



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

Appeal Number: PA/03339/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 14 January 2022**

**Decision & Reasons Promulgated
On 8 February 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**KENEDDY KELVIN NYIRENDA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Ms M Chowdhury, instructed by Anglia Immigration Law

DECISION AND REASONS

1. I shall refer hereafter to Mr Nyirenda as the appellant, as he was before the judge, and to the Secretary of State as the respondent, as she was before the judge.
2. The appellant appealed to the First-tier Tribunal against the Secretary of State's decision of 4 May 2020 refusing his human rights and protection claim.

3. No further issues arise in respect of the protection claim. The judge dismissed the appeal in that regard and her decision has not been challenged.
4. However, she allowed the appeal on human rights grounds, in respect of the appellant's claim for family and private life. This is in the context of the appellant having been deported from the United Kingdom on 4 December 2008, having been convicted on 3 January 2007 of rape at Manchester Crown Court, being sentenced on 23 January 2007 to three years and ten months' imprisonment. He had been in the United Kingdom since 2004 as a student.
5. He met his wife, a British citizen who was born in Malawi, in December 2011 and they married in April 2014. The further details of his immigration history are set out in the subparagraphs to paragraph 5 of the judge's decision. He had applied for revocation of his deportation order and that was refused and an appeal against that decision was dismissed on 30 April 2015.
6. The Judge set out the relevant legal principles at paragraphs 44 to 53 of her decision. This included references to the Devaseelan guidance, in light of the earlier decision by the Tribunal dismissing the appeal against the refusal to revoke a deportation order in 2015. The judge noted that there was no dispute in relation to the facts other than in relation to the asylum aspects of the claim.
7. With regard to the appellant's wife, the judge found that she has recurring granular cell tumours which are benign but require repeated surgeries to remove them. She suffers from depression and anxiety and has serious concerns about the quality and availability of medical care in Malawi based on her experiences when she was nursing her father when he was dying in 2013. She continued to work full-time with the appellant's support and although she was not travelling for work due to the pandemic she continued to work long hours from home. The appellant was the primary caregiver for the children, cooked the meals, did the housework and was the principal contact for their school.
8. The judge accepted that family life was engaged, the appellant being married to a British citizen and having two British citizen children. The judge stated that one of the children was a minor but it would appear from the ages given at paragraph 5(xvi) of the judge's decision that the children in fact are both minors. Nothing turns on the point in any event.
9. The judge referred to the relevant Immigration Rules and the need to apply a balance sheet approach as recommended by the Supreme Court in Hesham Ali. She also took into account the guidance from the Upper Tribunal in Binaku [2021] UKUT 34 (IAC) regarding the relationship between Part 5A of the Nationality, Immigration and Asylum Act 2002 and the Immigration Rules. She noted also from the latter decision the

approach to be adopted by the Tribunal in respect of an individual who had re-entered the United Kingdom in the face of an extant deportation order.

10. The judge went on to consider, in light of the length of the appellant's sentence, whether Exception 1 or Exception 2 applied as set out in section 117C of the 2002 Act. Exception 1 did not apply, but Exception 2 was relevant, in that the appellant was found to have a genuine and subsisting relationship with a qualifying partner and also with two qualifying children. The issue thereafter was whether the effect on the partner or child would be unduly harsh.
11. The judge considered first whether it would be unduly harsh for the children to live with the appellant in Malawi and concluded that it would not. She bore in mind the guidance in Zoumbas [2013] UKSC 74 in particular. She considered that whilst it would be in the children's best interests to remain in the UK with both their parents, she did not find that their removal from the UK with the appellant would be materially detrimental to their best interests.
12. Nor did she consider that it would be unduly harsh for the children to remain in the UK with the appellant if he was returned to Malawi. His removal would have an emotional impact on the children but they would be able to continue living with their mother without suffering unreasonable disruption to their lives or any irreversible harm. She noted that the appellant's wife is a highly educated professional with a career that pays a significant salary and they have a family home in the United Kingdom on which the wife has a mortgage. The Child Social Work assessment of 2017 confirmed that there were no concerns in respect of the wife's ability to meet the basic care needs of both children.
13. The judge then went on to consider whether it would be unduly harsh for the appellant's wife to return to Malawi with him. She noted dicta from the Court of Appeal in KB (Jamaica) [2020] EWCA Civ 1385 in relation to the meaning of "unduly harsh", in the test provided for in section 117C(5) by reference to the decision of the Supreme Court in KO (Nigeria) 1 WLR 5273 and the decision of the Court of Appeal in HA (Iraq) [2020] EWCA Civ 117. She noted that in particular it was an elevated test, carrying a much stronger emphasis than mere undesirability or what is merely uncomfortable, inconvenient or difficult but the threshold was not as high as the very compelling circumstances test in section 117C(6). She observed that the unduly harsh test sets a high threshold for an individual to overcome to establish that deportation disproportionately breaches their family life rights.
14. She went on to find that this test was satisfied when considering the possible relocation of the wife to Malawi. She was previously a national of Malawi and lived there during her childhood and formative years. She was now a British citizen and whilst it was submitted that she would need to surrender her British citizenship in order to return, it was not apparent to the judge from the evidence why she could not return as the spouse of the

