Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14193/2017

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 28 May 2019	**On 18 September 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R H K
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms H Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr S Vokes, Counsel instructed by Lawrencia & Co Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the children of the Respondent (also "the claimant"). Breach of this order can be punished as a contempt of court. I make this order because the case concerns the welfare of children who may be harmed by publicity that identifies them,

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal to allow the appeal of the respondent, hereinafter "the claimant", against the decision

of the Secretary of State on 24 October 2017 to refuse her leave to remain on human rights grounds. The claimant is subject to deportation following her being sentenced to two and a half years' imprisonment for offences of dishonesty. The details of the offences are summarised at paragraph 15 of the refusal letter where the Secretary of State said:

> "You were convicted on 11 December 2012 at Derby Crown Court for eleven offences including making false oath or declaration with reference to marriage, entering the United Kingdom without leave, 2 counts of possession of false identity documents with intent and four counts of possession of false identity, dishonestly failing to notify a change of circumstances for receipt of immigration benefits and assisting unlawful immigration into EU member state."

3. The claimant entered the United Kingdom in 2002 and has continued to live there but for most of that time she has lived a lie. In short, the claimant had cheated the immigration system by entering the United Kingdom pretending to be someone that she was not. The claimant is a citizen of Ghana. She pretended to be someone from Sierra Leone in need of international protection. She claimed benefits to which she was not entitled and used her improperly obtained status to facilitate her husband to the United Kingdom. These offences are amongst the most serious examples of breach of immigration law by an individual. Sierra Leone was in a state of disorder. There were many credible reports of undisciplined, often very young, soldiers rampaging through civilian communities committed atrocities including rape and brutal amputations. Ghana, in contrast, was peaceful and enjoyed a growing economy and maturing political structure. The claimant has cynically taken advantage of the dire situation that existed in Sierra Leone to obtain dishonestly status and public funds to which she was not entitled. She denied the offences when she was caught. Hers is the kind of offending that brings disrepute to a humane international code that intends to protect people who cannot live safely in the countries of which they are nationals and which offending, understandably, at least creates a risk of a person in genuine need being disbelieved because of the suspicion that offences like these inevitably generate. The claimant is clearly a foreign criminal and clearly liable for deportation.

4. However she is also the mother of four children who were each born in the United Kingdom and are each British citizens. Her first child, a daughter, TAA, was born in May 2002. Her first son, DJA, was born in May 2005. Her second son, TKKA, was born in September 2007 and her second daughter EKA was born in February 2009. The Secretary of State accepted that the claimant was in a "genuine and subsisting parental relationship" with the children and they lived together as a family unit. The Secretary of State further accepted that it would be "unduly harsh for your children to return to Ghana with you".

5. The reasons for accepting these things are given and are unremarkable. They children are British citizens who have each spent their entire lives in the United Kingdom where they are being educated.

6. The Secretary of State also accepted that the claimant is married and is in a genuine and subsisting relationship with her husband. However the relationship was not established when the claimant was in the United Kingdom lawfully and the Secretary of State did not accept that the claimant's relationship with her husband was a reason to avoid deportation under the Immigration Rules.

7. When the case came before the First-tier Tribunal the judge there accepted that the effects of removal would be unduly harsh and allowed the appeal. However that is a very gross simplification of a decision that is complex and in many ways unsatisfactory and before I consider the grounds I look carefully at what the First-tier Tribunal actually decided.

8. Its decision begins, worryingly, by saying that the claimant appeals against the decision "to make a deportation order against her". She does not. This is a human rights based appeal and is an appeal against a decision to refuse her leave to remain on human rights grounds.

9. The judge records evidence from the claimant about the difficulties the children experienced when she was in prison and the need for social service intervention. Her husband was willing to work and had jobs, first as a warehouse operator and then, after he had obtained an HGV license, a driving job. However he could not work when the claimant was in prison.

10. The claimant's husband gave evidence and confirmed that he found it very difficult to look after four children and hold down a job.

