



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-003187
UI-2023-003188
First-tier Tribunal Nos: EA/07746/2022
HU/00450/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26th October 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDDY TORGBO ANANE TORTO

Respondent

Representation:

For the Appellant: David Clarke, Senior Presenting Officer

For the Respondent: No appearance or representation

Heard at Field House on 19 October 2023

DECISION AND REASONS

1. The Secretary of State appeals with the permission of First-tier Tribunal Judge Monaghan against the decision of First-tier Tribunal Judge Groom (“the judge”). By her decision of 23 May 2023, the judge allowed Mr Torto’s appeal against the respondent’s decision to refuse his human rights claim. That claim was prompted by the Secretary of State having decided to deport the Mr Torto from the United Kingdom as a foreign criminal, following his conviction for being concerned in the evasion of the prohibition on importing Class A drugs.
2. To avoid confusion, I will refer to the parties as they were before the First-tier Tribunal: Mr Torto as the appellant, the Secretary of State as the respondent.

Background

3. The appellant's full immigration history was set out at [5]-[19] of the respondent's decision. It suffices for present purposes to mention only the following details.
4. The appellant's date of entry to the UK is not known, although it is known that he had unsuccessfully applied for entry clearance on two occasions in 2004. In 2010, he was granted a residence card as the spouse of an EEA national. He was granted a further residence card in March 2017. On 14 January 2020, he was granted Indefinite Leave to Remain under Appendix EU of the Immigration Rules.
5. The appellant was convicted of the index offence, on his plea of guilty, at Luton Crown Court on 14 January 2022. On 10 February 2022, he was sentenced by Ms Recorder Powell QC to five years and seven months' imprisonment. I need say little about the facts of the offence. The appellant had arranged for just over three kilogrammes of cocaine to be delivered from Holland to an address in Luton. He had collected the cocaine from that address and had driven it to his home, where he was arrested.
6. Deportation proceedings were initiated and in due course the Secretary of State issued two appealable decisions.
7. The first was a decision to deport the appellant 'pursuant to the Immigration Act 1971 and the UK Borders Act 2007'. That decision stated that the appellant had a right to appeal against it under regulation 6 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"). The appellant appealed against that decision under reference EA/07746/2022.
8. The second decision was the refusal of the appellant's human rights claim. The appellant had a separate right of appeal against that decision under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The appellant appealed against that decision under reference HU/00450/2023.

The Appeals to the First-tier Tribunal

9. The appeals were linked and heard together by the judge, sitting at the Nottingham Justice Centre, on 2 May 2023. The appellant was represented by Nazir Ahmed of counsel. The respondent was represented by a Presenting Officer. The judge heard oral evidence from the appellant and his partner, Ms Anane, and submissions from the advocates before reserving her decision.
10. In her reserved decision, the judge found that the respondent's first decision did not breach any rights which the appellant had under the Withdrawal Agreement and that it was in accordance with section 3(5) of the Immigration Act 1971. She therefore found against the appellant on the two grounds of appeal which were available to him under regulation 8 of the 2020 Regulations. (Whilst the judge's decision does not state in terms that the first appeal was dismissed, [21]-[36] of her decision demonstrate that that was clearly her intention.)
11. At [37]-[113], the judge went on to allow the appellant's appeal on human rights grounds. The structure of that analysis was as follows.

