



IAC-AH-KEW-VP-V1

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

Appeal Number: DA/01947/2014

THE IMMIGRATION ACTS

Heard at Field House
On 30th November, 2015

Decision & Reasons Promulgated
On 29th January, 2016

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR A T
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant:

Mr Tom Wilding, a Senior Home Office Presenting Officer

For the Respondent:

M M Zahir, a solicitor and Partner in, 'The Law Advisers'

Anonymity

The First-tier Tribunal made an anonymity order in this appeal. I am satisfied that such order shall remain in place unless the Tribunal or any appropriate court directs otherwise. As such, no report of these proceedings shall directly or indirectly identify the respondent or his family members. Failure to comply with this order could lead to a contempt of court.

DETERMINATION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department and to avoid confusion I shall refer to her throughout as being "the Claimant." The respondent is Mr AT, a national of Sierra Leone born on 26th June, 1977.
2. The respondent entered the United Kingdom on 24th December, 2000, using a stolen South African passport and claimed asylum. This was refused on 5th December, 2001, and he appealed on 20 December, 2001, but his appeal was dismissed on 3rd April, 2003. Permission to appeal was subsequently granted and dismissed on 31st March, 2004. A subsequent application for permission to appeal was rejected on 25th June, 2004.
3. I assume that it was on 25th June, 2004 that he became appeal rights exhausted.
4. The respondent made an application for leave to remain on 17th December, 2006, and this was rejected on 15th April, 2007, without a right of appeal (because the respondent had no leave).
5. On 26th March, 2011, the respondent was served with a notice advising him he should leave the United Kingdom. Further submissions were made by solicitors on his behalf on 5th November, 2012 requesting leave to remain outside the Immigration Rules and for a work permit. These were refused on 5th December, 2013.
6. On 8th February, 2006 the respondent was convicted at Bow Street Magistrates' Court of possession of cannabis a class C controlled drug and was fined £75. On 25th September, 2007 he was convicted at Greenwich Magistrates' Court, again for possession of cannabis a class C controlled drug and was again fined £75. On 20th January, 2014 he was convicted at Woolwich Crown Court of possession with intent to supply a controlled drug, class B cannabis, for which he was sentenced to twelve months imprisonment and ordered to pay a £100 victim surcharge and the cannabis was ordered to be forfeited and destroyed. The respondent was also convicted of facilitating the acquisition or possession of criminal property, for which he was sentenced to a twelve month term of imprisonment to run concurrently.
7. On 15th October, 2014 the Claimant made a deportation order in respect of the respondent under Section 32 of the UK Border Act 2007. The respondent appealed to the First-tier Tribunal and his appeal was heard by First-tier Tribunal Judge Stokes at Taylor House on 20th February, 2015.
8. In a determination promulgated on 30th April, 2015 the judge allowed the respondent's appeal on human rights grounds.
9. The Claimant, dissatisfied with the decision, sought and was granted permission to appeal to the Upper Tribunal by Upper Tribunal Judge Kebede. She said:-

"There is arguable merit in the assertion in the grounds that the judge erred in her approach to the question of 'unduly harsh' when considering paragraph 399(A) of the Immigration Rules in relation to the appellant's stepchildren and that her assessment of 'very compelling circumstances' whilst taking account of the public interest, failed to give it the appropriate weight."

10. At the hearing before me, Mr Wilding, for the Claimant drew my attention to paragraphs 37 and 39 of the determination. It will be helpful to the reader if I set them out below:-

“35. The [Claimant] did not accept that the [respondent] had a legal relationship with JA, JH and JO as he had taken no steps to formalise his relationship with them or financially support them. He did not meet the definition of ‘parent’ in paragraph 6 of the Immigration Rules. It is clear from the evidence before me that he has built up a genuine parental relationship with these children who regard him as their father. They are all British citizens who were born and have lived all their lives in the UK. They have no connection with Sierra Leone. They are now all well settled in secondary schools here having gone through the English education system from the beginning. JA and JH are both at critical stages of their education as they are now in the GCSE stream. It would be **unreasonable** for them as British citizens to be expected to follow the [respondent] to Sierra Leone. There is evidence before me that their work and attendance has suffered during the [respondent’s] detention not least because they have to help their mother who is also caring for three children under the age of 6. JO has been identified as benefiting from help with his speech and language and has qualified for a disability living allowance owing to his need to be constantly supervised and needs support from outside his home. I accept F’s evidence that she has no family in the UK and therefore no one to whom she can turn for support. It is clear from the children’s evidence that she is finding life a struggle without the [respondent’s] help particularly as the children go to separate schools and their performance at school has suffered because of this. It is not in their best interests to leave the UK **nor reasonable to expect them to** it is in their best interest to remain with their mother in the UK. I find, however, in the circumstances before me that it is also in their best interest for them to remain within a family unit consisting of the [respondent]. I have referred to their evidence that, although he is in prison, they have remained in close contact with him by visiting and telephoning him and regard him as their father. They have been adamant as to the caring and active role he plays in their lives.” [My emphasis]

...

