



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08364/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20 November 2018

Decision & Reasons Promulgated  
On 18 December 2018

Before

THE HONOURABLE LORD MATTHEWS  
SITTING AS AN UPPER TRIBUNAL JUDGE  
UPPER TRIBUNAL JUDGE McWILLIAM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR R D A  
(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr T Wilding, Home Office Presenting Officer

For the Respondent: Mr N Klear of Counsel instructed by Phillip Priscilla Solicitors

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

## **DECISION AND REASONS**

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge McIntosh promulgated on 10 September 2018 in which she allowed the respondent's appeal against a deportation order which was made on 28 August 2014. We will continue to refer to the respondent in this appeal as "the appellant" and the Secretary of State as "the respondent". We have anonymised the appellant because he has a young child.

### **Immigration History**

2. The appellant entered the United Kingdom on 13 November 2008 with a multiple visit visa, valid until 6 May 2009. He was granted further leave to remain until 6 November 2009 and again until 24 June 2010. In February 2010 he lodged an application for a certificate of approval to marry his then partner, PMR. Following their marriage he applied for leave to remain as her spouse, she being a person present and settled in the United Kingdom. He was granted leave to remain until 5 June 2012. During the course of June 2012 he applied for indefinite leave to remain as her spouse but that application could not be processed for administrative reasons and he resubmitted his application on 23 July 2012.
3. In February 2013 the appellant appeared before Blackfriars Crown Court facing charges of conspiracy to defraud and on 13<sup>th</sup> June 2013 he was sentenced to 30 months' imprisonment. He was issued with a liability to deportation letter and questionnaire on 8 July 2013. It was not clear if it was received by the appellant as no response was forthcoming. He had in the meantime been transferred to a different prison. Be that as it may, on 16 April he was again served with a liability to deportation letter and a questionnaire, to which he responded on 16 June 2014.
4. On 22 August 2014 a decision was made to refuse his application for indefinite leave to remain dated 23 July 2012 and on 26 August 2014 a deportation order was signed against him. He was served with the reasons for deportation together with the order on 28 August 2014 and the decision was certified affording him an out of country right of appeal.
5. Further representations were made on his behalf on 1 September 2014, referring to his relationship with SB. The timing of this further information coincided with the confirmation of the removal directions dated 3 September 2014 and scheduled for 9 September 2014. On 8 September 2014 the reasons to refuse to revoke the deportation order notice was served on the appellant. This decision was again certified under Section 94B of the 2002 Act.
6. On 9 September 2014 he was not removed and the removal direction was cancelled. At the end of his custodial sentence he was detained at Brick House IRC. On 8 October 2014 he submitted an application for judicial review in respect of the

decision to make a deportation direction and the certification. A decision was made to refuse him leave to remain with no right of appeal.

7. On 28 October 2014 he made a bail application, which was granted, and on 5 May 2015 his application for judicial review was refused. Subsequent representations were made on his behalf on 13, 28 May 2015, 7 September 2015 and 1 December 2015. On 13 July 2016 a decision letter refusing him leave to remain addressed the previous representations made on his behalf. On the same occasion he was detained on reporting under the immigration service powers. On 18 July 2016 removal directions were set for 26 July 2016.
8. Following the notice for removal directions a pre-action Protocol was submitted on 20 July followed by an application to stay the removal. On 28 July 2016 a sealed judicial review was lodged and a bail application was submitted on 17 August 2016. He was released on a restriction order on the same day.
9. On 20 September 2016 his application for judicial review was refused but he was not removed from the United Kingdom.
10. On 17 October 2016 a renewed judicial review application was confirmed and the matter listed for an oral permission hearing for 3 November 2016. On 25 October 2016, however, a consent order was signed and he discontinued his judicial review application.
11. At the end of December 2016 he submitted additional evidence to support his application for further leave to remain and there were certain communications between him and the Home Office between December 2016 and March 2017. On 14 March 2017 he was detained when he attended at his reporting venue. The detention was with a view to effecting his removal. On the same day he was served with a human rights refusal decision certified under Section 94B.
12. On 16 March 2017 he sought to return to Ghana voluntarily and informed the Home Office of his wish. However, as the removal directions were already set, he could not return voluntarily. On 17 March he indicated that he no longer wished to return to Ghana voluntarily, citing the fact that his partner was unwell and he had a child in the United Kingdom. On 21 March 2017 he was served with removal directions for his return to Ghana on 28 March 2017. On the day before his removal he was served with a supplementary letter containing the decision of 14 March. On the same day his representatives applied for and were granted a stay on the removal directions of 28 March 2017.
13. On 3 April 2017 he submitted a judicial review application challenging the decision of 14 March and also requesting that the Section 94B certification be withdrawn. He was granted bail on 18 April 2017.

