



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08128/2017

THE IMMIGRATION ACTS

Heard at Field House
On 6 June 2016

Decision & Reasons Promulgated
On 11 June 2019

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

AEN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Bond, counsel instructed by Irving & Co Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Twydell, promulgated on 28 February 2019. Permission to appeal was granted by Deputy Upper Tribunal Judge McGeachy on 29 April 2019.

Anonymity

2. A direction has been made previously and is repeated below because a number of minors are affected by this appeal.

Background

3. On 11 February 2001, the appellant was granted leave to enter as a visitor. He was granted further leave to remain as a student until 31 October 2002. Following his marriage to VJ with whom he had a child K, the applicant was granted leave to remain as a spouse until 19 March 2004. The appellant was granted indefinite leave to remain on 6 February 2004.
4. On 28 July 2014, the appellant was convicted, following a guilty plea, of six counts of supplying Class A drugs for which he was sentenced to two years' imprisonment. Thereafter he was informed of his liability to deportation and on 8 May 2015, the deportation order was signed. Delay to the progress of this case was caused by the respondent initially certifying the appellant's human rights claim as well as the appellant raising asylum matters.
5. On 11 August 2017 the appellant was served with a decision refusing his protection and human rights claims and it is this decision which is the subject of this appeal. In refusing the appellant's claim, the respondent relied on Section 72 of the Nationality, Immigration and Asylum Act 2002, concluding that he had been convicted of a particularly serious crime and that he constituted a danger to the community of the United Kingdom, presumptions that the appellant had failed to rebut. His asylum claim and Humanitarian Protection claims were therefore refused under paragraphs 336 and 339F of the Immigration Rules. The appellant's claim that he would face ill-treatment in Jamaica from the family of his friend who was killed in place of him, was considered without a personal interview with the appellant because of the delay in the claim being brought. The respondent decided that the appellant's claim was not objectively well-founded because he could avoid ill-treatment by relocating within Jamaica or seeking protection from the Jamaican authorities.
6. In refusing the appellant's Article 8 claim, the respondent accepted that the appellant had a genuine subsisting relationship with his partner and two of his six children but did not accept that it would be unduly harsh for them to either remain in the United Kingdom without the appellant or accompany him to Jamaica after the appellant's deportation. It was not accepted that the appellant met the private life exception to deportation because he had spent less than half of his life lawfully present in the United Kingdom. It was not accepted that there were very compelling circumstances which outweighed the public interest in his deportation.

The hearing before the First-tier Tribunal

7. The appellant did not pursue his asylum and humanitarian protection claim. The First-tier Tribunal judge accepted that the appellant had genuine and subsisting parental relationships with all six of his children and that his relationship with his

partner was genuine and subsisting. Nonetheless, the judge found that it would not be unduly harsh for the children and his partner to remain in the United Kingdom without the appellant. Regarding the youngest children M and I, the judge found that it was not unduly harsh for them to accompany the appellant and their mother to Jamaica.

The grounds of appeal

8. The grounds of appeal were fivefold. Firstly, it was argued that the judge adopted an overly restrictive approach in her analysis of unduly harshness in relation to M and I. Secondly, the judge's focus on whether or not the appellant was the main carer of his children skewed her findings on the issue of unduly harshness. Thirdly, the judge erred in her consideration of unduly harshness in relation to the appellant's partner. Fourthly, the judge failed to make any findings on the conclusions of the independent social worker. Lastly, the judge failed to take into account the considerable delay in implementing the deportation order as well as the appellant's rehabilitation.
9. Permission to appeal was granted on a narrow basis not mentioned in the grounds, because "the judge in paragraph 39 of the determination applied the decision of the Upper Tribunal in *KMO (section 117 - unduly harsh) Nigeria* [2015] UKUT 00543 (IAC) whereas that decision has been distinguished by the Supreme Court in *KO (Nigeria)*[2018] UKSC 53." Permission was not explicitly refused on any ground.
10. The respondent did not file a Rule 24 response.