39. Although I have found previously in this determination that the [respondent] and F have a genuine and subsisting relationship, he formed this relationship whilst he was living in the UK unlawfully and his immigration status was precarious. For these reasons he does not meet the requirements of paragraph 399(b)(i). Having found that the children’s best interests are to remain in the UK with their mother and [the respondent] I do not find that it is reasonable to expect Felicia to accompany the [respondent] to Sierra Leone, a country to which she has no ties or has ever visited. Ms Lambert said that there was no policy in force regarding removals to Sierra Leone at this time when there is a medical crisis affecting the whole country because of the Ebola outbreak. F now has settled status in the UK in line with her three youngest children. The oldest children are all British citizens and cannot reasonably be expected to leave the environment and culture within which they have been brought up. There is clear evidence before me that she is struggling to cope with the demands of her growing family. I accept that she has no family or work here. The [respondent’s] removal to Sierra Leone would mean that she was left without the [respondent’s] day-to-day physical and emotional support which would undoubtedly impact on

the children as it has done during his detention. In these circumstances I find that it would be 'unduly harsh' for F to be left in the UK on a long-term basis without him."

11. In those two paragraphs Mr Wilding drew my attention to the fact that the judge suggests that it "unreasonable" first for the children to be expected to follow the respondent to Sierra Leone (paragraph 35) and then for F to accompany the respondent to Sierra Leone (paragraph 39). The Rules and Act require it to be "unduly harsh". The judge simply asked the wrong questions. The judge was required to assess the impact on the children of following the respondent to Sierra Leone and also to assess the impact of them remaining in the United Kingdom with him having been returned to Sierra Leone. The judge was also required to perform the same task in respect of his partner, F. Instead, at paragraph 39 the judge has found that it would be unreasonable for the respondent's partner's children to follow the respondent to Sierra Leone but has not considered whether it would be unduly harsh for them to do so. She has not gone on to consider whether, if they remained in the United Kingdom and the respondent departs to Sierra Leone whether that would result in any unduly harsh consequences.
12. As to the grounds of removal of the respondent being unduly harsh in terms of the effect it would have on other members of the family, the judge has set out at paragraph 34 the framework which she uses to assess the case under it. This is, Mr Wilding submitted, flawed. Again, it will be helpful if I set out the paragraph in question:-

"34. The 'criminality guidance in Article 8 cases' suggests that the [Claimant] envisages the 'unduly harsh' test as some form of proportionality assessment (paragraphs 253-254) but the statute in Immigration Rules are not phrased in a way that indicates it is a proportionality assessment. Instead of conducting a full proportionality assessment taking into account all the circumstances of the case and balancing them against the public interest in deportation, which is the approach contained in the wording of Article 8 of the European Convention, and applied by the Strasbourg Court, the new scheme simply sets out specific exceptions to deportation that would bear no resemblance to a full Article 8 balancing exercise. The plain wording of the exceptions contained in the statute and Rules pose a simple question; whether the effect of deportation would be 'unduly harsh' on the child. Nothing in the wording suggests that the child's best interest should then be weighed against the public interest or any other factors before deciding whether it is 'unduly harsh'."

Mr Wilding drew my attention to the decisions of the Upper Tribunal in *MAB* (Para 399; "unduly harsh") *USA* [2015] UKUT 435 (IAC) and to the decision in **KMO (Section 117 - unduly harsh)** *Nigeria* [2015] UKUT 543 (IAC). At paragraphs 24 and 25 of *KMO* the Tribunal say this:-

"24. The Immigration Rules, when applied in the context of deportation of a foreign criminal, are a complete code. Where an assessment is required to be made as to whether a person meets the requirements of para 399 of the Immigration Rules, as that comprises an assessment of that person's claim under Article 8 of the ECHR, it is necessary to have regard, in making that assessment, to the matters

which the Tribunal must have regard as a consequence of the provisions of Section 117C. In particular those include that the more serious the offence committed, the greater is the public interest in the deportation of a foreign criminal. Therefore, the word 'unduly' in the phrase 'unduly harsh' requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh.

