



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

Appeal Number: HU/08949/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 January 2021 and 18 March  
2021**

**Decision & Reasons Promulgated  
On 10 August 2021**

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MABIKA MALAMBA  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: On 12 January 2021: Mr S Whitwell, Senior Home Office Presenting Officer  
On 18<sup>th</sup> March 2021: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr B Haseldine, Counsel instructed by Caulker & Co Solicitors

**DECISION AND REASONS**

1. This is an appeal brought by the Secretary of State with the permission of Upper Tribunal Judge Allen against a decision of the First-tier Tribunal on 17 April 2020 to allow the appeal of the respondent, hereinafter the "claimant", against a decision of the Secretary of State on 7 August 2017 refusing him leave to remain on protection and human rights grounds.

The claimant is a national of the Democratic Republic of Congo and is subject to deportation.

2. The appeal has previously been determined unsatisfactorily, the decision set aside and the appeal remitted to the First-tier Tribunal and it is an appeal against the decision in the remitted hearing that I now determine.
3. I begin by considering carefully the First-tier Tribunal Judge's decision.
4. The judge began by setting out the uncontroversial facts.
5. These include that the claimant was born in April 1981 and entered the United Kingdom in July 1991 at the age of 10 years with his mother and siblings.
6. In February 1999 his mother was given indefinite leave to enter and the claimant was given similar status in line with his mother.
7. However, the claimant has committed criminal offences. The First-tier Tribunal Judge noted a total of seventeen convictions beginning in February 1999 and continuing until July 2017. The most serious offence was of attempted robbery for which he was sentenced to three years' imprisonment in April 2005.
8. The convictions are summarised at paragraph 5 of the First-tier Tribunal's decision and reasons and I set that out below because I find it is a concise synopsis of the history that is not easily improved:
 

"His criminal offending includes the following:-

  - o Between February 1999 and December 2003, the [claimant] was convicted on six occasions of seven offences including assault on a constable, theft, criminal damage, possession of class B drugs, and failing to surrender to custody.
  - o On 2 August 2004 he was sentenced and convicted of obtaining, or conspiring to obtain, property by deception, handling stolen goods and possession of a class B controlled drug. He was sentenced to nine months' imprisonment.
  - o On 28 April 2005, he was sentenced to three years' imprisonment as referred to above, for attempted robbery.
  - o Between 29 August and 22 December 2011, he was convicted on four occasions of six offences including grievous bodily harm, making false representations, public order offences, and commission of further offences during a suspended sentence order.
  - o On 7 November 2012, he was convicted of common assault and commission of a further offence during the suspended sentence order.
  - o On 21 December 2012, he was convicted of intimidating a witness.
  - o On 8 February 2013, he was convicted of common assault".
9. On 5 November 2003 he applied for naturalisation as a British citizen but the application was refused in December 2003 because of his criminal convictions.
10. However, after his being convicted and sent to prison for three years for attempted robbery in April 2005 he was informed that the Secretary of State had considered his position and had decided not to take any action against him.

11. The decision not to take further action was made on 9 May 2006. The claimant continued to offend and on 10 June 2015 the Secretary of State made a deportation order which appears to have prompted the application for leave to remain on protection and human rights grounds.
12. The claimant has enjoyed a close relationship with Ms Agata Sosnowska since 2014. Ms Sosnowska is a Polish national granted settlement in the United Kingdom on 19 June 2019. She is the mother of two sons with the claimant, the first born in November 2017 and the second in October 2019. The claimant has two other children with a former partner. These are daughters born in April 2008 and November 2010.
13. All of the children are British citizens.
14. It is a feature of the case that when the Secretary of State made the decision complained of she was unaware of the claimant's relationship with Ms Sosnowska. The children were born after the decision.
15. It was not the Secretary of State's case that the claimant is a "persistent offender".
16. The judge then summarised the claimant's case drawing heavily on Counsel's skeleton argument. Appropriately, because this is required by Parliament, the judge directed himself to Part 5A of the Nationality, Immigration and Asylum Act 2002 and noted it was the claimant's case that he fulfilled the requirements of Exception 1 under section 117C because he had been lawfully resident in the United Kingdom for most of his life and was socially and culturally integrated into the United Kingdom and there would be very significant obstacles for his integration into the Democratic Republic of Congo. It was also the claimant's case that he fulfilled the requirements of Exception 2 because he had a genuine and subsisting relationship with both a qualifying partner and with a qualifying child and the effects of his deportation would be unduly harsh. It was also his case that the children's best interests supported the argument that the appeal should be allowed. It was the claimant's case that paragraph 398 of HC 395 was not relevant because he had not been sentenced to at least four years' imprisonment and was not a persistent offender and had not caused serious harm but, if contrary to his contention, he did come within that scope then the exceptions under statute were effectively also exceptions under the Rules.
17. The Secretary of State relied on the refusal letter as far as it was still relevant but of course recognised that the arrival of the children did at the least require other things to be considered.
18. The judge's findings began at paragraph 34. He recognised the claimant had a bad criminal record and at least until May 2017 was "classifiable as a persistent offender". That was no longer the case because it appeared that the claimant had stopped offending. The judge found in the face of unchallenged evidence that the claimant is the primary carer of his children with Ms Sosnowska and she is able to work in employment as a consequence. The judge found that the claimant had clearly built up a private life over a long period of residence and "accepted that he is

