



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/09534/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 22<sup>nd</sup> January 2019

Decision & Reasons Promulgated  
On 1<sup>st</sup> February 2019

**Before**

**LORD BECKETT SITTING AS AN UPPER TRIBUNAL JUDGE  
UPPER TRIBUNAL JUDGE GILL**

**Between**

**K F  
(ANONYMITY DIRECTION MADE)**

**Appellant  
and**

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

**Respondent**

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

Whilst no anonymity direction was made earlier in the proceedings, we now make an anonymity direction because the case involves a child. 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.

The parties at liberty to apply to discharge this order, with reasons.

**Representation:**

For the Appellant: Mr Bazini, Counsel, instructed by Karis Solicitors Ltd.  
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

## DECISION AND REASONS

1. The appellant is a national of Albania, born 23 March 1982, who has appealed against a deportation order of 22 August 2017 made under section 32(5) of the UK Borders Act 2007.
2. The appellant was sentenced to imprisonment for 20 months on 1 December 2016 at Canterbury Crown Court, for facilitating illegal entry by two Albanian nationals into the UK. Given the length of his sentence, he fell within the definition of "foreign criminal" in section 117D(2) of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act").
3. His appeal was heard in the First-tier Tribunal (FtT) on 21 August 2018 and refused in a decision promulgated on 21 September 2018.
4. On 5 October 2018, he presented essentially two grounds of appeal:
  - A complaint that the FtT judge had applied the higher test under section 117C(6) of the 2002 Act when the appropriate test was that contained in section 117C(5);
  - The FtTJ had failed adequately to address the best interests of his daughter whose interests were a paramount consideration.
5. On 24 October 2018, the Supreme Court issued its decision in *KO (Nigeria) v Secretary of State for the Home Department* [2018] 1 WLR 5273, and disapproved certain decisions of the Court of Appeal, including *MM (Uganda)* [2016] EWCA Civ 450, as to the manner in which Exception 2 under section 117C (5) of the 2002 Act should be applied.
6. The appellant gave notice in advance of the hearing before us that he would seek to found on the decision in *KO (Nigeria)*. Given the timing of the issuing of that decision, and that notice had been given to the respondent, we allowed a third ground of appeal, based on *KO (Nigeria)* to be heard in the appeal. Mr Clarke had no objection to our allowing this additional ground of appeal and he indicated that the Secretary of State was conceding the appeal on the ground that the error proposed in the new ground of appeal had been a material error of law. Despite the concession, we heard submissions from parties on the question of materiality.
7. The new ground of appeal, as expressed in the appellant's skeleton argument, is in these terms:

"In KO, the Court held that the "unduly harsh" test was to be determined without regard to the criminality of that parent, the severity of the relevant offences or indeed the criminal's immigration history.  
That being the case, the FTTJ's decision contained material errors of law rendering the decision unlawful and unsafe. The FTTJ plainly adopts the

approach of MM Uganda (see para 102 and 106 etc) which was held to be wrong in KO.

It is plain that in his deliberations which effectively take place from paras 106 onwards, that the FTTJ has firmly and mostly in his mind the criminality and immigration history of the appellant. Indeed this makes up the bulk of his consideration (see paras 1060108 and 110-112). Even if the FTTJ had made a clear finding on the unduly harsh test it would be clear that in doing so he had fallen foul of the lawful approach identified in KO. “

8. Whilst we had no difficulty in accepting the concession that there was an error of law given the decision of the Supreme Court in *KO (Nigeria)* and its disapproval of the approach laid down in *MM (Uganda)* we wished to consider if the error could be material in the circumstances of this case. Accordingly we invited Mr Clarke to explain why he considered it to be material and we heard also from Mr Bazini.

*Submissions for the Secretary of State*

9. Mr Clarke’s position was that in light of the decision in *KO (Nigeria)*, it was clear that there was an error of law in the way in which the question of whether deportation was unduly harsh for the appellant’s daughter had been considered. The FTTJ had treated the appellant’s level of criminality and associated public interest considerations as determinative without making any findings about the effect of deportation on the child and without determining the question of her best interests which were a primary, though not decisive, consideration. There were no findings on the credibility of the evidence presented which, Mr Clarke submitted, rendered the making of a proper assessment of whether deportation was unduly harsh almost impossible. There would require to be a re-hearing and it ought to take place in the FtT.

*Submissions for the appellant*

10. Mr Bazini confined his submissions to explaining why he considered the conceded error to be material. He submitted that there were no findings as to the effect of deportation on the child and no engagement with how the likely change in her mother’s circumstances which would flow from deportation would affect her. There was no explicit finding as to where the child’s best interests lay.

