Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06414/2019 (R)

THE IMMIGRATION ACTS

Heard at Birmingham CJC with parties attending by Skype On 6th October 2020	**Decision & Reasons Promulgated On 5th November 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FO
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mrs. H Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr S Ibeneche, Syeds LawCare Solicitors

DECISION AND REASONS (R)

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

Although no anonymity direction was made by the First-tier Tribunal ("the FtT"), it is appropriate for me to make an anonymity direction in order to protect the interests of the children affected by the case. Unless and until a Tribunal or court directs otherwise, FO 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.

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is FO. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to FO as the appellant, and the Secretary of State as the respondent.

2. The hearing before me on 6th October 2020 took the form of a remote hearing using skype for business. Neither party objected. The appellant and his partner joined the hearing remotely. I sat at the Birmingham Civil Justice Centre and the hearing room and building were open to the public. I was addressed by the representatives in exactly the same way as I would have been if the parties had attended the hearing together. I was satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

3. The appeal before me is an appeal from a decision of Judge Sangha ('the judge') sitting in the First-tier Tribunal. In his decision promulgated on 25th July 2019, the judge allowed the appellant's appeal against a decision of the Secretary of State dated 27th March 2019 refusing his application for leave to remain and refusing to revoke a deportation order dated 6th December 2011.

4. The appellant is a national of Ghana. He arrived in the United Kingdom 24th July 2001 with the benefit of a six month visit visa. The appellant

failed to leave the UK when the visit visa expired. In February 2006 he made an application for indefinite leave to remain as a dependent of his partner, FE, a national of Ghana. The appellant's partner had arrived in the UK in April 2000, also with the benefit of a six-month visit visa. She too, remained in the UK unlawfully when her visit visa expired. The appellant and his partner were by then the parents of two children born in the UK, AO born on 1st August 2002 and SO born on 28th September 2005. The application for indefinite leave to remain was refused on 19th June 2007 and an appeal against that decision was dismissed by the Tribunal in May 2007.

5. The appellant applied for naturalisation on 26th November 2007 using the name 'Frank Kojo Agyeman'. That application was refused on 18th June 2009. In January 2010, the appellant was arrested in connection with the application for naturalisation. On 9th April 2010 he was convicted at Wolverhampton Crown Court of 'With intent knowingly possessing false/ improperly obtained/ another's ID document and of remaining in the United Kingdom beyond the time limit. On 30th April 2010 he was sentenced to a total of 12 months imprisonment.

6. The appellant and his dependents were notified in July 2010 of a decision to make deportation orders against them on the grounds that the appellant's removal would be conducive to the public good. Appeals against that decision by the appellant and his dependents were dismissed by Immigration Judge Andrew and Mr G Sandell for reasons set out in a decision promulgated on 6th October 2010. The First-tier Tribunal noted that the appellant and his partner have three children, all of whom have been born in the UK. The third child, EA was born on 7th October 2008. The Tribunal found that the family enjoys a private and family life in the UK, and noted that the appellant had been in the UK for some nine years, and his partner, longer. At paragraph [64] of its decision, the Tribunal said:

> "Whilst we accept the scales are finely balanced in this case, because of the age, in particular, of the eldest child, the factors that tip them in favour of deportation is the complete disregard of both the appellant and Ms [FE] for both the immigration laws and the criminal laws of the United Kingdom, in that Ms [FE] condoned the appellant's criminal

> activities, and that the whole of the family would be removed to Ghana, will be find it is reasonable to remove them."

7. The appellant, his partner and their children were subsequently served with deportation orders, but nevertheless remained in the United Kingdom. The eldest child, AO, became a British Citizen on 27th October 2015 and SO became a British Citizen on 20th April 2016. In August 2016, the appellant's partner made an application for further leave to remain in the UK. The appellant was listed as a dependent. The youngest child, EA became a British Citizen on 6th December 2018. By a decision made on 28th February 2019, the respondent accepted that the appellant's partner is the primary carer of their three British citizen children, and the deportation orders signed against the appellant's partner and children were revoked on the same day. On 27th March 2019 the respondent made a decision refusing the appellant's application for further leave to remain and refusing to revoke the deportation order signed in respect of the appellant.

