



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

Appeal Number: HU/07730/2016

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons  
Promulgated**

**On 26 September 2017**

**On 14 November 2017**

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

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

Appellant

**and**

**SERGE GOUMA**

(anonymity direction not made)

Respondent

**Representation:**

For the Appellant: Mr P Armstrong, Senior Home Office Presenting Officer

For the Respondent: Mr A Gilbert, Counsel instructed by Hammond Lloyd Legal

**DECISION AND REASONS**

1. Although this case touches on the welfare of a child I do not see any risk to the child's welfare arising from reporting this decision and I do not make any order restricting reporting.
2. The Secretary of State appeals a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State to refuse him leave to remain on human rights grounds. Permission was given by Upper Tribunal Judge Kebede because she was satisfied that it was reasonably arguable that the First-tier Tribunal had not

given adequate reasons in law for concluding that the consequences of deportation would be unduly harsh.

3. It is helpful to consider carefully the First-tier Tribunal's decision. It sets out the claimant's immigration history. He is a citizen of the Ivory Coast. He was born in 1989 and arrived in the United Kingdom in September 2004 at the age of 14 years. He unsuccessfully claimed asylum but was given discretionary leave to remain until November 2007. He applied for an extension of his leave but before a decision was made he was caught committing criminal offences.
4. In April 2009 he was arrested and cautioned for possessing crack cocaine. In August 2009 he was charged with supplying crack cocaine. He was convicted of this offence and in February 2010 he was sentenced to two years in a young offenders' institution. In January 2010, presumably while he was awaiting sentence for possessing crack cocaine, he was fined for possessing cannabis.
5. He was told of the intention to deport him in March 2010 and he responded by setting out claims for asylum and leave to remain on human rights grounds based on his private and family life particularly his relationship with his daughter in the United Kingdom. He was served with a deportation order in November 2010 and refused asylum and leave to remain on human rights grounds. He appealed and his appeal was allowed on human rights grounds in May 2011. He was then given discretionary leave to remain until 2011 extended until 24 December 2012. He applied for leave to remain before that leave expired but he made his application in the wrong form and it was not processed. A further application was made in April 2013 but that was not accompanied by the necessary fee and so was not processed.
6. On 13 August 2013 he was sentenced to a community order for twelve months for making false representations.
7. He applied for further leave to remain in April 2014 but in a letter dated 24 November 2015 he was told that he had to be deported. He then made the application on 12 December 2015 seeking leave to remain on human rights grounds the refusal of which led to this appeal.
8. It was the claimant's case before the First-tier Tribunal that the effect of removal would be unduly harsh for the claimant's partner and child. The First-tier Tribunal directed itself on the law. Paragraph 66 of the decision is particularly significant and includes the following:
 

*"In deciding whether the decision is unduly harsh I have considered **MM (Uganda) v Secretary of State for the Home Department (2016)** and **KMO (Section 117 - unduly harsh) Nigeria [2015] UKUT 00543 (IAC)** where the Upper Tribunal set out'... matters to which the Tribunal must have regard as a consequence of the provisions of s117C. In particular, those include that the more serious the offence committed, the greater is the public interest in 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."*
9. The judge went on to find, unremarkably, that the claimant was socially and culturally integrated into the United Kingdom and that he had no meaningful

links with Ivory Coast. The judge also accepted that there were “solid supportive relationships” with the claimant’s partner and extended family.

10. At paragraph 71 of her decision the First-tier Tribunal Judge noted that the claimant had developed a relationship with a Ms A--- N--- and that they had a child O-- G--- who was born in August 2012. The child’s mother was concerned that he suffered from Asperger syndrome but there was no medical evidence to support that claim. When she was ten years old Ms N was found to have persistent behavioural difficulties and was later found to have Autistic Spectrum Disorder. Nevertheless she is now capable of training to be a nurse.
11. At paragraph 72 the Judge noted that there was “no evidence” of any behavioural difficulties exhibited by the child OG and the Judge found there were no mental health concerns to be considered. The judge noted that OG was managing at nursery and that the nursery recognised that the claimant was involved in the care of his son.
12. Paragraph 73 of the Tribunal’s decision is particularly significant. The Judge said:

“The conclusion of the Tribunal in 2011 was that the public interest in deportation was outweighed, inter alia, by the potential for the appellant to develop a relationship with a child who may be his daughter. It has now been established that the girl is not his child. My decision, more than five years after that conclusion, is reached against a background of further years in the UK, a relationship which developed shortly after that decision, one which has resulted in a child where it is accepted by [Secretary of State] that the relationship with Ms N and the child are genuine and subsisting. I accept the evidence that he is the primary caregiver for their son while she is training to be a nurse.”

13. At paragraph 78 the Judge said:

“The [claimant] is a foreign criminal, however, his significant crime occurred more than six years ago and I accept that the weight attached to the public interest arising from his deportation diminishes with time during which he continues to be a proper member of UK society, following UK laws. I find that he was convicted in 2013 after trying to use forged Argos vouchers, he was sentenced to, and completed, 100 hours community service. I find that this weighs against him but I accept the proper concession by [the Presenting Officer] that, on its own, such a conviction would not raise any prospect of deportation.”

