



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

Appeal Number: PA/00476/2016

**THE IMMIGRATION ACTS**

**Heard at : UT(IAC) Birmingham**

**Decision &  
Promulgated**

**Reasons**

**On : 7 June 2017**

**On : 14 June 2017**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**A  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms V Easty, instructed by Wilsons Solicitors

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Following a grant of permission to the respondent to appeal against the decision of the First-tier Tribunal allowing the appellant's appeal against the refusal of his protection and human rights claim, it was found, at an error of law

hearing on 31 January 2017, that the First-tier Tribunal had made errors of law in its decision. The decision was accordingly set aside and is to be re-made.

2. The appellant is a citizen of the Russian Federation born on [ ] 1981. He arrived in the UK on 10 May 2000. He has a lengthy immigration history including a grant of exceptional leave to remain from 6 September 2002 to 6 September 2003 based on draft evasion from the Russian military followed by various unsuccessful applications for leave to remain on asylum and human rights grounds. A more detailed account of his immigration history is set out in my error of law decision of 3 February 2017.

3. The more salient parts of the appellant's history are that he was convicted, on 15 January 2001, of indecent assault on a female aged 16 or over and was sentenced to 18 months at a Young Offenders Institute. That pre-dated the grant of exceptional leave to remain. Following the refusal of an application for leave to remain in August 2005 he was next encountered upon his arrest on 4 September 2009 for fraud relating to a Polish passport. He was served with papers as an overstayer. On 5 October 2009 he was convicted and sentenced to 13 weeks' imprisonment, suspended for 12 months. On 18 August 2014 the respondent issued a deportation order against the appellant under the automatic deportation provisions in the UK Borders Act 2007 and served an accompanying decision on him on 22 August 2014. However the deportation order was withdrawn after the appellant married BA, a British citizen, on 12 December 2014 and produced his marriage certificate to the Home Office. On 31 May 2015 a new decision to deport was made, under section 5(1) of the Immigration Act 1971. The appellant made submissions in a section 120 notice which were considered as an asylum and human rights claim. That claim was then refused by the respondent on 5 January 2016.

4. In refusing the claim, the respondent considered that the appellant would be at no risk on return to Russia and that he was not entitled to humanitarian protection. With regard to Article 8, the respondent considered the appellant's relationship with his daughter, EG, a British citizen born on 21 November 2011 from a previous relationship. The respondent noted that social services had been involved with EG since December 2013, when the appellant's ex-partner and the mother of EG was deemed not fit to look after EG due to mental illness. As a result EG was in the care of her grandmother, AG, who had obtained a Special Guardianship Order. The appellant had applied for contact with his daughter in February 2015 through a child arrangement order which was still pending, and in the meantime he had informal contact through AG. The respondent noted the recommendation in a Cafcass report, that the appellant spend time with EG, once fortnightly, initially supervised but with the possibility of subsequent unsupervised contact. The respondent referred to two court orders regarding contact and noted that parental responsibility was held by AG with limited contact by the appellant. The respondent considered that it would not be unduly harsh for EG to remain in the UK if the appellant was deported and concluded that the requirements in paragraph 399(a) of the immigration rules had not been met. The respondent accepted that the appellant had a genuine and subsisting relationship with BA but noted that their marriage was

entered into at a time when he was subject to a deportation order. The respondent considered that it would not be unduly harsh for BA to live in Russia or to remain in the UK without the appellant and concluded that the requirements in paragraph 399(b) of the immigration rules had not been met. The respondent did not accept that the appellant could meet the requirements in paragraph 399A on the basis of private life, as he had not been lawfully resident in the UK for most of his life, he was not socially and culturally integrated in the UK and there were no very significant obstacles to his integration into Russia. The respondent did not accept that there were very compelling circumstances which outweighed the public interest in the appellant's deportation.