*The facts of the case*

11. The appellant entered the UK illegally in 2005 and in 2007 was sentenced to imprisonment for 8 months for the use and/or possession of false documents. He was removed to Albania of consent on 1 October 2017. He entered the UK again in 2010 or 2011, again illegally. He commenced a relationship with LC in 2015 and they began living together on 6 October 2015. Their daughter was born in June 2016. They had not been together as a couple for some months before the hearing before the FtT in August 2018 and must have separated in or about April 2018.

12. On 19 May 2016, both the appellant and LC were arrested on suspicion of facilitating illegal entry when LC was stopped at Dover with two Albanian nationals hidden in the boot of her car.
13. On 17 October 2016 the appellant was convicted at Channel Magistrates Court of conspiring to do an act to facilitate the commission of a breach of UK immigration law and on 1 December 2016, at Canterbury Crown Court, he was sentenced to imprisonment for 20 months whilst LC was sentenced to 16 months which she served with her infant daughter. She was released in April 2017. The appellant was released from his sentence in October 2017.

*The determination*

14. In the light of our hesitation in recognising the materiality of the conceded error, and the profound criticisms of the determination made on either side, we shall examine the determination in some detail.
15. The appellant's criminal and immigration history is recorded at paras 3-6. At paras 7-20 the Secretary of State's decision and reasons are summarised.
16. It is recorded at para 27 that parties agreed that the outcome of the appeal would turn on the question of undue harshness. That can only be a reference to Exception 2 in section 117C (5).
17. The evidence of the appellant before the FtT is summarised at paras 29-53. The appellant maintained that he has a close relationship with his daughter. After LC was released from prison in April 2017 she had regularly visited the appellant in prison, bringing their daughter with her to visits. He says that he sees his daughter almost every day, taking her to and from nursery, and that he cares for her three or four evenings per week when his former partner is working from 6pm to 2am. He assists LC by taking her to university several times each week. The appellant has no income but is supported by friends and gets some financial help from LC and occasionally her family. Even if he could get work in Albania, it would take him six months to earn enough to fly to the UK to visit his daughter. LC had regular caring responsibilities for her two children by a former partner, with whom they reside. He seemed to suggest that his ability to support LC by working in Albania would be very limited and that if his absence forces her to give up university, the loss of student finance will have a real impact on her finances, with implications for their daughter.
18. The evidence of LC is summarised at paras 54-72. LC confirmed that she had known of the appellant's immigration history at an early point in their relationship. They had separated four months previously (circa April 2018.) She confirmed that the appellant is frequently involved with their daughter. She explained that she is in the second year of a degree in broadcast journalism and also works part time, all of which is supported by the appellant's involvement in taking their daughter to nursery and caring for her when LC is working as described by the appellant. She explained that she had no friends or family who could support her in the way which the appellant does at present. Her parents cannot help her financially.

Without working, she could not pay her rent. She could not change her hours at work or study part-time. She has two other children, aged 9 and 5, who live with their father. She sees her two older children twice per week, every second weekend and their time in school holidays is split evenly between her and their father. She described a very good relationship between her daughter and her step-siblings. Their daughter is very close to the appellant and he is very important to her. He always puts her first. She is at a delicate age, would not understand if her father were removed. LC would not be able to travel to Albania to visit the appellant. She later said that she would do so which would be difficult, especially if she had to reduce her hours at work. The FtTJ does not explain which of these contradictory assertions he accepted.

19. The respective submissions are summarised at paras 74 to 85. In paras 87-89 there is a recitation of some of the law which the FtTJ considered to be applicable. He noted that the Secretary of State had not found it established that the appellant came within any of the exceptions in the Immigration Rules or part 5A of the 2002 Act.
20. At paras 90-112, the FtTJ set out his findings and reasons. At para 92 he found in fact and law that the appellant did not meet the criteria for Exception 1, section 117C (4) of the 2002 Act (private life). In this same paragraph he noted the scope of Exception 2 and seems to have accepted that the appellant's daughter is a British citizen. In para 93 he noted that the appellant is a medium offender within the scope of Immigration Rule 398(b) and the potential exceptions in rules 399 and 399A.
21. In para 95, with reference to Rule 399(a), the FtTJ found in fact that there is a genuine and subsisting relationship between the appellant and his daughter and appears to have been satisfied that she was a British citizen although he did not say so in terms at this point but he had already noted the Secretary of State's acceptance of that fact at para 12 and noted in para 92 that the child was a national of both the UK and Albania. He appears also to have accepted that it would be unduly harsh for the child to go to Albania. He then indicated that he was not satisfied that it would be unduly harsh for the child to remain in the UK without the presence of the appellant but offered no reason for that finding.
22. Despite having apparently just determined the primary issue in the case (see para 16 above) he explained in para 97 that he would now "consider the particular circumstances of this appeal and make my findings."
23. At para 98 he declared it clearly relevant to have regard to the seriousness or otherwise of the offence of which the appellant was convicted and considered the circumstances as disclosed by the remarks of the sentencing judge.
24. He then considered three decisions founded on by the Secretary of State which seem to be: *MM (Uganda), AJ (Zimbabwe) v Secretary of State for the Home Department* [2016] EWCA Civ 1012 and *Olairewaju v Secretary of State for the Home Department* [2018] EWCA Civ 557.