The decision of First-tier Tribunal Judge Sangha

8. The appellant's immigration history is set out at paragraphs [3] and [4] of the decision. At paragraphs [5] to [15] of his decision, Judge Sangha sets out at some length the matters relied upon by the respondent as set out in the respondent's decision. At paragraphs [19] to [21], Judge Sangha sets out what he considered to be the relevant provisions of the Immigration Rules and the Nationality, Immigration and Asylum Act 2002. Although there is no reference to paragraphs 390 to 392 of the immigration rules, at paragraph [22] he said:

> "In the case before me, paragraph 399 and 399A are relevant because the appellant before me was convicted of an offence or offences for which he was sentenced to a period of imprisonment of less than four years but at least 12 months (that is 12 months in total). In this case, therefore, under the immigration rules, in order to succeed, the appellant has to establish the criteria specified in paragraph 399(a) and or (b). In particular, the appellant has to show that he has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK and the child is a British citizen and that it would be unduly harsh for the child to live in the country to which he would be deported; and that it would be unduly harsh for the child to remain in the UK without him. Alternatively, the appellant has to

> established that he has a genuine and subsisting relationship with the partner who is in the UK and is a British citizen and the relationship was formed at a time when he was in the UK lawfully and his immigration status was not precarious and that it would be unduly harsh for his partner to live in the country to which he is to be deported because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM and that it would be unduly harsh for his partner to remain in the UK without him."

9. The findings and conclusions of Judge Sangha are set out at paragraphs [27] to [39] of his decision. At paragraphs [29] to [36] of his decision, Judge Sangha considered whether paragraph 399(a) of the Immigration Rules applies, having noted, at [27], that the appellant has been convicted of an offence for which he has been sentenced to a period of imprisonment of less than four years but at least 12 months. It was uncontroversial that the appellant has a genuine and subsisting relationship with his three children, all of whom are under the age of 18 and all of whom are now British citizens. For reasons set out at paragraphs [29] to [36], Judge Sangha found that it would be unduly harsh for the children to live in Ghana and it would be unduly harsh for the children to remain in the UK without the appellant. In reaching that decision, Judge Sangha refers to a number of factors including the particularly significant and active role played by the appellant in his children's welfare, and in particular, the support provided by the appellant that enables his son [SO], to further his ambition of wanting to play football at the highest level following the contract signed with Shrewsbury Town FC Academy. Judge Sangha found that the appellant's deportation from the UK would result in the breakdown of the family unit and would impact upon the children's welfare and development. The deportation of the appellant would also deny the children the opportunity to develop a secure attachment to their father and would have an adverse impact upon the children. At paragraph [37], Judge Sangha concluded:

> "Having considered all the evidence before me in the round, I come to the conclusion that it would be unduly harsh to expect the children to live in the country to which their father is being deported to, or indeed for them to remain in the UK without their father. I come to this conclusion after taking into account the various factors referred to in NA (Pakistan) v SSHD [2016] EWCA Civ 662. I note that in this case, the appellant received a sentence at the bottom end of the scale (12 months). I note that he has not offended since being sentenced for the offences in 2010. Whilst the appellant entered as a visitor initially and

> most of his presence in the UK has been unlawful, the fact remains that he has now been resident in the UK for some 18 years. The appellant's offences did not involve violence, drugs or sexual matters. I am satisfied that if the appellant were to be deported from the UK, it would lead to further family difficulties given the support that he gives his wife and children. In view of the fact that I accept that the undue harshness test is met in this case, consequently the appellant meets the rules. I then go on to consider s117C of the 2002 Act and I do find in this case that the public interest in the deportation of the appellant is at the lower end of the scale and that Section 2 of Section 117C of the 2002 Act applies and operates as the effects upon the children will be unduly harsh. Having considered all the evidence in the round, therefore, I come to the conclusion that it would be unduly harsh for the appellant and all the children to relocate to Ghana in the circumstances of this particular case. Equally, I find that it would be unduly harsh for the children to remain in the UK without the appellant if he were to be deported."