11. More importantly there was evidence from an independent social worker, one Gideon Boadu. Mr Boadu had produced reports dated 19 January 2015 and 27 February 2018. In preparing the reports the witness had spoken to teachers at the children's school and someone who worked for the county council social services.

12. In summary there were no concerns about the children when the parents were together but the children were distressed by their mother's absence. The First-tier Tribunal Judge made important findings at paragraph 40 which is one of two extremely long paragraphs that would have benefitted from some subdivision. However in paragraph 40 the First-tier Tribunal Judge said:

> "In essence the effects of the [claimant's] deportation would be devastating upon the family. Mr Boadu noted that all four children presented with significant mental health difficulties. It was noted that Mr [A] had struggled to cope. The reality of the position is that the [claimant] and her husband face great financial difficulty in the event of Mr [A] not working. During the first period when the [claimant] was away from the family Mr [A] was unable to work. The benefits which were paid were stopped. He had difficulty finding employment which would let him meet his responsibilities in looking after the children. Matters were so bad that he struggled to provide food. He had difficulty paying the rent. He had difficulty paying the bills. Housing benefit from Derby Council was withdrawn. Mr [A] was told that he could not receive public funds. There was

> no entitlement for him to do so. This was because he had been granted a residence card based on derivative rights."

13. The judge then accepted evidence showing that the claimant's husband had received an overpayment of tax credits of almost £18,000 and the need to repay that added to his stress. The judge considered the possibility of the family being helped by neighbours or friends and said that he found "that the plain reality of the position is that outside help would not be available on a permanent basis to cater for the circumstances which I have described", the "circumstances" being the need to provide care when the claimant's husband went to work.

14. It was clearly the judge's view that removing the mother (that is, "the claimant") from the family would be unduly harsh for the children which is the statutory test required by section 117C(5) of the Nationality, Immigration and Asylum Act 2002.

15. One of the reasons for that conclusion is the financial consequences of the claimant's husband to reduce his income to be available for the children or to provide care. However the judge was also clear that the problems were not only financial. He said:

> "Mr [A] continued to work on the footing which has been explained. Significant problems then developed. Mr [A] was completely dependent on the family friends who have been referred to to provide assistance in caring for the children both before and after school. It was either necessary for someone to stay at the family home from the time to which I have referred in order to enable Mr [A] to go to work or for Mr [A] to take the children to the home of someone else so that they could look after the children there. I accept the evidence which shows the emotional damage which was done to the children while their mother was in prison and while she was detained. I find their behaviour deteriorated. I do not find that they were able to continue with their education in the same way. It was necessary for the two older children to be referred for counselling. I have accepted the reports of Mr Boadu. His qualifications and experience are clear. It is equally clear as to how the foundations for his conclusions have been established. The sources are given. I find that the reality of the position is that the emotional damage upon the children impacted upon their education. I find that the confirmation of causation has been provided by the effect of the return of the [claimant] to the family. I find that Mr Boadu is supported by the views of Mrs H, the head teacher at [the children's] Primary School. I find that the reality of the position is that the [claimant] has played such an important role in the upbringing of all of the children that the effect of her removal would reflect the centrality of the importance of her role in the emotional and supported contexts. I find that the corollary of this is that Mr [A] cannot on his own provide for the emotional and supportive needs for the children as they have developed as they had been met by their mother and the exacerbation of the position because of the removal of their mother would have the impact on Mr [A] of him being placed in the position of being less able to cope with the consequences."

16. The Decision and Reasons continues in the same vein. At paragraph 42 the judge said:

> "I take into account all the factors relevant to the history of the [claimant] and her offending. I take into account all matters appertaining to policy. I find for the reasons which I had given that it would be unduly harsh for the children to remain in the United Kingdom without their mother. I find the Immigration Rules are met. I find that compelling circumstances exist which enable me to proceed to consider whether there would be a breach of Article 8 outside the Rules."