appellant without surrendering her British citizenship. She was familiar with local customs and practices that would aid re-integration by herself, the appellant and their children. Also, her mother lived in Malawi and whilst they were no longer in regular contact, it was reasonable to expect that contact would be re-instated if she returned. She was a well-educated, resourceful and professional woman who would be able to find work in Malawi.

15. Nevertheless, the judge considered that the wife's physical and mental health conditions were such that it would be unduly harsh for her to return to Malawi with the appellant. She had regularly recurring granular cell tumours. The consequences of repeated operations to remove the tumours had had a negative impact on her physical and mental health. She was awaiting further operations which she had delayed as she did not want to undergo them while the appellant remained on immigration bail. She had concerns about the standard of the medical care and sanitation in Malawi based on her experiences visiting her father in hospital in 2013. She might therefore refuse necessary medical treatment or find that it was not available on return to Malawi. The relevant CPIN confirmed that medical facilities were rudimentary.
16. In addition, there was a report from a Dr Singh, who confirmed that the appellant's wife has a depressive illness of moderate intensity and suffers from panic disorder. The doctor considered that if the appellant were deported it would exacerbate the wife's mental health problems and make her passive suicidal thoughts more active. The CPIN, from which the judge again quoted, confirmed that there was poor mental health provision in Malawi.
17. The judge went on to consider the impact on the wife remaining in the United Kingdom without the appellant. She noted that the wife was heavily reliant on the appellant for practical and emotional support. The extent of that reliance was demonstrated by the fact that the appellant came to the United Kingdom on two occasions in contravention of his deportation order to look after her. Since being returned to the United Kingdom by the Irish authorities in October 2016 the appellant had become the primary carer for the children. Whilst she was financially self-sufficient and would be able to pay for childcare to look after the children while she worked, she did not have any family support in the United Kingdom. She had deferred necessary medical treatment in the UK until the appellant was able to support her without the constraint of his immigration bail conditions or the risk of breaching them. She might continue to refuse treatment if he was not in the UK to support her. Given the planned operations to remove her tumours and the likelihood that she would continue to require operations, together with her poor mental health, remaining in the UK without the appellant would place an unreasonable strain on her. This would undoubtedly have a negative impact on the children as well. The judge in 2015 had noted that there would be difficulties for the wife following the appellant's deportation but they would not amount to unduly harsh circumstances. The judge

considered, however, that, following Devaseelan, the facts had changed since that determination, particularly with regard to the wife's physical and mental health and also with regard to the extent of her reliance on the appellant for practical and emotional support. That support could not reasonably or effectively be provided remotely or by visits to Malawi. As a consequence, the judge found that the effect of the appellant's deportation would be unduly harsh on his wife and accordingly, the requirements of Exception 2 were satisfied.

