



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02265/2020 (V)

THE IMMIGRATION ACTS

Heard at : Field House
On : 22 March 2021

Decision & Reasons Promulgated
On : 7 April 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EULOGUE MORENHO GUEI

Respondent

Representation:

For the Appellant: Mr A Tan, Senior Home Office Presenting Officer
For the Respondent: Ms S Pledger of Latitude Law Solicitors

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.
2. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Guei's appeal against the decision to refuse his human rights claim following the making of a deportation order against him. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the

respondent and Mr Guei as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of the Ivory Coast born on 26 March 1994. He entered the UK in 2009 after being issued with a settlement visa and granted indefinite leave to enter to join his parents, following a successful appeal against the refusal of entry clearance. He enrolled in school on 13 May 2009. Between April 2015 and September 2016, he was convicted nine times for 18 offences, which resulted in short sentences insufficient to justify deportation action but leading to a warning letter. On 24 July 2017 the appellant was convicted of robbery in relation to an offence committed on 13 September 2016 and a failure to surrender to custody at the appointed time, for which he was sentenced on 14 December 2017 to 12 months' imprisonment.

4. On 21 December 2017 the respondent made a decision to deport the appellant pursuant to section 32(5) of the UK Borders Act 2007 and invited him to respond. He responded on 25 January 2018, relying on his Article 8 family life with his British partner and daughter, born on 14 October 2017, and his lack of connections to the Ivory Coast. The appellant was released on immigration bail on 25 April 2018. On 2 May 2018 he became the subject of a Deportation Order and on 4 May 2018 the respondent made a decision to refuse his human rights claim.

5. In that decision, the respondent accepted that the appellant's daughter was British, but did not accept that he had a genuine and subsisting relationship with her, as she was born whilst he was in custody and she was only 6 months old. The respondent accepted that the appellant had a genuine and subsisting relationship with his partner, as she was his surety in his bail application. The respondent did not accept that it would be unduly harsh for the appellant's partner and daughter to live in the Ivory Coast with him and did not accept that it would be unduly harsh for them alternatively to remain in the UK without him if he was deported. The respondent considered that the appellant could not, therefore, meet the requirements of paragraph 399(a) and (b) of the immigration rules. As for the appellant's private life, the respondent did not accept that he could meet the requirements of paragraph 399A since it was not accepted that he had been lawfully resident in the UK for most of his life and it was not accepted that he was socially and culturally integrated in the UK or that there would be very significant obstacles to his integration in the Ivory Coast. The respondent did not consider there to be very compelling circumstances outweighing the appellant's deportation.

6. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge Buckley on 21 September 2020. By that time the appellant had a second child, born on 27 April 2019. The judge heard from the appellant, his partner, his partner's parents and his partner's aunt. The evidence before the judge was that the appellant had left the Ivory Coast shortly after the death of his mother when he was about three years old and then spent approximately ten years living in Belgium with his father and siblings, until he came to the UK in 2009 at the age of 14 or 15. His behaviour deteriorated in 2014 as a result of drugs and alcohol and he committed several offences culminating in the robbery in September 2016. The appellant met his partner in November 2016 at a time

when she also had difficulties with drink and drugs. At the time of the hearing, the appellant had been out of custody for two and a half years and had complied fully with reporting restrictions and had committed to caring for his family. It was submitted on behalf of the appellant that he had been a daily presence in the lives of his children for the past five months due to lockdown and he had a close family unit. He had not committed any serious drugs offences and there was no actual violence in the offence leading to the deportation proceedings.

7. The judge considered, in regard to the proportionality assessment, that the appellant was a medium offender who had placed his offending into context, had shown remorse and had not re-offended for four years and had complied with all the requirements imposed on him. With regard to the exceptions to deportation, the judge found the evidence of the witnesses to be compelling in support of the appellant's character and his family relationships. He accepted that the appellant had a genuine and subsisting relationship with his partner and two children and he concluded that the impact of deportation would be devastating and that it would be unduly harsh for them to remain in the UK without him if he was deported. The judge concluded that the second exception to deportation was met and he allowed the appeal on that basis.

8. The respondent sought permission to appeal that decision to the Upper Tribunal on the basis that the family life as described by the judge was not sufficient to meet the unduly harsh threshold and that the judge had failed to have regard to the established case law in respect to the unduly harsh threshold and the public interest in deportation.

9. Permission was granted in the First-tier Tribunal on 27 October 2020 and the matter then came before me. Both parties made submissions.

10. Mr Tan submitted that, whilst the judge referred to KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent) [2018] UKSC 53 and HA (Iraq) v Secretary of State for the Home Department (Rev 1) [2020] EWCA Civ 1176, it was not clear how he distinguished the appellant's case to show that the 'unduly harsh' test was met. The 'real world' scenario envisaged in KO was no different for deportees. There were no specific factors identified by the judge which made deportation unduly harsh. The 'best interests' consideration at [73] was not an additional factor but had to be considered in any case; the vulnerable position of the appellant and his partner was not relevant as it referred to the start of their relationship in 2016; and the consideration of the evidence "in the round" at [77] meant that the judge had taken into account the nature and seriousness of the appellant's offending and the question of rehabilitation, which were not relevant considerations for the 'unduly harsh' test. Mr Tan submitted that the judge erred further by failing to consider the second "prong" to the unduly harsh test, namely whether it would be unduly harsh for the appellant's partner and children to relocate to the Ivory Coast with him, a matter which the respondent had relied on in the refusal letter and upon which no concession had been made at the hearing.