17. The judge then allowed the appeal. It is plain that his main reason for allowing the appeal arose from concerns about the rights of the children.

18. The decision is challenged on three grounds settled by Mr I Jarvis who is a particularly experienced Senior Presenting Officer. Mrs Aboni relied on the grounds.

19. The first ground needs special consideration. It is headed "Material misdirection in law/fact – the duty of the Local Authority to a family where basic needs are not being met".

20. The grounds contend that the First-tier Tribunal Judge, having accepted the evidence of Mr Gideon Boadu that "the local authority would have to take the children into care because there would be no money for the family", went on to conclude at paragraph 40 "In the event of failure on the part of Mr [A] to earn enough money to look after the children and with the risk of destitution overtaking the family the clear risk arises of the children having to go into care".

21. It was the Secretary of State's contention that that finding should not have been made. It is based on a false premise. There would be money for the family. The contention that money would not be available because Mr [A] was in the United Kingdom because of derivative rights of residence and therefore disqualified from receiving benefits is wrong. This understanding was then explained with reference to a decision of the Court of Appeal. The ground contends that it was wrong in law to conclude that the children could be destitute and taken into care and this wrong finding wrongly influenced the conclusion that there was undue harshness flowing from the mother's removal.

22. I consider if the premise of this ground, namely that the alleged erroneous understanding of the law impacted significantly on the finding that there would be undue harshness in the event of the claimant's removal, is sound. The possibility of the children being taken into care clearly excised the First-tier Tribunal because provision was made for written submissions to be sent after the hearing. I have read the written submissions prepared by Ms E Rutherford of Counsel for the claimant dated 24 April 2018. These drew attention to the evidence that the family were suffering financially and defended criticisms that the expert was acting as an advocate rather than giving impartial opinion evidence.

23. I find paragraph 15 of Ms Rutherford's written submissions particularly pertinent and I set it out below:

> "During his evidence an issue emerged regarding the family's finances and what would arise if Mr [A] was unable to work to provide for the children considering his lack of entitlement to access public funds. Mr Boadu was clear that if the children were destitute and there was no entitlement to public funds then the children could be taken into care. He stated that initially the Local Authority would look to see what support could be provided but if none could be and Mr [A] was unable to work and the family were destitute the children could be taken into care. It is submitted that the evidence is that the family are struggling financially and has significant amounts of debt. The evidence shows that Mr [A] is not entitled to claim benefits and has in fact received a demand that he repays tax credits that have been incorrectly paid to him. The evidence shows that he has been overpaid a total of £17,931. Debt collection agencies are already pursuing him over a sum of just over £5,000. If he is unable to work he will have no source of income. Further it appears that reducing his hours or changing jobs and returning to warehouse work is not a realistic solution. Should he do this his income would be reduced. He has provided evidence of his earnings in 2014–2015 and 2015–2016. Plainly the amounts that he would obtain are significantly below that which the family require to support themselves as evidenced by the amount of debt that they had previously accrued and continue to accrue despite his current income. Any reduction in that income will be disastrous for the family. It is submitted that the evidence shows that in the absence of [the claimant], Mr [A] would be unable to continue in his present employment. It is clear that the family are struggling on the present earning and the reduction due to him changing employment or him not working at all will place the family in very difficult financial circumstances and there is a very real risk that they will be left destitute."

24. The further submissions on behalf of the respondent are signed by the Presenting Officer Mr Luke Tallis and are dated 14 May 2018. These contend that the evidence does not support the conclusion that the family are struggling financially as they claim. He said that the bank accounts show substantial credits during times when the claimant was detained. He said there were no care proceedings. He then noted that the First-tier Tribunal Judge had stated that the claimant was to serve evidence relating to her current income capable of being earned by the claimant's husband both before and after he qualified as an HGV driver and whether B&Q could provide flexible hours, B&Q being his employer. The required evidence was not produced and its absence was said to support Mr Tallis's contention that the claimant's husband and claimant were not being straightforward about the difficulties they faced in her absence.