14. On 23 April 2017 the Secretary of State agreed to withdraw the decision of 14 March 2017 and the supplementary letter served upon the appellant on 27 March. A consent order giving effect to the withdrawal of the judicial review was sealed. On 14 June 2017 the Supreme Court handed down judgment in the case of Kiarie and Byndloss v SSHD [2017] UKSC 42 and in light of that judgment the certifications under Section 94B were withdrawn, as was the decision of 13 July 2016 refusing his human rights claim under paragraph 353 of the Immigration Rules with no right of appeal. The submissions between 5 June 2014 to March 2017 stood to be reconsidered.
15. On 17 July 2017 a decision was made to refuse him leave to remain in accordance with Section 82(1) of the 2002 Act. He appealed against that decision.
16. The First-tier Tribunal heard evidence from the appellant, from SB and from a social worker, Ms Bulmer. As well as that, the judge made it plain that he had considered all of the evidence in the case. Paragraph 22 sets out the documents which were considered, namely the appellant's bundle consisting of 133 pages and the Home Office bundle, including, amongst other documents, the appellant's applications, the decision of the Secretary of State, the judge's sentencing remarks, the liability to deportation and questionnaire dated 8 July 2013 and the response to the liability to deportation letter dated 5 June 2014, the PNC records in relation to the appellant and further submissions from the appellant's legal representatives. There were also other documents included with the respondent's bundle. The judge correctly identified that the burden was on the appellant to show that he met the requirements of the Immigration Rules and for him to show that Article 8 was engaged in his case. The judge made it plain that in reaching his decision he took account of all the documents.
17. It is not necessary to rehearse all of the findings which can be seen in the decision of the First-tier Tribunal. Putting it shortly, the FTT found that the risk to the appellant and SB's son (S) outweighed the public interest requiring the appellant's deportation. The critical findings can be found from paragraphs 64 to 85 of the decision.
18. There was no dispute that the appellant met the statutory requirements enabling his deportation pursuant to Section 32 of the UK Borders Act 2007, but it was his case that his deportation would amount to a breach of Article 8 of the European Convention. The FTT so found.

### *The Grounds of Appeal*

19. The Secretary of State sought permission to appeal on a number of grounds. The first of these was that the FTT had failed to weigh up the public interest in the deportation of foreign criminals before finding that the risk to the son, S, outweighed it. Reference was made to the case of MM (Uganda) [2016] EWCA Civ 450 at paragraph 26. Secondly, the public interest in deportation was not diluted by the fact that there was no further offending. The offence itself was significant. It appeared to have

been a professionally planned fraud carried out over a significant period and probably cost the train company involved over £100,000 of loss. It was submitted that the FTT had applied the wrong threshold. The correct approach encompassed the arduous test of undue hardship. There was no suggestion in the decision that if necessary the son could not be adequately cared for by social services if the appellant was deported.