The appeal before me

10. The respondent advances two grounds of appeal. First, in considering whether the deportation order made against the appellant should be revoked, Judge Sangha failed to have any regard to the matters set out in paragraphs 390 to 392 of the immigration rules and failed to have any regard to the previous decision of Immigration Judge Andrew promulgated on 6th October 2010 in which the Tribunal had considered an appeal by the appellant against a decision of 14th July 2010 to make a deportation order against the appellant on the grounds that his removal would be conducive to the public good. The respondent submits Judge Sangha gave undue weight to the period of time that has elapsed since the index offence and the lack of reoffending when considering the public interest in circumstances where the respondent is entitled to proceed on the basis that those unlawfully in the UK, will leave of their own accord. Second, Judge Sangha erred in his self-direction at paragraph [31] of his decision that the statutory duty contained within s55 of the 2009 Act, overrides paragraph 399(a)(ii)(a) of the immigration rules. The respondent submits that although the best interests of a child are a primary consideration, they are not determinative. The respondent submits Judge Sangha has failed to give cogent reasons for his conclusion that it would be unduly harsh for the children to relocate with their parents to Ghana, or for the children to remain in the UK without the appellant. The respondent submits the evidence does not establish that the appellant's removal from

the UK would be detrimental to the children to the extent required to establish that the high threshold is met.

11. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 16th November 2019. He noted:

> "It is arguable that the judge erred by finding at paragraph 31 that the test of "unduly harsh" in paragraph 399 of the Immigration Rules is overridden by the statutory duty to have regard to the best interests of the appellant's children. The unduly harsh test is found in section 117C of the Nationality, Immigration and Asylum Act 2002 as well as in the immigration rules and, arguably, there is no basis in either statute or case law to characterise the requirement to have regard to the child's best interests as overriding the test of undue harshness. Arguably, the judge has failed to appreciate that it will frequently be the case that the effect of deportation on a child would not be unduly harsh even though it is not in the best interests of the child."

12. At the hearing before me I invited the parties to address the recent decision of the Court of Appeal in HA (Iraq) and Others v SSHD [2020] EWCA Civ 1176.

13. On behalf of the respondent, Mrs Aboni adopts the grounds of appeal dated 6th August 2019, and submits Judge Sangha misdirected himself at paragraph [31] as a matter of law. She submits that although the best interest of the children are a primary consideration, they are not determinative. They were one factor in considering the wider Article 8 issues and the 'unduly harsh' test. She submits Judge Sangha erred in his application of the 'unduly harsh' test. It is a high threshold to be met and although Judge Sangha may have been entitled to find it would be unduly harsh for the family to live in Ghana, the Judge erred in finding that it would be unduly harsh for the children to remain in the UK without the appellant. She submits Judge Sangha considered the appellant's involvement in the children's lives, but does not give adequate reasons for showing that the high threshold is met.

14. Mrs Aboni submits the recent decision of the Court of Appeal in HA (Iraq) and others, supports the respondent's case that the best interests are a primary consideration, but the threshold to establish that it would be unduly harsh for the children to remain in the UK without the appellant is a

high one. The criterion of undue harshness sets an elevated bar which carries a much stronger emphasis than mere undesirability. She referred to paragraph [56] of the judgement in which Lord Justice Underhill said:

> "…the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold "acceptable" level. It is not necessarily wrong to describe that as an "ordinary" level of harshness, and I note that Lord Carnwath did not jib at UTJ Southern's use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, "ordinary" is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of "undue" harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

15. Mrs Aboni submits Judge Sangha failed to make any findings on the relevant issues and fails to explain why it would be unduly harsh for the children to remain in the UK without the appellant. She submits Judge Sangha made reference to the appellant's involvement in the children's activities but he does not consider whether the activities could continue in the absence of the appellant.