integrated in the UK". His removal would be an interference in the private and family lives of the claimant and his partner and their children.

19. The judge further found that the claimant's removal to the DRC would entail "very significant obstacles" to integration in that country. He built this conclusion on a matrix of reasons including his having left the DRC when he was 10 years old and his having no adult experience in that country, on being educated in the United Kingdom and having very limited ability in speaking Lingala and no ability to read or write the language. The claimant knows no one in the DRC and has no property there. His only employment had been in the United Kingdom. The judge could not see how the claimant could expect to obtain work and his partner could not afford to maintain a home in the United Kingdom and support him in the DRC.
20. The judge found that the effect of the claimant's removal on the partner and the children would be unduly harsh. He based this on the claimant being the primary carer of the children and that removing him would make the claimant's partner a single parent with a significant adverse effect on her finances, that the children would be deprived of contact with their father from a very young age and the judge found the consequence likely to be no meaningful contact at all between the children and their father. The claimant could not support the children in any way financially. It would not be in the interests of any of the children or partner to leave the United Kingdom to join the claimant. The judge found that the requirements of Exception 1 and 2 were met. The judge found that statute provided that the public interest did not require the claimant's removal. The judge was satisfied that the claimant's deportation would be disproportionate to the proper purpose and the judge allowed the appeal.
21. I have read Mr Haseldine's skeleton argument. I mean it no disrespect when I say it needs no additional express consideration here. The points were covered by the judge.
22. I now consider the Secretary of State's grounds.
23. Ground 1 is described as "making a material misdirection of law/failing to give adequate reasons for findings in a material matter". The contention is that the judge, in concluding the effects of separation would be "unduly harsh", has not given adequate reasons for finding that the consequences can be properly so described. Reference is made to the case of **Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213** at paragraph 46 referring to innocent children attracting sympathy but that is not the same. The Supreme Court in **KO (Nigeria) & Ors v SSHD [2018] UKSC 53** confirmed that the unduly harsh test is a high one and going beyond what is the necessary consequence of separation.
24. The grounds also contended that there was no basis for concluding as the judge did at paragraph 42 that separation would be an inevitable consequence of deportation and the judge had given no reason for finding it unduly harsh for the children to remain in the United Kingdom with their

mother where they would be able to avail themselves of Social Services support if that was required.

25. The finding that there were very significant obstacles to integration was also challenged. The grounds refer to **MK (Sierra Leone) [2015] UKUT 223** where the “very significant obstacles” test was described as an elevated threshold so that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even where multiplied will generally be insufficient in its context.
26. It also referred to a case where the Upper Tribunal had decided on its facts that there would not be very significant obstacles for a person with a long absence from the Democratic Republic of Congo to return there. The grounds then contended that the judge had failed to have regard to the case law concerning the public interest where, following **OH (Serbia) v SSHD [2008] EWCA Civ 694** Wilson LJ, as he then was, identified three facets of the public interest including the risk of reoffending, the need to deter foreign criminals and the role of deportation as expressing society’s “revulsion”.
27. The word “revulsion” is now seen as an infelicitous but there is still a genuine public concern about foreign criminals remaining in the United Kingdom.
28. Mr Haseldine had prepared a further skeleton argument for the hearing on 12 January 2021 which I now consider.
29. The skeleton argument points out that the claimant’s criminal activities were described by the Secretary of State as “low level” in the Deportation Order Explanatory Minute dated 9 July 2015. That does not seem entirely apt in the case of someone who had been sent to prison for three years for attempted robbery but it is what the Secretary of State chose to do and it is difficult for a judge to go behind it.
30. On 9 May 2006 after, the claimant had been convicted for attempted robbery, the Secretary of State wrote to say that no action was going to be taken.
31. With respect to Mr Haseldine I have checked this claim in the Deportation Order Explanatory Minute which appears in my bundle after the Deportation Order. As is often the case with documents in the Home Office bundle I find the pagination either hard to find or hard to understand but it is placed after the Deportation Order marked, I think, “Y1”. The policy justification for deportation is said to be “aggregate low level offending”.
32. A synopsis includes the background which I set out below because I find it illuminating:
 