12. The judge directed herself to the relevant law at [37]-[57]. At [48]-[50], the judge concluded that the appellant could not meet the requirements of the private life exception to deportation in s117C(4) of the 2002 Act. At [51], she stated that her focus was on family life and ‘whether the Article 8 family life exception applies.’ At [52], the judge referred to her duty to consider the best interests of the children and at [53] she directed herself to the high threshold presented by the test of undue harshness. The latter self-direction included reference to authorities including *KO (Nigeria) & Ors v SSHD* [2018] UKSC 53; [2018] 1 WLR 5273, *SSHD v HA (Iraq) & Ors* [2022] UKSC 22; [2022] 1 WLR 3784 and *MK (Sierra Leone)* [2015] UKUT 223 (IAC); [2015] INLR 563 (the title of which was said by the judge to be *MK (Sri Lanka)*, but nothing turns on that).
13. At [54], the judge set out the family relationships relied on by the appellant. He was divorced from his wife, Ms Daalberg, but he still had a relationship with their two teenage children. He was in a relationship with his current partner, Ms Anane, and he represented a father figure to her three children. At [60]-[66], the judge summarised the respondent’s stance on these relationships. The respondent accepted that the appellant had a genuine and subsisting parental relationship with each of the five children and that he had a genuine and subsisting relationship with Ms Anane. The respondent did not accept that the appellant’s deportation would be unduly harsh on them.
14. At [67]-[75], the judge considered the seriousness of the appellant’s offence and the contents of the OASys report which was before her. She made reference to the sentencing remarks and to the steps the appellant had taken whilst in custody. She stated that she placed ‘significant weight on the findings made within the OASys report with regards to the appellant’s family circumstances and his motivation to address his offending behaviour.’
15. The judge considered the circumstances of the appellant’s children and step-children at [80]-[87]. She made further reference to section 55 of the Border, Citizenship and Immigration Act 2009 at [88], noting that the best interests of the children were a primary consideration, ‘not the only consideration’. At [89]-[91], the judge noted that the appellant had committed a serious offence for which he had received a sentence of more than four years’ imprisonment but that he had expressed remorse, made efforts to improve himself, and that there was no evidence of adverse behaviour since the appellant was convicted.
16. At [84], the judge noted that the appellant was due to be released in September 2024 and that Ms Anane intended for him to return to the family home. At [85], she accepted that this was in the best interests of the appellant’s three step-children. At [94]-[96], the judge accepted that the appellant played a significant role in the lives of his two children prior to his imprisonment. At [97], she held that ‘it would be unduly harsh for them to remain in the UK without the appellant as this would be a permanent separation.’
17. In relation to the appellant’s three step-children, the judge found at [98] that it would be unduly harsh for them to live in Ghana. At [99]-[101], she noted that the appellant was sharing responsibility for them prior to his imprisonment and was fully involved in their day to day lives. She accepted that he was genuinely willing to continue to care for them on release. At [101], the judge concluded that:

Given the family life that the children enjoyed with the appellant prior to his imprisonment, particularly [L], for whom the appellant is the only father figure he has known in his life, I consider it would be unduly harsh for them to remain in the UK without the appellant.

18. At [102]-[105], the judge turned to the appellant's relationship with his partner. She accepted that the relationship had been ongoing for a number of years and that it was genuine and subsisting. Given her connections to the UK, the judge found that it would be unduly harsh for her to relocate to Ghana with appellant. At [105], she reached this conclusion:

It is apparent that her relationship with the appellant would not continue if he were to be deported to Ghana. Ms Anane is struggling both emotionally and financially as a result of the appellant's imprisonment, however it was clear from her oral evidence that she did not have an intention of walking away from the relationship. She has had a settled family life with the appellant for at least seven years prior to his imprisonment and I find it would be unduly harsh for her to remain in the UK without the appellant.

19. At [106]-[113], the judge assessed the proportionality of the respondent's decision. It is necessary to set out that analysis in full:

[106] The Appellant has resided in the UK since 2007 and has regularised his residency in the UK during that time. The Appellant has been employed previously in the UK and was of good character until he committed an offence in 2021.

[107] The Appellant stated that with the exception of his mother, who has now passed away, he has no other ties or family members left in Ghana. It was apparent that there is no family home.

[108] The Appellant has developed community ties since he has been in the UK and has helped with his local church community. He has expressed a willingness to attend training and education courses whilst in custody.

[109] I place significant weight on the evidence of Ms Anane particularly the reasons why she avoided informing the children about the Appellant's imprisonment stating that she did not want the children to "be broken or give up."

[110] I have had regard to the authority of Kamki [2017] EWCA Civ 1715 and particularly note that in a case such as this, deportation is not only a further means of punishment for the Appellant, but a further means of punishment for the Appellant's children and stepchildren.

[111] For the reasons as set out above, I find that the Appellant has demonstrated that there are very compelling circumstances which exist such that deportation would be a breach of family life under Article 8.

[112] I am satisfied that in this case the balance of proportionality lies in favour of allowing the appeal on human rights grounds. 113. Accordingly, the appeal is allowed.