5. The appellant appealed against that decision. His appeal was heard on 4 March 2016 by First-tier Tribunal Judge Hall, who dismissed the appeal on asylum, humanitarian protection and Articles 2 and 3 grounds but allowed the appeal on Article 8 grounds. Whilst he found that the appellant could not meet the requirements of paragraph 399(b) or 399A, he accepted that the criteria in paragraph 399(a) were met. He accepted that the appellant had a genuine and subsisting relationship with his daughter EG and concluded that it would be unduly harsh for EG to remain in the UK without him. The appellant was without legal representation at that hearing.

6. The respondent sought, and was granted, permission to appeal to the Upper Tribunal against Judge Hall's decision on Article 8. At an error of law hearing on 31 January 2017 I found the judge's determination to be materially flawed, for the following reasons:

"13. Judge Hall, in focussing on the best interests of the appellant's daughter and the adverse effects of the appellant's deportation upon her, without balancing that against the public interest and other relevant considerations including his past criminal offending, had clearly been following the approach taken in the case of MAB (para 399; "unduly harsh") USA [2015] UKUT 435. The Court of Appeal in MM (Uganda) & Anor v Secretary of State for the Home Department (Rev 1) [2016] EWCA Civ 617, however, has since resolved the conflict between MAB and KMO, favouring the approach taken in KMO and finding that MAB was wrongly decided. Judge Hall's approach was accordingly legally flawed.

14. Mr Mills relied on the Court of Appeal's finding in The Secretary of State for the Home Department v AJ (Zimbabwe) [2016] EWCA Civ 1012, at [17], that it would be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals, and submitted that that was clear authority for the proposition that great weight had to be given to the public interest in considering proportionality under Article 8 in criminal deportation cases. I agree with his submission that that was a matter which the judge ought plainly to have considered but clearly did not. Indeed the judge gave no indication that the public interest formed any part of his consideration of the "unduly harsh" test.

15. Accordingly the conclusion reached by Judge Hall in regard to the "unduly harsh" test was unsustainable in law and has to be re-made. As Mr Mills

submitted, the balancing exercise was only partially undertaken by the judge and needs to be completed by taking into account other relevant factors including in particular the public interest. I therefore set aside Judge Hall's decision in respect to paragraph 399(a). His other findings, including those on paragraph 399(b) and 399A, are preserved.

16. Whilst it would have been possible to go on to re-make the decision with the benefit of the additional evidence produced by the appellant, including the most recent Cafcass report dated 19 December 2016 prepared for the family court proceedings, I considered that it was in the interests of justice for the matter to be listed for a resumed hearing on another date in order to give the appellant an opportunity to find legal representation and, if available, produce any further evidence. The appellant expressed his preference for such an opportunity, although I advised him that the appeal would proceed even if he was not successful in finding legal representation.

17. I note that the final order of the family court, further to the submission of the Cafcass report, does not appear to have been produced to the Tribunal and it would be helpful if the appellant could produce that, together with any other evidence of contact with his daughter. It is anticipated that the matter will proceed on the basis of submissions, but the Tribunal does not exclude further oral evidence and any witnesses should therefore attend."

7. The appeal then came before me again on 7 June 2017, by which time the appellant was legally represented and had produced a bundle of evidence including statements from himself, his wife BA, his mother-in-law, his friend and his daughter's grandmother AG, letters of support, a forensic psychologist report/risk assessment and a Child Arrangements Order from the family court dated 7 April 2016.

8. The appellant, his wife BA and his friend VS all attended and adopted their witness statements. None were cross-examined by Mr Mills. The appellant explained that his ex-partner, the mother of his daughter EG, had applied for a contact order before Christmas and the court hearing was set for 27 July 2017. However she had not co-operated with Cafcass or provided any of the papers required by the court. The recommendation from Cafcass was that she would see her daughter once or twice a month. The appellant said that he was involved in the proceedings because he had parental responsibility for his daughter. His mother-in-law had had an operation on her knee recently and was unable to care for EG so he had been caring for her with his wife. They had taken her to visit her grandmother most days after school. His daughter was doing well but suffered from severe anxiety because of the uncertainty of her situation. She did not understand what was happening and they had tried to explain. He believed that she should have some contact with her mother as that was what she wanted.