25. I have also considered Counsel's skeleton argument in the First-tier Tribunal. Again I summarise it by quoting a leading paragraph. Even allowing for some slight grammatical drift in the final sentence the point is clear. Ms Rutherford said in paragraph 4:

> "It is submitted that this is a close family and that [the claimant] is an integral part of it. The evidence is clear that while she was in prison the entire family struggled to cope. Mr [A] struggled to maintain his employment which of course enabled him to provide for his family and to care for the children while [the claimant] was in prison. Due to the pressures of caring for the children on his own he had to leave his employment and the family required financial assistance. The children struggled emotionally and all four presented with mental health difficulties, T and D were referred for counselling.

> Social services were also contacted in order to provide the family with assistance. The children's school have confirmed that they have noticed a marked deterioration gather children'(sic) performance at school and their behaviour."

26. The skeleton argument went on to assert that the evidence showed that the situation had normalised after the claimant's return to the family. It is clear to me that the case before the First-tier Tribunal was not argued on the minutiae of what benefits were available or whether the claimant's husband was getting all that he was entitled to get but that the breakdown in family relations caused by her absence was very significant.

27. I have looked again at the report and addendum prepared by Mr Gideon Boadu. The report was completed in January 2015 and the addendum in February 2018. It would be utterly astonishing and rather worrying if removing the mother did not cause an adverse reaction in the children. However it is right to remember that the adverse reaction presented not only in bad behaviour but in children needing psychiatric support and in one case descending into self harm.

28. I am very doubtful that the First-tier Tribunal made sound or even clear findings about the family's entitlement to benefits. The case was not put on the basis of precise sums. The evidence that money is owed to the Revenue and other sources seems to be perfectly sound and not challenged. It may very well be that the claimant's husband did not manage as well as some people might have managed. It may well be that he was keen to keep his job possibly because his skills lie more in driving a lorry or working in a warehouse than in making a home. His evidence is that he found it very difficult, in fact impossible, to be an effective full-time single parent. Financial difficulties played a part but poverty was not the point. The social worker's evidence was that the children are suffering in the absence of their mother. Some criticism is made of the social worker's impartiality but no good reason has been given to doubt it.

29. I find the social worker's conclusions entirely unremarkable and referenced to their sources, much as did the First-tier Tribunal. The First-tier Tribunal Judge's conclusion in paragraph 40 where he said: "I find that the reality of the position is that disintegration of the family would follow. I find that this result would follow even if a family were able to remain solvent", was entirely open to the judge and entirely reasoned albeit that the reasons were somewhat buried in paragraphs that are presented disappointingly.

30. With great respect to Mr Jarvis's grounds (and Mr Jarvis did not present the case to the First-tier Tribunal) this is a case of Aunt Sally knocking. The decision was not made because of a wrong impression of the benefits but because there was practical experience of the father not coping. There is no point or merit in ground 1.

31. The other grounds can I find be dealt with in a brisker way.

32. The second point is that there is a "Material failure to make findings on matters materially in dispute between the parties". This is a challenge arising from the absence of corroborating evidence from the people who are said to have provided care and assistance. This is particularly important because the claimant's husband is the subject of a suspended sentence of imprisonment because of his commenting offences similar to, but less serious than, the claimant's. The judge particularly wanted documentary evidence about the support from the family.

33. This criticism does not amount to an error of law.

34. The evidence of the children's behaviour is in the independent evidence of the social worker based on his own observations and what the school has told him. I do not regard it as a material error that the judge did not say more about the evidence that he had not got whether or not requested in further directions.

35. The third point is indifferent in kind and refers to "Material misdirection in law: the approach to the public interest".

36. The judge is rightly criticised for not showing any express regard to the requirements of Part 5A of the Nationality, Immigration and Asylum Act 2002. It is an extraordinary omission but I agree with Mr Vokes that the material test, namely "is separation unduly harsh for the children" was identified and applied.

