



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

Appeal Number: HU/26716/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 12 January 2018**

**Decision & Reasons Promulgated
On 18 January 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GIDEON [O]

Respondent

Representation:

For the Appellant:

Mr. T. Tarlow, Home Office Presenting Officer

For the Respondent:

Mr. D. Chirico of counsel, instructed by Wilson Solicitors LLP

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent, who was born on 17 March 1992, is a national of Nigeria. It is the Respondent's case that he was brought to the United Kingdom by his aunt in 2003. He was encountered by the police on 10 August 2010 and applied for asylum that same day. His

application was refused on 26 October 2010 but he was granted discretionary leave to remain until 25 October 2013. He has not had any further leave since that date.

2. Meanwhile, he had entered into a relationship with his partner in 2007. She is a British citizen who was born on 3 April 1991. She already had a daughter, who had been born on 14 February 2006. She subsequently had three children with the Respondent. A daughter, S, who was born on [] 2009, another daughter, G, who was born on [] 2010, and a son, J, who was born on [] 2014. All of the children are also British citizens.
3. The Respondent has a significant number of criminal convictions which date back to 3 March 2009. Many of them relating to driving without insurance or a driving licence or driving whilst disqualified. Five of these convictions lead to sentences of imprisonment. He was also sentenced to 30 months in a Young Offenders Institute for robbery on 11 April 2012.
4. On 22 February 2012 he had also been sentenced to 26 months detention in a Young Offenders Institution for dangerous driving, driving whilst disqualified and using a motor vehicle without insurance. He had two of his children in the car at the time of the offence.
5. On 29 May 2015, a deportation order was made in relation to him as a foreign national criminal. In response the Respondent made a human rights claim but this was refused on 25 November 2016. The Respondent appealed and First-tier Tribunal Judge Aujla allowed his appeal on Article 8 grounds in a decision promulgated on 26 September 2017.
6. The Appellant appealed against this decision and First-tier Tribunal Judge Parkes granted her permission to appeal on 9 October 2017.

ERROR OF LAW HEARING

7. Both the Home Office Presenting Officer and counsel for the Respondent made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below. Counsel for the Respondent relied on his skeleton argument and also a Rule 24 Response.

ERROR OF LAW DECISION

8. In his decision, the First-tier Tribunal Judge reminded himself that the longest sentence received by the Respondent was one of three years detention in a Young Offenders Institution. He then reminded himself of the requirements of section 117C of the Nationality, Immigration and Asylum Act 2002 and paragraphs 399 and 399A of the Immigration Rules.
9. Paragraph 399 of the Immigration Rules states that one of the exceptions to deportation for a person who has been sentenced to at least twelve months but less than four years imprisonment applies where:

“(a) the foreign criminal has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country in which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the United Kingdom without the person who is to be deported”.
11. Similarly, section 117C(5) of the Nationality, Immigration and Asylum Act 2002 says that the exception applies “where C has...a genuine and subsisting parental relationship with a qualifying child, and the effect of C’s deportation on the...child would be unduly harsh”.
12. The Respondent has three children of his own who are British citizens and also cares for his partner’s British child and it was not disputed that the Respondent has genuine and subsisting parental relationships with the children.
13. In terms of whether it would be unduly harsh for the children to live in Nigeria with the Respondent, the First-tier Tribunal Judge concluded in paragraph 14 of his decision, that, on the basis of the medical evidence and the social worker’s report, “it would be totally unreasonable and unduly harsh to expect the [Respondent’s] partner and the children to accompany him to Nigeria.”

14. It was not disputed that his daughter, R, had a serious form of epilepsy and had required a number of admissions and appointments at hospital and was not responding to medication and treatment. Correspondence from the NHS also indicates that she has suffered from a deterioration in her motor and language skills. It was the circumstances of this child which were foremost in the First-tier Tribunal Judge's mind and the seriousness of her condition was not challenged by the Respondent.
15. The report prepared by Diane Jackson, an independent social worker, dated 20 April 2015, also indicated that when he was not in custody the Respondent played a significant role in his children's lives and gave his partner the support necessary to meet her caring responsibilities. The First-tier Tribunal Judge also accepted that the Respondent's partner had to assist her own mother who suffered from glaucoma and diabetes and her grandmother who suffered from dementia.
16. In the grounds of appeal the Appellant did not challenge any of the findings about the health and circumstances of the Respondent's family members but submitted that the one error made by the First-tier Tribunal Judge was his failure to apply the test approved in *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 450 where the Court of Appeal found that when considering whether it was unduly harsh for a child to live in another country with a foreign national criminal or, in the alternative, remain here without him, regard had to be had to all the circumstances in the case, including that person's immigration and criminal history".
17. In particular, Lord Justice Laws stated that:
 - “22 I turn to the interpretation of the phrase "unduly harsh". Plainly it means the same in section 117C(5) as in Rule 399. "Unduly harsh" is an ordinary English expression. As so often, its meaning is coloured by its context. Authority is hardly needed for such a proposition but is anyway provided, for example by VIA Rail Canada [2000] 193 DLR (4th) 357 at paragraphs 35 to 37.
 23. The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in MAB ignores