25. It might be observed also that the Secretary of State has published Immigration Directorate Instructions - Chapter 13: Criminality Guidance in Article 8 ECHR Cases. Although such guidance to decision makers cannot be determinative in matters of statutory interpretation, since this has been published by the same department that brought the Immigration Bill to Parliament that inserted Section 117 into the 2002 Act, it might be thought likely that the guidance at least gives a good idea of what the legislation was intended to achieve. At 2.5.3 the guidance says this:-

2.5.3 The effect of deportation on a qualifying partner or a qualifying child must be considered in the context of the foreign criminal's immigration and criminal history. The greater the public interest in deportation the stronger the countervailing factors need to be to succeed. The impact of deportation on a partner or child can be harsh, even very harsh, without being unduly harsh, depending on the extent of the public interest in deportation and the family life effected.

2.5.4 For example it will usually be more difficult for a foreign criminal who has been sentenced more than once to a period of imprisonment of at least twelve months but less than four years to demonstrate that the effect of deportation would be unduly harsh than for a foreign criminal who has been convicted of a single offence because repeat offending increases the public interest in deportation and so requires a stronger claim to respect for family life in order to outweigh it."

13. Mr Wilding submitted that there must be a subjective analysis and balancing exercise, because the Rules are a complete code (see *MF Nigeria*).
14. The Immigration Judge appeared to query whether the Rules were a complete code or not (see paragraphs 22 and 23 of the determination).
15. At paragraph 45 of the determination the judge expresses the need for a fair balance between the rights of the individual and the public interest. This, suggested Mr Wilding is not necessarily wrong, but a fair balance has to recognise that on the Secretary of State's side of the balancing exercise there is a very significant weight to the public interest. The proportionality assessment clearly favours deportation unless an appellant can demonstrate circumstances of sufficient weight to displace, and then outweigh that presumption. The approach adopted by the judge discloses a burden on the Secretary of State to justify deportation rather than the respondent

establishing that his rights under Article 8 are very strong and capable of overcoming the pressing public interest.

16. Responding at some length Mr Zahir pointed out to me that the judge properly set the law at paragraphs 14 and 16 of her determination. He submitted that the judge very clearly knew what her function was and the reasoning of the judge reveals no misdirection on her part. At paragraph 36 of the determination the judge clearly considered the fact that the decision would result in the respondent's removal the impact of which on the children would be unduly harsh. The decision of the judge was not flawed because the judge was entitled to deal with the matter in the way that she did. The Secretary of State is simply wrong. Responding briefly, Mr Wilding suggested that the relevance of paragraphs 14 to 16 is unclear because the complaint of the Secretary of State is the application of the law. At paragraph 36 the judge simply fails to consider adequately the question of unduly harshness because of the error of law on the part of the judge at paragraph 34 which was that in the judge's view the question of unduly harshness does not factor in the public interest or other factors. A best interest assessment in respect of the children is not a conclusion but paragraph 34 of the determination reads as if it is. It is simply unclear how far what the judge says at paragraph 35 impacts on what the judge subsequently says at paragraph 36 where she finds that the respondent's removal would be unduly harsh on both the respondent's non-biological children and his biological children.
17. I have concluded that there is merit in the argument made by the Claimant and on their behalf by Mr Wilding. I believe that First-tier Tribunal Judge Stokes did err in law and those errors were material. The judge conflated the correct threshold in considering whether it would be reasonable for the respondent's partner and children to accompany him to Sierra Leone with what is reasonable. The judge's approach to paragraph 399A and B is flawed and the judge failed to provide adequate reasons for concluding that the respondent's removal would be unduly harsh. The judge's approach to the need for a "fair balance between the rights of the individuals and public interest is misconceived. The correct approach is clearly set out in *KMO*. For these reasons I have concluded it is necessary to remit the appeal for hearing afresh by a judge other than First Tier Tribunal Judge Stokes..
18. Although it formed no part of the Secretary of State's challenge to the determination, I have identified two further errors in it. I do not believe that they were material, but if they were repeated they might become material. The first is that at paragraph 2 of the determination the judge refers to the fact that the respondent remained unlawfully in the United Kingdom from 2011. In actual fact he appears to have been in the United Kingdom without leave since he became appeal rights exhausted in April 2007 or very shortly thereafter. He has therefore remained in the United Kingdom unlawfully since that time. The second error is in the last sentence at paragraph 25 of the determination. The respondent's partner, F is not a person with settled status in the United Kingdom. She has been granted limited leave to remain for a period of 30 months and issued with a biometric residence permit at the end of that period she may become entitled to apply for settlement, but at the moment she is not a person with settled status.

19. I am told that no interpreter is required, but that the Secretary of State for the Home Department does not have a copy of the respondent's appeal bundle. AT's advisers are respectfully asked to ensure that they serve a copy on the Claimant as soon as possible **and in any event at least ten days before the remitted hearing.**

Richard Chalkley

Upper Tribunal Judge Chalkley