The Appeal to the Upper Tribunal

20. In her grounds of appeal, the Secretary of State submitted, firstly, that the judge had failed to apply the threshold in *MK (Sierra Leone)* and had given inadequate reasons for concluding that the appellant's deportation would give rise to unduly harsh consequences. She contended, secondly, that the judge had misdirected herself in law in concluding that the exacting test in s117C(6) of the 2002 Act was met. Her conclusion that deportation was disproportionate seemed to follow on from her conclusion that it would be unduly harsh and there was no proper 'balance sheet' of the competing interests at stake.
21. In granting permission, Judge Monaghan considered both grounds to be arguable.
22. The appellant remains in prison to date. He continues to be represented by Greystone Law Solicitors, however. Notice of hearing was sent to the appellant, by post to HMP Spring Hill, and to his solicitors by email, on 4 October 2023. On 18 October 2023, the appellant's solicitors wrote to the Upper Tribunal, enclosing a response to the grounds of appeal which was settled by trial counsel. The email stated that the appellant had not placed the solicitors in funds for the hearing and that the rule 24 response had been provided by counsel on a pro bono basis. They apologised for the delay but stated that they had been awaiting further instructions from the appellant.
23. The rule 24 response and the email from the appellant's solicitors was only provided to me, by email, at 1003 this morning. I had not had an opportunity to consider it. It had not been provided to Mr Clarke. I rose for half an hour so that we might both consider the documents.
24. On resuming the hearing, I noted that there had been proper notification of the hearing and that the appellant's solicitors, who had clearly been in contact with the appellant in prison, had not applied for the hearing to be adjourned. Submissions for the appellant had been made in writing by counsel. I considered that it was in the interests of justice to proceed with the hearing in the appellant's absence.
25. I indicated to Mr Clarke that having considered the papers in detail, including the rule 24 response, I was satisfied that the judge in the FtT had erred in law and that her decision to allow the appeal on Article 8 ECHR grounds should be set aside. In the circumstances, I did not need to hear from Mr Clarke and he did not wish to address me. My reasons for reaching that conclusion are as follows.

Analysis

26. I bear in mind the restraint which is to be shown by an appellate body when considering whether a judge in a specialist tribunal has erred in law. I am grateful to Mr Ahmed of counsel for his distillation of the relevant principles, at [6] of his rule 24 response. The five sub-paragraphs set out under [6] of the rule 24 response reflect the caution urged in cases such as *Lowe v SSHD* [2021] EWCA Civ 62; [2021] Imm AR 792. I have those principles firmly in mind in reaching the conclusions which follow.

The First Ground – Undue Harshness – s117C(5)

27. In relation to the first ground of appeal, I accept Mr Ahmed's submission that the judge gave herself an accurate self-direction in relation to the meaning of the statutory test of undue

harshness. As I have already noted in my summary of her decision, she directed herself in accordance with the leading authorities at [53]. Mr Ahmed submits that what the judge then proceeded to do was to consider in accordance with [44] of *SSHD v HA (Iraq)* ‘whether that elevated standard has been met on the facts and circumstances of the case before it’.

28. I am unable to accept that submission. The litmus test which determines whether reasons are legally adequate is whether they enable the appellate body to understand why the judge below reached their decision: *R (Iran) & Ors v SSHD* [2005] EWCA Civ 982; [2005] Imm AR 535, at [13]-[16]. This decision does not do so. Although the judge was aware of the elevated threshold of undue harshness, she gave no adequate reasons to explain why on the facts of this case it would be unduly harsh for the appellant’s family to remain in the UK without him.
29. The judge’s decision is obviously to be read as a whole but the critical conclusions she reached on undue harshness are to be found at [97], [101] and [105]. In [97], the judge seems to have proceeded on the basis that it would be unduly harsh to separate the appellant from his two biological children because it would amount to a ‘permanent separation’. No further reasons were given. The judge did not suggest that the appellant’s deportation would have a significant impact on their behaviour or their educational prospects. The reader is simply unable to discern what it was which led the judge to conclude that the elevated threshold was met. The fact that the result of deportation would be permanent separation was obviously insufficient in itself.
30. The conclusion at [101] suggests that it would be unduly harsh for the appellant’s step-children to remain in the UK without the appellant because he enjoyed a family life with them and because he is the only father figure which one of the children has ever known. With respect to the judge, those findings speak to the genuine and subsisting parental relationship which the appellant has with the children, and not to the issue of undue harshness. The judge’s conclusion that the appellant’s deportation would be unduly harsh on the children fails to explain at all what consequences would arise for the children and why she considered those consequences to be unduly harsh.
31. The same is true of the judge’s conclusion in respect of Ms Anane, at [105]. She noted in that paragraph that Ms Anane is ‘struggling emotionally and financially’ whilst the appellant is in prison but she failed to explain what consequences would befall the appellant’s partner in the event of the appellant’s deportation and why she considered those consequences to meet the elevated threshold in section 117C(5) of the 2002 Act.
32. Despite the careful self-direction which she gave herself at the start of her decision, the judge seems to have concluded that it would be unduly harsh on the appellant’s family to remain in the UK without him largely because they have a genuine and subsisting relationship with him and it would be in the best interests of the children for him to remain. The conclusion did not follow, however, and the judge failed to make what Lord Hamblen described in *SSHD v HA (Iraq)* as ‘an informed assessment of the effect of deportation’.
33. In my judgment, therefore, the judge failed to give legally adequate reasons for concluding that the appellant’s deportation would give rise to unduly harsh consequences for his partner, children and step-children.