20. There was insufficient reasoning as to why it was accepted by the FTT that the appellant was a full-time carer of S. The finding that it was unlikely that SB would be able to continue full-time work if the appellant was deported was said to be contrary to her own evidence and to the evidence that her employer was extremely sympathetic and supportive of her condition. This finding was inadequately reasoned and was not made out on the evidence.
21. No account was taken of the submission by the Presenting Officer that the relationship between the appellant and SB was entered into when both parties were aware that his immigration status was precarious. The relationship had been given greater weight in the proportionality assessment than it should have been afforded in the light of Section 117B(4)(b).
22. More specifically, the FTT had applied the wrong threshold when finding that it was unreasonable for SB to travel to Ghana. This was a lower threshold than that which was required, namely undue harshness. There was a lack of adequate reasoning behind this finding and the judge failed to make a finding on the SSHD's position in the refusal letter which stated that medical facilities were available, that extended family could assist with the family's transition, that the child's young age made him more liable to adapt and that SB was in a favourable position to find employment. The FTT had failed to consider all the factors, adequately or at all, and this amounted to a material misdirection.
23. Permission to appeal was granted principally on the basis that the judge appeared to refer to a reasonableness test rather than a test of undue harshness when considering Section 117C of the 2002 Act, but the scope of argument was not limited.
24. In presenting the appeal for the respondent Mr Wilding handed up copies of the case of KO (Nigeria) & Ors v Secretary of State for the Home Department, a judgment handed down by the Supreme Court on 24 October 2018. That decision altered the respondent's challenge to a degree inasmuch as it previously relied on MM. Effectively, KO said that the extent of the criminality did not come into the equation when assessing the undue harsh test. Reference was made in particular to paragraph 23 where Lord Carnwath said the following:

“On the other hand the expression ‘unduly harsh’ seems clearly intended to introduce a higher hurdle than that of ‘reasonableness’ under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word ‘unduly’ implies an element of comparison. It assumes that there is a ‘due’ level of ‘harshness’, that is a level which may be acceptable or

justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

25. From paragraph 27 onwards Lord Carnwath referred to the meaning of "unduly harsh" and in particular cited the guidance given by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), [2015] INLR 563, paragraph 46. There the following was said:  

"By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."
26. Mr Wilding submitted that the decision had problems from paragraph 80 onwards. Undue harshness had to be considered in relation to both the question of separation and the question of the family unit moving abroad. The judge started with the question of separation, which was surprising, but in fact nothing really turned on that.
27. There was no analysis of what would amount to undue harshness in paragraph 80. Paragraphs 64 to 80 set out his findings about the evidence and the background, but there was no engagement with the high test of undue harshness. Relocation to Ghana by the family was dealt with only in paragraph 82 and that paragraph was not itself enough. The only specific challenge to the evidence which Mr Wilding advanced was in relation to the finding in paragraph 84 that SB would be unlikely to be able to continue in full-time work. There was no deeper analysis of that. When it was compared to the finding in paragraph 50 that she generally worked six days a week and that her employers were extremely supportive and sympathetic, it was not clear where the findings in paragraph 84 came from. In the circumstances, though, it was a relatively minor matter.
28. In paragraph 82 the FTT had found that it was "unreasonable to expect the appellant's partner and child to travel to Ghana". This was no mere slip of the pen or the keyboard. It showed that the FTT had applied the wrong test. In paragraph 85 the judge had relied on the best interests of the child rather than any question of undue hardship.

29. In reply Mr Klear submitted that the reference to reasonableness was indeed a slip. This was a long decision by an experienced judge who had set out all the evidence on which he relied. Paragraphs 38 to 51 contained the summary of the evidence of SB. The judge had found her to be credible. The appellant's evidence was set out in paragraphs 26 to 37 and the social worker's in paragraphs 53 to 55.
30. At paragraph 60 reference was made to the submissions of the Secretary of State in relation to Section 117C and in paragraph 62 the submissions by Mr Klear were set out. It was recorded that Mr Klear submitted that the removal of the appellant would be "unduly harsh". Paragraph 76 set out 117C in full including the "unduly harsh" test. Reference was made to 117C(5) in paragraph 79. It was obvious that the judge had looked at the relevant provisions and the reference to unreasonableness was an obvious slip.
31. In respect of materiality, the judge took account of SB's psychiatric condition. Her condition was incurable. He found that if she travelled to Ghana it would trigger a relapse exposing the child to emotional harm and neglect. That is why he thought it would be unduly harsh if the appellant were deported and the family had to move to Ghana.
32. In paragraph 80 the judge referred to Section 55 of the Borders, Citizenship and Immigration Act 2009 and the case of ZH (Tanzania) which was still good law. Considering the best interests of the child first was in line with KO. In the light of this, another Tribunal would not have arrived at a different decision. Paragraph 80 was also relevant in its discussion of the child's circumstances. In the absence of the appellant it would be unlikely that SB could meet his needs without considerable support.
33. In reply Mr Wilding submitted that paragraph 82 did not engage with the severity referred to in KO. That pointed to the reference to unreasonableness not being a slip of the pen. The whole decision was infected by the failure to engage with the higher threshold.