14. The Judge went on to accept that the claimant and his partner had “developed deeper ties as a family over time” and that he has “built his family in support of his partner in building her career”.
15. At paragraph 80 of the decision the Judge said:
 

“it would not be in the best interests of, and would be unduly harsh for, his child to remain in the UK and be separated from him”.
16. At paragraph 81 the Judge noted that the claimant is a member of a “close and supportive family” and said how “membership does bring value and benefit to the wider family as well as to his partner and son”.
17. The Judge repeated the finding given earlier that the claimant
 

“is supporting his partner, and caring for their son, while she trains to be a nurse and that her course will finish in July 2018”.

18. At paragraph 83 the Judge said:

“Whilst the public interest in his deportation remains, it is my conclusion that his situation is within the exception on the basis of his relationship with his child and the impact on his continued development of the [claimant’s] absence at this crucial stage in his life.”

19. At paragraph 84 the Judge said:

“If I am wrong on that point I must consider his relationship with his wife. I find that he has a genuine and subsisting relationship with a partner within the scope of paragraph 399(b). I rely on the finding in the 2011 decision that she would remain in the UK. In considering her position, if he is deported they can communicate using social and electronic media. I find that she could travel to Ivory Coast to visit the [claimant] and whilst I accept that his absence would involve her in additional childcare responsibilities and may impact on her financial situation, I would not find those to be unduly harsh, absent other factors. The other factors in this case which I take into account are the length of time since the offence and the [claimant’s] social, cultural and family ties in the UK.”

20. At paragraph 91 the Judge said:

“I rely on the previous findings and the reasons set out above to find that the effect of the deportation will be unduly harsh on the child and his partner.”

21. At paragraph 92 the Judge said:

“This [claimant] committed his offences as a young adult. He spent a number of years supporting his family, initially with his own work and thereafter in the work carried out by his partner. Whilst the scales are weighted in favour of deportation and while further weight must be added to the new factor of recent criminality, I rely on the findings of the previous Tribunal, and the nature of his family life which has continued to develop, on the fact that the recent criminality would not, in itself require deportation and I find that the public interest in his deportation does not, in this instance, outweigh the rights of the [claimant] and his family to enjoy family life in the UK.”

22. Mr Armstrong made his case very simply. He relied on the Secretary of State’s grounds and particularly 1b which is in the following terms:

“In **KMO (Section 117 - unduly harsh) Nigeria [2015] UKUT 00543 (IAC)** the Upper Tribunal reaffirmed the definition of ‘unduly harsh’ from the earlier decision of **MAB (para 399; “unduly harsh”) USA [2015] UKUT 00453 (IAC)**. Paragraph 26 of **KMO** states the following,

*‘Although, for these reasons, I respectfully depart from the approach advocated by the Tribunal in **MAB** I do adopt the other guidance offered by that decision:*

*“Whether the consequences of deportation will be ‘unduly harsh’ for an individual involves more than ‘uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging’ consequences and imposes a considerably more elevated or higher threshold.*

*The consequences for an individual will be ‘harsh’ if they are ‘severe’ or ‘bleak’ and they will be ‘unduly’ so if they are ‘inordinately’ or ‘excessively’ harsh taking into account all of the circumstances of the individual.”*

*Although I would add, of course, that “all of the circumstances” includes the criminal history of the person facing deportation.””*

23. I have no hesitation in saying that if the decision to allow the appeal concerned only the claimant's partner it would be clearly wrong. The public interest requires deportation, because that is what statute says, unless the effects will be unduly harsh and although the judge has directed herself impeccably I see no basis whatsoever for finding the effect on the partner to be unduly harsh and it is not clear that the Judge reached any such conclusion. Her concerns about the partner have to be read with her concerns about the child.
24. It is equally clear that the Judge has directed herself correctly in respect of the child and has unequivocally concluded that the effects of removal on the child would be "unduly harsh". That said it is not at all clear what the judge found those unduly harsh consequences would be.
25. I confirm that I have considered Mr Gilbert's submissions but to the extent that he says the decision is explained adequately I cannot agree. As indicated in my own analysis of the Decision and Reasons there are many correct examples of appropriate self-direction. There are also reasons to suspect the judge has misdirected herself. The time spent since the most serious offence was committed is not particularly relevant in determining whether the effects on the child or partner would be "unduly harsh" and the judge has, I find, rather glossed over the significance of a more recent conviction for an act of dishonesty. Clearly a matter dealt with in the magistrates' court and punished by a community order is likely to be a great deal less serious than a matter that resulted in a two-year custodial sentence on a young offender but it is not acceptable to steal from Argos or anyone else.
26. Further the Judge has not acknowledged that the requirements of section 117C of the Nationality, Immigration and Asylum Act 2002 were introduced by amendment in July 2014 and so were not in force when the claimant previously appealed successfully. The present regime is tougher and has statutory force. The fact that the earlier appeal was successful does not illuminate significantly, if at all, consideration of whether the consequence of removal of unduly harsh now.
27. I am not particularly concerned that the more additional recent offence would not have the effect of attracting deportation. The fact is the claimant is somebody who is at risk of deportation because of his own bad behaviour. His status was precarious. He did not even have leave to be in the United Kingdom. His previous appeal was successful largely because of the effect removal would have on other people and his response to that was to offend again.
28. However this does not of itself undermine the finding that the effect of removal on the child would be unduly harsh. The nearest the judge gets to justifying the decision is the finding that the claimant is the primary carer of his son when his partner is studying. That is a significant finding but of itself does not impress me particularly. He is available to care for the child and has enough about him to honour some of his responsibilities as a father. Interfering with that relationship would be harsh but I do not see how of itself it can be described as unduly harsh. The harshness that follows is the consequence likely to follow from deportation. Family relationships are destroyed. That is what deportation does.

