the Court of Appeal’s judgment in *KF (Nigeria)* of the guidance provided at paragraph 23 of *KO (Nigeria)* [2018] UKSC 53:

*“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.”*

#### Error of law discussion

23. We have come to the conclusion that the FTT judge took a number of wrong turns in the decision. Some were raised during the course of argument and described as errors of law, some were not. Nonetheless we feel it would be helpful to refer to some of them:
- a. At para. 8 of the decision the FTT Judge sets out IR 399. He refers to the rule as it was before 28 July 2014. The version cited by the FTT Judge makes no reference to the need for an “unduly harsh” effect on a qualifying partner or qualifying child.
  - b. Although he refers to section 117C at para.61 the FTT judge failed to explain its relevance and fails to set it out. Although he recites at para.40 and 41 the submissions made by the parties which refer to the “unduly harsh” test he makes no reference of the statutory or regulatory context from which the test is derived.
  - c. At para.54 the FTT Judge concludes that IR 399 is not engaged but has cited the wrong version of that rule.
  - d. The FTT Judge concludes (para.56) that the case before him (the appellant having been sentenced to 15 months imprisonment) is not an automatic deportation case. He appears to base this conclusion on *Bah (EO Turkey) - liability*

*to deport* [2012] UKUT 196 (IAC) (see para.46 of the decision). In fact the present case is (subject to section 33 of the same Act) governed by section 32(5) of the UK Borders Act 2007.

24. In addition to these, we accept as the grounds of appeal submit that:
- a. The FTT Judge made no specific reference to the Secretary of State's duty under section 55 of the BCIA 2009. However, the FTT Judge considered the exact extent of the appellant's involvement with the children and his relationship with each of them. He made clear findings of fact in respect of this matters. In our judgment this treatment of the appellant's involvement with the children is a clear indication that the Judge had the section 55 duty in mind. We therefore conclude that this ground is not made out.
  - b. The judgment fails to set out how the test for undue harshness arises in a statutory or regulatory context. However, at para.50 of the judgment the FTT Judge finds that the relationship between the appellant and his partner is "*not significantly strong [enough] to have unduly harsh effect on the family upon his removal from the UK*". On balance we have reached the view that the FTT Judge did consider the effect the appellant's deportation would have on his partner and "the family". The conclusion might helpfully have expressed in a clearer way but, on balance we find that this ground is not made out.
  - c. The FTT Judge makes no reference to "very compelling circumstances" in his judgment. This is an error of law but it is not material for the reasons we set out below.

### Materiality

25. We now deal with the question of materiality of the errors we have identified above.
26. By section 12 of the Tribunals Courts and Enforcements Act 2007 the UT may set aside a decision if it finds an error of law but is not obliged to do so. If the error is not material, so that the UT can be sure that the decision would have been the same if the error of law had not been made, the decision should not be overturned.
27. We remind ourselves, as set out at paragraph 135 of the judgment of the Court of Appeal in *R (Balajigari) v Home Secretary* [2019] 1 WLR 4647 that it is well established that the court "should observe great caution in refusing relief on the basis of immateriality, and that is reflected by expressing the relevant threshold in terms of inevitability".

28. Adopting this approach, we are satisfied that any errors of law are not material and that if those errors had not been made, and if the FTT Judge had properly directed himself on the law, the conclusion expressed in the decision would have been the same.
29. It is significant that the findings of fact made the FTT Judge are not challenged. Those findings allow us to reach a clear conclusion on materiality. Dealing with each ground of appeal (but not in the order advanced):
  - a. As we point out at paragraph 21 above, section 117C(5) requires 3 questions to be answered. The presence or absence of undue harshness only arises when there is genuine and subsisting relationship with a qualifying child or such a relationship with a qualifying partner. In our view the FTT Judge's findings of fact suggest strongly that the appellant is not in a genuine and subsisting relationship with his partner or with any of the 3 qualifying children. Indeed the finding at para.52 is that the appellant "has very minimum involvement in the lives of his children". If there was no sufficient relationship then the consideration of undue harshness is not reached. In any event the high hurdle of undue harshness for the children or the appellant's partner cannot on any legitimate view be overcome, given the findings of fact regarding the nature and quality of those relationships.
  - b. Given the findings of fact made by the FTT Judge, we have reached the clear view that any application of the "very compelling circumstances" test would have resulted in the conclusion that there are none. One of the features of this appeal is that the appellant falls far short of every hurdle he would need to surmount if his appeal was to succeed.
  - c. If we are wrong and the FTT Judge did not have the section 55 duty at the forefront of his mind we have no doubt that he would have reached the same conclusion. The FTT Judge found that appellant had "very little involvement with the lives of his children". On a strict reading, this finding relates only to his 2 sons. However, paragraph 52 goes on to refer to the partner's wish to take "their children" to visit him in Jamaica. As the appellant and his partner have only one child together, any sensible reading of this paragraph strongly suggests that the finding relates to the appellant's partner's children (their son, and her daughter). The appellant's evidence of his relationship with his partner's daughter (that he plays a fatherly role in her life) was found by the FTT Judge to be exaggerated. Taking these findings together, it seems to us that his approach to the question of undue harshness would have been the same.
30. This is a decision that falls short in numerous ways. We have identified those above. However, the FTT's findings of fact have not been challenged and they were open to it. Those findings of



fact are such that on any application of the applicable high tests in section 117C, the dismissal of the appeal on Article 8 grounds is inevitable. It follows that, even if we were to be wrong about the grounds of appeal, any relevant errors of law are immaterial.

31. For all of the reasons we have set out we are satisfied that the appeal must be dismissed.

**Notice of decision**

The FTT's decision does not contain a material error of law and we do not set it aside.

Signed:

Date: 7 January 2020

HHJ Bird