The Second Ground – Very Compelling Circumstances – s117C(6)

34. The respondent's second ground is also made out, and even more clearly than the first. Mr Ahmed mounts a robust defence of the judge's analysis of s117C(6) in his rule 24 response. He submits, and I accept, that the judge took account of the *Boultif v Switzerland* (2001) 33 EHRR 50 factors, as required by [51] of *HA (Iraq)*. I also accept the submission he makes in relation to the judge's consideration of the appellant's offending behaviour; that was assessed by the judge with reference to the sentencing remarks and the OASys report. The difficulty with the judge's decision, however, is that she failed to conduct any meaningful balancing exercise in which she gauged the public interest in the appellant's deportation and weighed that against the Article 8 ECHR rights which are at stake. She cited s117C(2) of the 2002 Act at [38] of her decision but she did not at any point assess the extent of the multi-faceted public interest in deporting a foreign criminal who had imported more than three kilogrammes of cocaine into the UK.
35. Nor, on the other side of the scales, am I able to discern what the judge considered to be the very compelling circumstances which were capable of outweighing the public interest in deportation. Nothing in [106]-[113] of the decision was rationally capable of showing that this was one of those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of Article 8 to deport the appellant (*HA (Iraq)* refers, at [48], citing earlier dicta in *Rhuppiah v SSHD* [2016] 1 WLR 4203 with approval).
36. My concern about the judge's approach to s117C(6) is reinforced by what she said about *Kamki v SSHD* [2017] EWCA Civ 1715 at [110]. She referred to that decision as supporting a view that deportation in cases such as this represented 'a further means of punishment for the appellant's children and step-children'. *Kamki* is not authority for any such proposition.
37. As is clear from the judgment of Sales LJ (as he then was) *Kamki* was a case of deportation in which the relevant domestic legal regime was the Immigration (EEA) Regulations 2006, under which the focus is on the future risk posed by the deportee. The appellant's appeal was not brought under that legal regime and anything said about the impermissibility of 'further punishment' in *Kamki v SSHD* was irrelevant. I note, in any event, that the only reference to the concept of 'further punishment' in the judgment of Sales LJ (with whom Newey LJ agreed) was in his reference to the submissions of leading counsel for Mr Kamki at [20] and in his brief conclusion on the point at [39]. If the judge understood *Kamki v SSHD* as establishing some sort of rule against 'further punishment' in the context of non-EEA deportation, she was wrong to do so. It is clear from *Zulfiqar v SSHD* [2022] EWCA Civ 492; [2022] 1 WLR 3339 that deportation in a non-EEA context serves a multi-faceted public interest after the completion of an individual's custodial sentence. The reference to *Kamki v SSHD* suggests that the judge was not aware of that, as does her failure to undertake any assessment of the public interest in the appellant's deportation.
38. In the circumstances, I am satisfied that the judge's decision to allow the appellant's human rights appeal involved the making of errors of law. Her decision on that appeal cannot stand and the decision on that appeal will have to be remade. Given the extent of the findings which will be necessary, and having considered what was said in *Begum (remaking or remittal)* [2023] UKUT 46 (IAC), I consider the proper forum for the determination of that appeal to be the First-tier Tribunal. The human rights appeal will therefore be remitted de novo to the FtT.

39. The judge's decision on appeal EA/07746/2022 is not said to be tainted by legal error. Although she failed to state her decision on that appeal in terms, it is clear from her analysis that she intended to dismiss it. For the avoidance of doubt, therefore, I make clear that the non-human rights appeal (EA/07746/2022) stands dismissed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. The FtT's decision on the human rights appeal (HU/00450/2023) is set aside and that appeal is remitted to the FtT for consideration afresh by a judge other than Judge Groom. The appellant's other appeal (EA/07746/2022) stands dismissed.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 October 2023