29. I have considered the evidence before the First-tier Tribunal in an effort to see if the unexplained conclusion made more sense in the light of the evidence.
30. The claimant in his witness statement confirmed that he has a close relationship with his partner and child and asserts that the effect of deportation would be “unduly harsh” but gives little consideration, if any, to what that effect would be. He does indicate that because his partner is studying and working he collects his son from school and takes him to school usually and plays with him.
31. I have considered the statement of the claimant’s partner. She emphasises her own immaturity when the relationship began. She was born in February 1994. She describes the claimant as “an amazing dad” as well as being a good uncle and acknowledges his affection for his child.
32. Other family members comment in letters on the desirability of the nuclear family being allowed to remain together. I note by way of example the observations in a letter from one Jasmine Waller who identifies herself as a friend of the family. She says:
- “If you genuinely took time to meet the family and Serge, you would understand the mistake [you are] making and the negative impact [you are] about to make on a young boy’s whole life. I beg you to rethink your decision.”
33. Similar points are made by family friends and supporters.
34. I have considered too the skeleton argument prepared for the hearing before the First-tier Tribunal but that has little to say about why it would be unduly harsh to remove the claimant. The only element in this case which is at all out of the ordinary in a case concerning a man living in a nuclear family with his child or children is that the wife depends on him for childcare. She is engaged in a course which is of limited duration. There will be difficulties in managing without the claimant although I find it significant that they have not been explained in the evidence. I can see nothing in these papers that would support a lawful conclusion that the effects of removal on the child would be unduly harsh. Rather they are the natural consequences of deportation when the person to be removed is a family man. I hope that no-one making these decisions falls into the trap of overlooking how horrible it is to break up a nuclear family. For many centuries the nuclear family has been regarded as one of the essential building blocks for stability in society but Parliament has made it clear that the public interest requires that foreign criminals are deported unless certain exceptions arise which do not exist here unless it is the law that fathers who live with their children cannot be deported.
35. I acknowledge the positive or neutral factors recorded by the First-tier Tribunal in its analysis of Section 117 including the amount of time the claimant has spent in the United Kingdom and his ability to speak English and his lack of ties with his country of nationality.
36. I have no hesitation in concluding that the best interests of the claimant’s son lie in his father remaining with him in the United Kingdom. There is no prospect of his removing to the Ivory Coast and it is best that he keeps a close relationship with his father. However other consideration can prevent the best interests of the child being achieved and this is such a case.

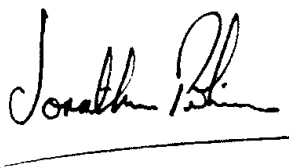
37. Even allowing for all this I cannot find on the evidence before me that the effects of removal would be “unduly harsh”.
38. I also ask myself if this is one of those rare cases where the application of Article 8 of the European Convention on Human Rights outside the Rules but this is not a case that can succeed on that basis. There are no exceptional or compelling or out of the ordinary factors here. This is a case fully within the statutory regime and I find the statutory regime permits only one conclusion.
39. It follows therefore that although the First-tier Tribunal Judge correctly identified that the appeal had to be dismissed unless she was satisfied that the effects of removal would unduly harsh within the meaning of section 117C(5) of the Nationality, Immigration and Asylum Act 2002 she did not explain adequately her conclusion that removal would be unduly harsh in this case.
40. Further, having considered the evidence before me. I have assumed that it is substantially truthful in its description of the present arrangements and I am reminded myself that for the purpose of an article 8 balancing exercise facts have to be proved to the ordinary civil standard of the balance of probabilities.
41. I am satisfied that the evidence does not support a conclusion that removal would be unduly harsh.
42. It follows therefore that I allow the Secretary of State’s appeal. I set aside the decision of the First-tier Tribunal and I order that the appeal against the decision to refuse the claimant leave to remain on human rights grounds is dismissed.

### **Decision**

The Secretary of State’s appeal is allowed.

I set aside the decision of the First-tier Tribunal.

I substitute a decision dismissing the claimant’s appeal against the Secretary of State’s decision.



Signed

Jonathan Perkins, Upper Tribunal Judge

Dated: 2 November 2017