### *Conclusions*

34. We reserved our decision which we give now. There is no dispute that the appellant is a foreign national with a relevant criminal conviction involving conspiracy to defraud and involving a loss to the commercial companies of £100,000. The given start date of the offending behaviour was 1 January 2009 and ended on 8 November 2012. The FTT records that the appellant disputed the length of his involvement in the offence but he also stated that he did not seek to go behind the judge's sentencing remarks. Whether the date of the offending was within three months of his entry into the United Kingdom or a year after that is in essence neither here nor there. His risk of reoffending is assessed as being low.

35. The appellant's relationship with SB commenced during the life of his marriage. According to her she did not know anything about his immigration status. She said that it was early 2012 that the relationship became serious. She was aware that he had leave to remain but never discussed his status. She was unaware of the fact that he was facing criminal charges until he rang from prison. The FTT obviously accepted this evidence. Mr Wilding did not seek to make anything of the precarious nature of the appellant's immigration status when the relationship was formed and in view of the fact that this appeal really turns on the circumstances of the child it does not seem to us that that is a factor which would weigh very heavily in the balance anyway, if at all, following KO. Neither do we consider that the findings as to Ms Bogle's employment are germane to the issue.
36. The crucial findings are as follows. The appellant's son was born on 17 October 2015 and continued to reside with the appellant and SB. There was ample evidence that the appellant played a significant role in the family unit. At paragraph 77 the FTT found that the appellant was the full-time carer of his son. He supported his partner generally and particularly during any relapse of her mental illness, when she experienced episodes of bipolar. When he was held in a Home Office detention centre she struggled to meet their son's needs. The evidence supported the contention that their 2 year old son looked to the appellant as his principal carer and recognised him as such. As we have indicated, one of the grounds of appeal is that the FTT failed to provide adequate reasons as to why it was accepted that he was the full-time carer of the child. There was, however evidence about this both from SB, the appellant himself and from the social worker, as well as the other evidence referred to by the FTT. This point was not advanced by Mr Wilding and we consider that he was wise not to make anything of it.
37. The most pressing issue in this case is SB's illness. While she is able to maintain a full-time job she is diagnosed with bipolar. The appellant's position was that he was able to support her during periods of relapse, ensuring that she took her medication and took care of herself. There was also evidence that she would fall asleep from time to time as a result of the medication, which could put the child in danger. The family support unit became involved with the family. This is an agency which works closely with vulnerable families and Ms Bulmer, the social worker who gave evidence, became involved with them in September 2017 until April 2018. The local authority was satisfied that the safeguarding needs of the child were currently being met and that a care package required to support the family, in the event of SB suffering a relapse, was in place. The needs of the family could be met because the appellant remained within the household. If SB suffered a relapse the local authority would be required to consider what support the family would need. There was no need for additional support with the appellant in place. If he were deported there would be a family case conference to determine whether they needed to put a plan in place. If his needs could not be met he might be placed on a child in need register. The risk assessment which was completed in January 2018 showed that SB suffered with bipolar with a high risk of relapse. The presence of the appellant significantly minimised that prospect. There were concerns in relation to her caring for the child



alone. That posed a serious risk to his welfare. Coin Street was a facility which was able to and did provide respite of three hours a week to the family. This would be insufficient support for SB alone if the appellant were deported. In the event that the mother cared for the child alone and fell short of what would reasonably be expected, the local authority would consider taking care proceedings which could result ultimately in the removal of the child from the family and his being placed for adoption. However, if the appellant remained in the United Kingdom providing stability for the family, then it was unlikely that Coin Street would remain involved with the family.