this combination of factors. The first of them, the public interest in the removal of foreign criminals, is expressly vouched by Parliament in section 117C(1). Section 117C(2) then provides (I repeat the provision for convenience):

"The more serious the offence committed by a foreign criminal,
the greater is the public interest in deportation of the criminal."

24. This steers the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the "unduly harsh" provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term "unduly" is mistaken for "excessive" which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history.

25 ...

26. For all these reasons in my judgment MAB was wrongly decided by the Tribunal. The expression "unduly harsh" in section 117C(5) and Rule 399(a) and (b) requires regard to be had to all the circumstances including the criminal's immigration and criminal history"

18. The Home Office Presenting Officer submitted that the First-tier Tribunal Judge had failed to take into account all the relevant circumstances.

19. However, the First-tier Tribunal Judge's reasoning was not restricted to paragraphs 42 to 46 of the decision but had to be read in its entirety. For example, in paragraph 43 of the decision the First-tier Tribunal Judge reminded himself that the Respondent had committed serious offences in the United Kingdom and this statement had to be read in the context of paragraphs 7 – 9 of his decision, which gave a detailed account of the Respondent's criminal

history and the sentences he had received. In paragraph 35 of the decision, the First-tier Tribunal Judge also stated that he had taken into account the Respondent's criminal record and in paragraph 42 he reminded himself of the fact that the Respondent had spent time in custody. Therefore, throughout the decision, he reminded him of the weight to the fact that the deportation of foreign criminals is in the public interest.

20. In paragraph 35 the First-tier Tribunal Judge also reminded himself that he had to take into account "the [Respondent's] residence history in the United Kingdom, his criminal record and the personal circumstances of his partner and the four children". In paragraph 36, the First-tier Tribunal Judge reminded himself of the facts relating to section 117C(1) of the Nationality, Immigration and Asylum Act 2002, which states that "the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal". In particular, he noted that the longest sentence passed on the Appellant was three years in a young offender's institution. In the following paragraphs he weighed this against the family's circumstances.
21. The Home Office Presenting Officer submitted that the First-tier Tribunal Judge had failed to note that the Respondent had entered the United Kingdom illegally and asserted that, if his lack of immigration status had been taken into account, the outcome may have been different.
22. However, in paragraph 2 of his decision the First-tier Tribunal Judge did note that it was the Respondent's case that he entered the United Kingdom with his aunt in 2002 but that the Appellant was not able to verify any such entry. Therefore, he was aware that on his own account the Respondent had made an illegal entry, albeit as a child. In paragraph 3 the First-tier Tribunal Judge noted that the Respondent had continued to live here without leave. He repeated this latter fact in paragraph 43 where he also noted that the Respondent had no status until 26 October 2010 when he was granted discretionary leave to remain. As discretionary leave to remain is granted for a finite period of time and there is no mention of further such leave being granted, it can be inferred that the First-tier Tribunal Judge was aware that no further leave had been granted.
23. The references to the Respondent's lack of immigration status have to be read in the context of the proportionality assessment clearly conducted by the First-tier Tribunal Judge between paragraphs 35 and 46 of his decision, which were predicated on the need to decide whether it

would be unduly harsh for the Respondent's British children for him to be deported from the United Kingdom.

24. As a consequence, the decision reached by the First-tier Tribunal Judge was in accordance with *MM (Uganda) & Anr v Secretary of State for the Home Department* [2016] EWCA Civ 617 and First-tier Tribunal Judge Aujla did not err in law when considering whether it would be unduly harsh to deport the Respondent.

DECISION

- (1) The Appellant's appeal is dismissed.
- (2) First-tier Tribunal Judge Aujla's decision is upheld.

Nadine Finch

Signed

Date 16 January 2018

Upper Tribunal Judge Finch