The hearing

11. Ms Bond argued that the First-tier Tribunal judge repeatedly referred to the appellant not being the primary carer of some of his children and this skewed the outcome of the appeal. The judge mistakenly believed that the impact on the children of the appellant's removal was not unduly harsh because the children have a primary carer in the form of their respective mothers. The judge's consideration was too narrow, she repeated that error and the decision was materially flawed. In addition, at [41] judge said that the best interests of the children were only one factor to be considered, notwithstanding her earlier self-direction that it was a primary consideration. Ms Bond argued that there was no proper consideration of the circumstances of the appellant's partner and the judge's finding that she is a resourceful and committed carer did not address whether it was unduly harsh for her to go to Jamaica with the appellant or stay in the United Kingdom without him. There were witness statements by family members, including the partner's father which were not considered by the judge. Nor were the conclusions of the independent social worker featured anywhere in the decision.
12. Ms Bond informed me that the appellant had drawn an additional matter to her attention on the morning of the hearing. At [24] the judge had made findings regarding the seriousness of the appellant's offending. According to the pre-sentence report, the street value of all the drugs in the appellant's possession was £80. The

report further states that the total weight of the drugs in his possession was just under 1 kg which Ms Bond submitted would be worth considerably more than £80. The judge relied on the said report and found that the appellant was caught in possession of just under 1 kg of drugs. Owing to missing documents, Ms Bond was unable to cross-check the quantities in question with either the indictment or judge's sentencing remarks.

13. A further issue which was raised at the hearing for the first time was that at [34] the judge considered there to be some ambiguity regarding the address the appellant was living at. I was told that both addresses were ones his partner was living at and that this was an issue which could have been cleared up at the hearing. Finally, Ms Bond submitted that the issue of rehabilitation was not featured at all in the judge's consideration and that this was a relevant factor, applying the guiding principles of *Boultif*.
14. Ms Everett argued that the judge did not err in repeatedly referring to the issue of who was the primary carer of the appellant's children because the judge said several times that the appellant had subsisting parental relationships with his children. It was inevitable that in looking at whether something is unduly harsh it is relevant to consider whether someone is the primary carer. Ms Everett submitted that because the appellant was not the primary carer, the separation would not be unduly harsh and that this taken with the other findings was not a perverse or unreasonable approach. As for the social worker's report, the judge was clearly aware of the conclusion that the best outcome was for the whole family to remain here together. Regarding the partner's circumstances, it was for the appellant to make out his case not for the judge to wrestle with the partner's reasons why she could not go with appellant to Jamaica. In relation to the quantity of drugs involved, Ms Everett accepted that the judge was mistaken about the quantity of drugs involved but argued that this would not have changed the outcome. Lastly, regarding the judge's factual error about the appellant's address, this was not a material error because she accepted there was a subsisting relationship between the appellant, his partner and children.
15. In response, Ms Bond argued that the appellant's partner was a third-generation British citizen and had not been to Jamaica since she was aged 10. The judge found that she had the ability to adapt, however there was no idea where that information came from. The judge erred in finding that the appellant was not a primary carer and therefore by definition the unduly harsh test could not be met.
16. At the end of the hearing I reserved my decision as to whether there was an error of law.

Decision on error of law

17. Permission to appeal was granted owing to the judge's reliance on *KMO* at [39] of the decision. The judge directed herself in the following manner by reproducing and applying [24] of *KMO*, including the following passage. "*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 consideration that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh.” At the time the appeal was heard on 8 February 2019, the relevant authority was of course *KO*, the judgment of which was given in October 2018. At [40] of First-tier Tribunal decision, the judge confirms that she would be taking into consideration the “*criminal history*” in deciding the issue of unduly harshness.