- In para 102, he referred to *MM (Uganda)* at paras 24 and 26, and noted how the Court of Appeal had interpreted the meaning of unduly harsh;
- In para 104 he noted observations of the Court of Appeal in *AJ (Zimbabwe)* at para 17 to the effect that whilst it will almost always be in the best interests of a child for their relationship with their father to continue without interruption, that cannot ordinarily outweigh the public interest in deportation. Lord Elias had concluded that paragraph of his judgement by stating:

“In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary.”

- In para 105 he noted that in *Olairewaju* the court had found that for an appellant who could not fall within the exceptions, there were not compelling circumstances over and above the scope of the exceptions.
25. In para 106 the FtTJ did reject the account given by the appellant and LC of their involvement in the offence to the extent that it was inconsistent with the remarks of the sentencing judge. In para 107 the appellant's immigration and criminal history is described as appalling.
26. At para 109 the FtTJ accepted that the appellant plays a significant part in the life of LC, facilitating her to perform her work and studies, and he accepted that their daughter enjoys the presence of her father in the UK.
27. At para 111 the FtTJ noted the obligation on the respondent imposed by the Borders, Citizenship and Immigration Act 2009, section 55 which he recognised also imposed duties on the FtT.
28. Para 112 is in these terms:

“112. As to whether it is unduly harsh for the appellant to be deported whilst his daughter remains in this country, in my view of the evidence overall, I do not find that to be so. The public interest here I find very strongly falls to be struck in favour of the Respondent and that is the position with respect to my assessment of proportionality. I do not find that very compelling circumstances have been established or that the Appellant brings himself within the exceptions set out in either the Immigration rules or within the 2002 Act.”

### *Analysis*

29. We consider that the concession on the *KO (Nigeria)* ground was correctly made. At para 23, Lord Carnwath said of Exception 2 in section 117 (C) (5):

“...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...."

30. To this extent, the FtT judge must now be seen to have been in error in those respects in which he applied the now disapproved reasoning in *MM (Uganda)*.
31. On the face of it this seems almost inevitably to be a material error, although we have had some hesitation in reaching that conclusion given the apparent facts of the case which may not readily meet the level of undue harshness. However, in the absence of clear findings of fact indicating what was made of the evidence generally and in the absence of any finding as to the effect on the child of the appellant's deportation, we did not feel able immediately to conclude that the effect on her could not go beyond what would necessarily be involved for any child faced with the deportation of a parent. Whilst the Court of Appeal has observed that the best interests of the child are unlikely to be decisive in the context of a situation where Parliament has declared that deportation of a foreign criminal is in the public interest, it was nevertheless incumbent on the FtTJ to determine where the best interests of the child lie.
32. Accordingly we shall sustain the appeal on the *KO (Nigeria)* ground.
33. For the reasons we have given, we set aside the decision of the judge to dismiss the appellant's appeal.
34. Whilst there were some positive findings made by the judge in the appellant's favour, Mr Bazzini accepted that the appeal should be heard afresh. We agree that this is the appropriate course of action, given that the judge did not assess the credibility of the evidence before him.
35. However, we direct that paras 30-71 of the judge's decision shall stand as the record of the evidence given before him.
36. We now consider whether the decision on the appeal should be re-made in the Upper Tribunal or whether the appeal should be remitted to the First-tier Tribunal.
37. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

- "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

38. In our judgment, such is the extent of the credibility assessment and fact-finding that is required to be carried out, given the considerable amount of evidence that was before the judge and the fact that the judge had not assessed credibility, that this case falls within para 7.2 (b). We therefore agree with the parties that this appeal should be remitted to the First-tier Tribunal on the merits on all issues.

39. We were informed by Mr Bazzini that the President of the Upper Tribunal is due to hear various cases (including HU/00192/2018 and HU/09690/2017) between 13-15 February 2019 and that it is anticipated that guidance will be given as to: (i) whether the issue of whether there are "very compelling circumstances" for the purposes of the proviso in para 398 of the Immigration Rules is a threshold issue or a proportionality issue; and (ii) the approach to be taken if an individual subject to deportation action fails to satisfy the criteria under the Immigration Rules. **Since these issues may become relevant in the determination of the instant appeal, it would be appropriate for the First-tier Tribunal to consider listing this appeal for hearing after the President's decision in the cases we have mentioned is reported.**

### Notice of Decision

The decision of Judge of the First-tier Tribunal Buckwell involved the making of errors on points of law such that his decision to dismiss the appeal is set aside.

This appeal is remitted to the First-tier Tribunal for fresh hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal Buckwell.

An anonymity direction is made.

Signed

Date

Lord Beckett sitting as an Upper Tribunal Judge.