9. Mr Mills then made submissions. He said that there was no challenge to the facts and that the appellant's relationship with his daughter EG had been accepted by the Tribunal. It was particularly telling that EG's grandmother trusted the appellant as a stable parent. This was therefore a strong case for the best interests of the child being for the appellant to remain in the UK with

her, given that she had had difficulties in her upbringing and suffered from anxiety, and Mr Mills accepted that the best interests of EG were therefore a weighty factor. Although there was a public interest in deportation, given the appellant's offences in 2001, the arguments in favour of the public interest had become much weaker. Mr Mills referred to the case of The Secretary of State for the Home Department v AJ (Zimbabwe) [2016] EWCA Civ 1012 in which it was emphasised that the "unduly harsh" test was an onerous test and that it would only rarely be met, but he accepted that this was such a case and was not simply a case of a child who would miss her father. He accepted that it would be unduly harsh for EG to be separated from her father.

10. In view of Mr Mills' helpful submissions I did not consider there to be any need to hear from Ms Easty and I allowed the appeal. In the circumstances there is no need for me to set out detailed findings and reasons. I simply make the following summary findings.

11. I am entirely in agreement with Mr Mills that this is one of the rare cases where the best interests of the child outweigh the strong public interest in deportation. The appellant's daughter EG has, as Mr Mills submitted, had a difficult childhood with a mother who is unfit to care for her and who has been under the guardianship of her grandmother AG. The appellant has a strong relationship with EG and has been her main carer for the past few weeks whilst her grandmother has been recuperating from an operation and therefore unable to care for her. In her letter of 4 April 2017 at page 46 of the appellant's appeal bundle, the Family Court Advisor Karen Hughes noted AG's proposal that EG reside with the appellant if anything should happen to her and recommended that it was in EG's best interests for the appellant to remain in the UK. A letter from the headteacher of EG's school, dated 3 April 2017, at page 48 of the appeal bundle, provides strong support for the appellant's continued presence in the UK. Clearly there can be no doubt that the best interests of EG are for the appellant not to be deported.

12. The public interest factors weighing in favour of the appellant's deportation are, of course, his lack of lawful basis to remain in the UK together with his criminal convictions. However the most recent conviction was over seven years ago. The appellant received a suspended sentence and has not offended since then. The more serious offence was over 16 years ago, shortly after he arrived in the UK. The forensic psychologist's report from Angela Phillips, prepared for Coventry Family Court in January 2016, which considered both offences, concluded that the appellant had accepted responsibility for his offending and posed a low level risk of reoffending, a very low risk of any sexual recidivism and no risk to children or to anyone else. The recommendation in the report was that he be reunited with his daughter. Those conclusions are supported in the Cafcass report of 19 December 2016 from Karen Hughes. The appellant has been in a genuine and stable relationship with his wife BA for several years and she has provided a compelling and supportive statement at page 22 of the appeal bundle. Further support is provided from BA's mother and the appellant's friend VS, all of whom provide weighty support for the appellant's character.

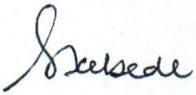
13. In all the circumstances, and given in particular Mr Mills' supporting submissions, I accept that the "unduly harsh" test, as considered in MM and AJ, and as onerous as it may be, is met in this particular case. I accept that the very strong interests of EG in having a reliable and stable parent present in her life outweigh the public interest in deporting the appellant. The appellant therefore meets the requirements of the exception to deportation on the basis of family life with a child under paragraph 399(a) of the immigration rules and his appeal is accordingly allowed on Article 8 human rights grounds.

**DECISION**

14. The original Tribunal was found to have made an error of law in its decision on Article 8 and the decision was set aside. I re-make the decision by again allowing the appellant's appeal on Article 8 human rights grounds.

Anonymity

The anonymity order previously made is continued, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed   
Upper Tribunal Judge Kebede

Dated: 9 June 2017