18. The judge went on to remind herself that the public interest in deporting the appellant remained and she balanced that against the specific circumstances of his case. Taking the relevant matters into account, she concluded, bearing in mind also the seriousness of the offence which had been committed, that the interference with his right to respect for family life was disproportionate, taking the family's situation as a whole, in particular the wife's physical and mental health conditions and the involvement of two British children.
19. The Secretary of State sought and was granted permission to appeal on the basis that the decision was inadequately reasoned, commenting also that there was no evidence that the appellant's wife would continue to refuse treatment and there would be no reason for her to do so and in the absence of family support she could rely on social assistance for support if necessary. As regards the finding that the provision of mental health care in Malawi is not to the same standard as the UK, there had not been a finding that the appellant's wife would not have access to such provisions that did exist and therefore the judge's reasoning in coming to the unduly harsh consequences findings was inadequate. Case law was cited to bear out the propositions set out in the grounds. It was argued that the judge had failed to have regard to the established case law and also had failed to have adequate regard to the very high public interest in the appellant's deportation, given the seriousness of his offence and the breaches of the deportation order.
20. In the skeleton argument submitted on the day before the hearing it was also argued that it was inconsistent for the judge to find that on the one hand, it would not be unduly harsh for the children to remain with their mother in the United Kingdom without the appellant but then to conclude that that it would be unduly harsh on the appellant's wife to remain in the United Kingdom without him.
21. In his submissions Mr Melvin relied on the grounds and the skeleton argument. He had seen the skeleton argument put forward on behalf of the appellant and considered that it was unmeritorious. He relied on the inconsistency referred to in his skeleton argument and also argued that the judge's decision was unreasoned and speculative and he referred to the grant of permission in this regard where the point about the potentially speculative nature of the judge's findings was emphasised. There was little objective evidence about treatment in Malawi and with regard to

operations in the United Kingdom that could have taken place. The findings at paragraphs 76 to 79 were unreasoned and inconsistent.

22. In her submissions Ms Chowdhury relied on the skeleton argument. She referred to the evidence set out at paragraph 23 of the judge's decision concerning the wife's reluctance to undergo further medical treatment while her husband's immigration situation was uncertain and whilst he was subject to a curfew. The findings in respect of undue harshness concerning the wife were set out in particular at paragraph 76. It was not speculative but it was because of the position of the appellant. If he were deported it was open to the judge to find that the wife would not have the operation, given the impact on the children. All the evidence had been considered and the judge had applied the correct tests and case law. The respondent had expressly accepted that there was no dispute on the facts save with regard to the asylum claim. The question of the impact of the appellant's removal on the wife and the children, that was the judge's reasoning.
23. By way of reply, Mr Melvin argued that the evidence was that the wife was still working and spending time away from the family and it was not affecting her ability to perform her tasks. It seemed to be a choice and the family was trying to hold the Tribunal to ransom in refusing medical treatment.
24. I reserved my decision.
25. I have set out in some detail above the judge's findings in respect of undue harshness. I do not consider that she has been shown to have erred in law as contended or at all. She set out the relevant legal tests including the relevant case law. It is not suggested that the wrong test was considered, and as regards the case law referred to in the grounds, it is important to bear in mind that each case on undue harshness will very much depend upon its own facts as is the case here. I do not consider that the contended for inconsistency between the findings in respect of the undue harshness of the children remaining in the United Kingdom with their mother and the impact on the mother either of removal or remaining in the United Kingdom without the appellant is a real one. Though it could be said that the impact on the mother would itself impact on the children, it was clearly proper for the judge to consider the impact on the children on the one hand and on the mother on the other hand separately, and it was open to her to find that the impact on her was such as to cross the undue harshness threshold without that same threshold being crossed in respect of the children. Though the decision she has come to on undue harshness is not necessarily one that would be reached by every judge, it was, in my view, one that was open to her on the evidence before her. She did not unduly speculate with regard to what the appellant's wife would do about possible operations and medical treatment, bearing mind as she did also, at paragraph 76 of her decision that the appellant's wife might find that the necessary treatment was not available in Malawi, and in any event, what she had to say about that was part of the overall

consideration of undue harshness which the judge undertook. It has not been shown that she erred in law in this or in any other respect, and as a consequence, her decision allowing this appeal is upheld.

Notice of Decision

The appeal of the Secretary of State is dismissed.

No anonymity direction is made.

A handwritten signature in black ink, appearing to be 'Allen', written in a cursive style.

Signed

Date 27 January 2022

Upper Tribunal Judge Allen