11. Ms Pledger submitted that the mere fact that the judge had considered the appellant's family circumstances to be in his favour did not mean that he had erred in law. Ms Pledger

relied on the case of KB (Jamaica) v Secretary of State for the Home Department [2020] EWCA Civ 1385 in submitting that there was no ordinary level of undue harshness. The judge had considered evidence from multiple witnesses and had made his decision on the basis of the particular circumstances of the appellant's case and the devastating effect of deportation on his family. Although the severity of the appellant's offending was not relevant for the unduly harsh consideration, that was not material as it was usually when the situation was the other way around. The fact that the appellant was released on bail shortly after the end of his sentence was relevant. The judge had considered everything. Nothing he said in his decision was immaterial. As for the second prong of the unduly harsh test, that was not materially determinative of the outcome as it was unlikely the judge would have made a different decision given that there were two British children.

Discussion and Findings

12. Dealing firstly with Mr Tan's last submission, that the judge erred by failing to consider the second limb of the 'unduly harsh' test and relocation of the family to the Ivory Coast, it is relevant to note that that was not a ground of challenge in the grounds of appeal and therefore was not a basis upon which permission was granted. As such it is not open to Mr Tan to rely upon it now as a ground of appeal. In any event, it is clear from Ms Pledger's submission before Judge Buckley, as recorded at [50(b)] of his decision, that the respondent did not make submissions on, or actively pursue that issue at the hearing. Other than the passing reference to the refusal decision which did raise the matter, and the absence of any specific concession, the indication from the submissions recorded at [49] is indeed that that was not a matter pursued by the respondent with any conviction. The focus was clearly on the question of undue harshness in the context of the family being split by the appellant's deportation and clearly, given the appellant's evidence that he had left the Ivory Coast at the age of three and had no connections to the country, there would have been little merit in an argument that his British wife and children could reasonably be expected to relocate to that country.

13. As for the main issue before the judge, namely the separation of the family, the grounds assert that the judge erred by failing to identify any factors which would make that separation unduly harsh and had effectively found that the mere existence of the family life "in and of itself" was sufficient to meet the test. However, I do not accept that that is the case. As Ms Pledger submitted in her skeleton argument at [8] and [14], the judge identified factors particular to the appellant's case which he considered were sufficient to meet the 'unduly harsh' threshold. His findings in that regard appear at [61], [65] to [67] and [74] to [77] and refer to the particularly close family unit, the significant role played by the appellant in his children's upbringing, the impact of coronavirus in terms of the close bond and continuous presence of the appellant in his children's lives and the mutual emotional and practical support provided by the appellant and his partner to each other as detailed at [62].

14. To the extent that the respondent challenges the judge's reliance upon those factors as being insufficient to meet the 'unduly harsh' threshold, it is important to distinguish between an error of law and a disagreement with what may be regarded as a somewhat

generous decision by the judge. In that respect, Ms Pledger properly relied upon the recent cases of AA (Nigeria) v Secretary of State [2020] EWCA Civ 1296 and KB (Jamaica), both of which raised similar issues and where, in the latter, at [16], reference was made to the observations of Floyd LJ in UT (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1095 at paragraph 19:

"19...Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State for the Home Department* at [30]:

"Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

15. Similarly, in AA (Nigeria), Popplewell LJ said at [38]:

"The factors which the FTT Judge identified were capable of supporting the conclusion that the effect on C and the children of remaining in the UK without the appellant met the elevated unduly harsh test. That was an evaluative judgement for the FTT Judge on the basis of the full evidence before her, including cross-examined oral evidence and the report from Ms Meeks, the nuances of which will not be apparent to an appellate tribunal. Her findings of fact are such that a conclusion of undue harshness was open to her. Different tribunals might have reached a different conclusion, but it is inherent in the evaluative exercise involved in these fact sensitive decisions that there is a range of reasonable conclusions which a judge might reach, and the error of law here under consideration is only made out if the FTT Judge's conclusion is outside that range. In my view it was within the range in this case."

16. In the appellant's case before me, it is undeniably the case that the judge properly directed himself on the correct test for 'unduly harsh', as set out in KO (Nigeria) and (HA) Iraq, that he was fully aware of the high threshold which needed to be met and that he applied those principles when evaluating and assessing the evidence. As in the case of AA (Nigeria), the judge had the benefit of hearing oral evidence from several witnesses and made an evaluative judgment from that evidence. It was open to the judge to find that the evidence, taken as a whole, met the high threshold.

17. Mr Tan challenged the judge's assessment of "all the evidence in the round", as stated at [77], as that thereby included a consideration of the nature and seriousness of the appellant's offending, contrary to the guidance in KO (Nigeria). Ms Pledger accepted that those were not factors relevant to the 'unduly harsh' test. However, as she submitted, the situation envisaged in KO was the other way around, namely where the appellant's offending was considered as undermining the weight to be given to other factors in the appellant's favour in relation to the public interest, rather than as positive features. In any event, it seems that that consideration by the judge was in a section preceding his assessment of the appellant's family life and to the extent that it may have been taken into account in the subsequent assessment of family life, the judge was entitled to have regard to the fact that the appellant had devoted the extended period of time since his release from custody to his family, when considering the impact of separation on his partner and children.

18. Accordingly, I find no merit in the assertion in the grounds that the judge misdirected himself in law and failed to give proper reasons for concluding that the appellant's deportation would be unduly harsh on his family. It seems to me that, whilst the judge's decision was perhaps a generous one and whilst another judge may have reached a different decision, his decision to allow the appellant's appeal was one which was open to him on the evidence available, that it was made in accordance with the relevant legislative framework and caselaw and that it did not involve any material errors of law.

DECISION

19. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring the decision to be set aside. The decision of the First-tier Tribunal to allow the appellant's appeal therefore stands.

Signed *S Kebede*
Upper Tribunal Judge Kebede

Date: 23 March 2021