16. On behalf of the appellant, Mr Ibeneche submits Judge Sangha had proper to all relevant facts and the respondent simply disagrees with the findings and conclusions reached by Judge Sangha. Mr Ibeneche submits Judge Sangha carefully considered the circumstances of the children and the children would not be able to do what they are doing at the moment, if the appellant is removed to Ghana. The appellant plays a fundamental

role in their lives. He submits Judge Sangha found the high threshold is met, and that was a conclusion that was open to the Judge.

Discussion

17. Although I accept there is no reference to paragraphs 390 to 392 of the immigration rules in the decision of Judge Sangha, that in my judgment is immaterial. Insofar as is relevant, the Immigration Rules state:

> Revocation of deportation order
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> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
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> (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.
>
> 391. In the case of a person who has been deported ….
>
> 391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.
>
> …

18. Here, paragraph 398 of the Immigration Rules applied. The appellant claimed that his deportation would be contrary to the U.K.'s obligations under Article 8 of the Human Rights Convention. Equally, although there is no reference to the previous decision of Immigration Judge Andrew and Mr G Sandell promulgated on 6th October 2010, and the grounds on which the deportation order was made, that again is in my judgment, immaterial. There had plainly been a change in circumstances, not only caused by the significant passage of time, but also by the recognition of the appellant's children as British citizens and the respondent's acceptance in the

decision made on 28th February 2019, that the appellant's partner is the primary carer of their three British citizen children, and the revocation of the deportation orders signed against the appellant's partner and children.

19. I reject the claim that at paragraph [31], Judge Sangha misdirected himself in law. The paragraph must be read as a whole. On its own, it would be a misdirection to say that "*the stated statutory duty contained within Section 55 of the 2009 Act overrides paragraph 399(a)(ii)(a)*", however Judge Sangha goes on to say, "*because relocation to Ghana will not promote, or safeguard, the children's welfare given their situation in the UK.…".* He goes on to note that he has to take into account the best interests of the children, and although I accept that the paragraph could have been better phrased, in my judgement, on a careful reading of what is said at paragraphs [31] to [37] of the decision, it is clear that Judge Sangha had regard to the best interests of the children as a primary consideration, but not one that was determinative. He repeatedly considers in his decision whether it would be unduly harsh to expect the children to live in Ghana with their parents, and whether it would be unduly harsh for the children to remain in the UK with their mother, separated from their father.

20. The threshold is, I accept, a high one. A Tribunal is required to make an informed evaluative assessment of whether the effect of the deportation on the children would be "unduly harsh", in the context of the strong public interest in the deportation of foreign criminals and requires a careful analysis of all relevant factors specific to the children. The question how a child will be affected by a parent's deportation can depend on a variable range of circumstances including their age, the living arrangements and family dynamics, the degree of a child's emotional and practical dependence on the parent and the individual characteristics of the child. At paragraphs [31] to [36] of his decision, Judge Sangha identifies the factors that lead to his conclusion that it would be unduly harsh for the children to remain in the UK without the appellant.

21. In my judgment, in reaching his decision, Judge Sangha clearly applied the correct test. Where a judge applies the correct test, and that results in an arguably generous conclusion, it does not mean that it was erroneous

in law. As the Court of Appeal said at [18] of Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence. The assessment of such a claim is always a highly fact sensitive task. The FtT judge was required to consider the evidence as a whole and he plainly did so, giving adequate reasons for his decision. The findings and conclusions reached by the judge are neither irrational nor unreasonable. The decision was one that was open to the judge on the evidence before him and the findings made.

22. It follows that I dismiss the appeal.

Notice of Decision

23. The appeal is dismissed and the decision of First-tier Tribunal Judge Sangha promulgated on 25th July 2019 shall stand.

Signed **V. Mandalia** Date 2nd November 2020

Upper Tribunal Judge Mandalia