“Deportation action was not pursued against Mr Malamba following his 2005 conviction for attempted robbery for which he received a three year sentence and he was sent a warning letter. In view of his convictions on 7 November 2012 and 8 February 2013 he was issued with a notice of decision to make a deportation order on 10 July 2013. Notice of appeal was lodged; however the Home Office withdrew the notice of decision to make a

deportation order on 21 January 2014, in line with the then policy resultant from **P (DRC) and R (DRC)**. Given the resumption of enforced returns to the DRC and a further conviction on 23 January 2014 for breach of a non-molestation order, the question of deportation is being revisited”.

33. The skeleton argument then, appropriately, points out that there is a serious relationship with Ms Sosnowska and two children from that relationship.
34. The skeleton argument then rehearses the First-tier Tribunal Judge’s Decision and Reasons and outlines principles of law and statutory provisions. It makes the point that the First-tier Tribunal Judge had given very clear reasons for his conclusion. I have alluded to them above and repeat them in outline. The claimant never lived in the DRC as an adult, he could not speak the language there, he knew no one there and had no property there and no obvious means of obtaining employment there or existing without work and his partner could not support him outside the country.
35. This, it was contended, justified the conclusion that there were very significant obstacles to reintegration.
36. The judge then drew out the factual differences between this claimant and the appellant in **Bossade**. He also pointed out that the Secretary of State had decided on an earlier occasion not to deport the claimant but to take no action even though he had been to prison for robbery and it was the Secretary of State who described the offences as “low level” (I have explained this above). Against this background the judge found it was rather difficult to see why the need to remove the claimant was so very pressing even though there had been further offences, albeit less serious than the ones that had been excused before.
37. Concerning the contention that the judge had not given adequate reasons for the finding that it was unduly harsh it was pointed out that the judge had accepted the evidence that the claimant was a primary carer and not only was that important in the lives of the young children but it also enabled the claimant’s partner to earn a living. This was within the scope of conclusions open to the judge.
38. I have indicated at the start of this hearing that the case came before me in January and March 2021. The hearing in January was aborted because of failings in the remote hearing mechanisms. Mr Whitwell, who I do not suggest was in any way to blame, suffered the embarrassment of failure by his video camera but also by telephone when he tried to use that as an acceptable but less satisfactory alternative. His main point was that the facts just did not justify the unduly harsh conclusion. There was nothing to explain why the effect on the children or indeed the partner were worthy of the description “unduly harsh”.
39. At the adjourned hearing Mr Melvin returned to this topic. He pointed out that although the First-tier Tribunal Judge identified the unduly harsh test there is no explanation about why the consequences satisfied the test. This, he submitted, made the reasoning inadequate. Similarly, the difficulties on return had been elevated to a degree that the facts did not

warrant. It was wrong to make too much of the partner being left as a single parent, that is a consequence of deportation; it is not unduly harsh but what deportation does.

40. Mr Haseldine said that the tests were identified, the conclusion was explained and it was up to the judge. If the judge found that it was “unduly harsh” then there was enough there to justify the conclusion. The finding was not plucked from the air.
41. The judge was also impressed by the difficulties the claimant had faced being unable to read or write Lingala and clearly attached considerable weight to that point as he was entitled to do. He was not a persistent offender and should not be treated as one.
42. I have considered these things. This may be a case that could have been decided rationally in a different way but that is not at all the same as saying the decision that has been made is irrational or otherwise unlawful. It is conspicuously clear that the judge had the correct tests in his mind and conspicuously clear why he found them satisfied. I do not accept that the reasoning is inadequate or that the decision is perverse, although this was not expressly alleged.
43. I find that this is a case of a judge identifying the test and the appropriate facts and evaluating them in a way that may not have been the only way possible but was clear and lawful and I dismiss the appeal brought by the Secretary of State.

**Notice of Decision**

44. The Secretary of State’s appeal is dismissed.

Jonathan Perkins

Signed  
Jonathan Perkins  
Judge of the Upper Tribunal

Dated 5 August 2021