38. SB evidence, which was accepted, was that she came to the United Kingdom aged 16 or 17 to join her mother and her daughter, to whom she had given birth in Jamaica. She completed compulsory education in the UK and went on to further education, including university. She had experienced episodes of depression and anxiety prior to university but this had become unmanageable at university. She completed her first year but struggled during the second year and was unable to complete the course. She left to seek employment. She commenced work as a cashier at Santander in 2004, gradually progressing to branch manager, before leaving in 2014. She had been admitted to the care of the mental health team at King's College Hospital and her medication of Quetiapine was increased. Gradually, with support and help from the staff, she was able to monitor and manage her condition and function again. She had had a serious relapse in 2017 when the appellant was unexpectedly detained in immigration detention. She simply failed to feed her child, was disorientated and knew that she needed help. Her impression was that as an individual with a diagnosis of bipolar she would not be well-received in Ghana and would be considered to be possessed by the Devil. She could not speak the language spoken in Ghana and did not think she would have access to medical treatment and medication.

It was submitted on behalf of the respondent that prescribed medication was available in Ghana and that the child was of an age to be able to adapt to life there with the appellant and his mother. The language difficulties were not insurmountable. She should be able to find employment there, given her experience in this country. In the alternative it would not be unduly harsh for her to remain in the United Kingdom. She would be provided with respite support and would have access to NHS mental health services and support from the local authority family support agency.

It is fair to say that the judgment does not really engage with the issue of whether or not medical treatment was in fact available in Ghana, as is plainly set out in the refusal letter. However, the judge obviously accepted, in paragraph 82, the evidence from the appellant and SB that her condition would be treated with suspicion in Ghana. We do not consider that he found there was insufficient treatment and therapy in Ghana to treat her condition but merely narrated that that was her evidence. However, he found that she would have no confidence of appropriate treatment in the event of a relapse. Her condition could not be cured and there was a

real risk that if she travelled to Ghana it would trigger a relapse, exposing the child to emotional harm and neglect, the very same risks the authorities in the United Kingdom would seek to guard against.

In paragraph 78 the judge found that the trigger of her condition has historically been emotional, with elements of anxiety. It is in this context that the question of a relapse if she had to travel to Ghana should be considered.

We are satisfied that the judge considered the position if the family were to relocate to Ghana. The findings in fact about what would happen there, in paragraph 82, are sufficient in our view to allow the FTT to find that the test of undue hardship to the child was met.

39. The issue of separating the family by deporting the appellant is dealt with principally in paragraphs 77, 78 and 80 of the decision. SB has struggled to meet the needs of the son on occasions when the appellant has been held in detention. The concern, described by Ms Bulmer, of the real possibility of the child being taken into care or possibly being placed for adoption is significant. In the event of a relapse, which could be triggered by anxiety, the child would be at risk. At the present time he is meeting his developmental milestones, resides within an emotionally warm family and is safe in a happy family home. He benefits from the attendance of the appellant at his creche. The judge found that in the absence of the appellant it would be unlikely that SB could meet his needs without considerable support. It would likely result in involvement from outside agencies and, as we have indicated, paragraph 78 refers to the possibility of being placed for adoption. This is based fairly and squarely on the evidence of Ms Bulmer. The FTT was entitled to accept all this evidence and, in our opinion, to hold that the circumstances fell within the ambit of undue hardship.
40. The FTT referred in a number of paragraphs to Section 117C of the Nationality, Immigration and Asylum Act 2002. It can hardly be thought that she was unaware of the appropriate test and we are satisfied that the reference to unreasonableness was merely a slip, when the decision is read as a whole. We are satisfied that the material findings in fact were based on evidence which she was entitled to accept and that, having regard to the best interests of the child S she was entitled to find that the test of undue hardship was met. We conclude that there is no material error of law in the decision of the FTT.

### **Notice of Decision**

The respondent's appeal is dismissed and the determination of the FTT stands

Signed

Upper Tribunal Judge McWilliam

Date 10 December 2018

**Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/291)**

We make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant in this decision. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.