18. The judge’s reliance on a decision, the conclusions of which had been overtaken by a Supreme Court decision amounts to a clear error of law. In considering whether the error was material, it is necessary to examine the issue of the judge’s view of the seriousness of the appellant’s offending. While this matter did not form part of the grounds of appeal, it is relevant to the judge’s findings on whether the appellant’s deportation would result in unduly harsh consequences, which wrongly included consideration of the extent of his offending. From the incomplete documents contained in the respondent’s bundle, it appears that the appellant was caught with less than a gram of Class A drugs, in total. That is significantly different from being caught with nearly a kilo of the same. It is the case that the judge was misled by the pre-sentence report, however there is an obvious inconsistency between the claim in that report that there was nearly a kilo of drugs found and the claim that the street value of the drugs was £80. I find that the judge erred in placing reliance on this part of the pre-sentence report and ought to have scrutinised this issue further. While, the judge ought not to have taken this issue into account in relation to the issue of unduly harshness in the first place, I accept the argument that this issue contributed to the judge’s overall findings. It is a matter of concern, that the appeal was determined with neither the full indictment nor the complete judge’s sentencing remarks before the judge.
19. I therefore conclude that the judge’s reliance on *KMO* as well as inaccurate information regarding the quantity of Class A drugs found in his possession amounts to a material error of law which justifies setting the decision of the First-tier Tribunal aside.
20. I will briefly consider the pleaded grounds and take the first two grounds together. The judge concluded at [33] that the appellant had a genuine and subsisting relationship with all six of his children but commented, more than once, that the appellant was not their main carer in her findings as to whether the effect of the appellant’s removal from the United Kingdom upon them would be unduly harsh. At [34] the judge finds that the appellant is not the main carer for any of his children. An observation she makes again at [45] of the decision.
21. The appellant’s evidence was that he lives with his partner and they look after M and I together and individually when the other is at work. The finding that the appellant’s partner is the main carer resulted from the judge’s view that there was contradictory evidence regarding the appellant’s address. I was told that this was an issue which was not raised with the representatives at the hearing and regarding which an explanation could have been provided at the time.

22. I am satisfied that the judge misled herself in treating the issue of whether the appellant was or was not the main carer as determinative when considering Article 8 under the Rules and section 117C of the 2002 Act and, further that she conflated this issue with that of unduly harshness.
23. The judge further erred in her consideration of unduly harshness in relation to the appellant's partner in that there were no clear findings, other than that she was the main carer of M and I and that she was "resourceful" and a "committed mother." At [41] the judge states that the partner had given no specific reason why she would not go to Jamaica with the appellant. At this point, it is worth noting that there is an explanation in her father's witness statement, that being that the partner wishes to ensure that her children are educated in the United Kingdom. This evidence was not considered by the judge. At [40] the judge makes a fleeting reference to the 'Summary and Conclusion' paragraph of the independent social worker's report, but makes no assessment of the detailed opinion expressed in that report which involved interviews with five of the appellant's six children as well as the writer's expert opinion of the impact of the appellant's deportation on his children.
24. The offences in question occurred in 2013 in the context of the appellant engaging in dealing to feed his addiction to crack cocaine. It was his first conviction and he has not offended since. The judge failed to take into account the evidence before her as to the appellant's rehabilitation. This issue was favourably commented upon in the partial judge's sentencing remarks and there was a professional risk assessment available in the form of an OASys report. Rehabilitation is one of the factors considered to be of importance in an overall assessment of proportionality, applying *Boultif* as well as *Garzon* [2018] EWCA Civ 1225.
25. There is also the matter of the judge, at [28] acknowledging that the welfare of the children is a primary consideration, but not applying this at [41], where she stated that "their best interests are only one factor."
26. For the foregoing reasons, the decision of the First-tier Tribunal is vitiated by material errors of law. I set aside the decision in its entirety.
27. While mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010, it is the case that the evidence on file is incomplete, the appellant has yet to have an adequate consideration of his appeal by the First-tier Tribunal and it would be unfair to deprive him of such consideration. I therefore remit the appeal to the First-tier Tribunal for a de novo hearing, with no findings preserved.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of one day by any judge except First-tier Tribunal Judge Twydell.

Directions for de novo hearing

- 1. The respondent is to file with the First-tier Tribunal and serve on the appellant a complete copy of the indictment and the judge's sentencing remarks no later than 28 days before the substantive hearing of this appeal.**

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 their 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.

Signed

Date 06 June 2019

Upper Tribunal Judge Kamara