37. It cannot be said that the judge trivialised the offending. He said in paragraph 41 that "it is clear that the nature of the offending of the [claimant] strikes at the heart of the system being operated by the [Secretary of State]". In the same paragraph he refers to his taking "a serious view of the offending". It was clearly the judge's view that the effects of the children were unduly harsh. There is nothing to suggest that the judge was unaware of the importance of deporting the claimant even though a model self-direction is conspicuously absent. Indeed he began his deliberations at paragraph 41 by referring, inappropriately but understandably because the decision of the Supreme Court in KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent) [2018] UKSC 53 had not been handed down, to the need to consider the offences to inform his decision about whether it would be unduly harsh for the children to remain in the United Kingdom without their mother. He then went on to express his disapproval of the offence. If anything the judge has applied too strict a test. It is regrettable that the judge did not direct himself expressly that the public interested lay in the claimant being deported but it cannot be said that the judge failed to appreciate the importance of deportation. He was deciding a "deportation appeal" and referred to the claimant's behaviour "striking at the very heart of the system". He did not allow the appeal because he undervalued the need for deportation. He allowed the appeal because he was concerned for the claimant's children.

38. There is nothing important in the criticism that the judge did not state expressly that he accepted the claimant's husband's evidence that one the children had self-harmed. It is clear the decision was based on accepting the evidence of the husband and of the

school that the children suffered when the claimant was locked up and that there was a big improvement when the claimant returned. The fact that the local authority withdrew support indicates that thing improved when the family adjusted to the claimant being in custody. It does not mean that there was no cause for concern. The judge clearly accepted the evidence that one of the children "self-harmed" and that happened in October 2016, some years have local authority involvement ceased.

39. I must address directly paragraph 17 of the grounds asserting that the adverse effect on the children is a normal consequence of deportation rather than a basis for finding undue harshness. Removing a parent from a child is a very serious step. It clearly concerned the sentencing judge before he carried out his duties. Removing a parent in circumstances where the relationship with the child is going to be fractured and where reunion in the child's country of nationality is not going to be possible for at least ten years and maybe never possible, is an extremely serious step but it is what is required by deportation. Nevertheless different families will cope differently. At one extreme the deported parent's presence might harm the family and that parent's absence will do nothing but improve the life of the child. At the other extreme a child might be entirely dependent on the parent who is to be removed and removal would wreck the child's life. This case is not quite in the second of my postulated extremes but is not very far from it. There are four children to consider here. Two of them female, one of them still very young. It is uncontroversial that they will benefit from their mother's presence. Although the judge did not spell it out in terms he clearly had the best interests of the children in mind and was of the view that their best interests lay in remaining in the United Kingdom with their mother. That is not determinative. This is a case where the absence of the mother has been tested. The father has done his best. He has not managed. The lives of the children have deteriorated. The children needed much support and although their circumstances improved so that local authority support ceased they were far from ideal. The family is heavily in debt (this does not depend on the correct understanding of benefits law, it is a fact that has occurred). Unlike the case of **WZ (China) v SSHD [2017] EWCA Civ 795** this is not a case where the welfare of the children was resolved by the mother giving up work. Rather it is a case of the welfare of the children diminishing when the father did his inadequate best.

40. It is an unattractive feature of arguments of this kind that the less effective a parent is the more likely the other parent is to achieve the desired (by her) result of avoiding deportation. However it is important to remember that this case, and indeed in my experience most human rights appeals following a deportation decision do not turn on the interests and welfare of the person to be deported but the effects that removal would have on innocent people, typically children. Parliament has provided that for foreign criminals not sentenced to more than four years' imprisonment can avoid deportation where the effects on children would be unduly harsh. Albeit in a decidedly suboptimal way that is what this judge has decided here. At paragraph 46 of his decision the judge unequivocally decided that "it would be unduly harsh for the children to remain in the United Kingdom without their mother". He was entitled to conclude that and although I do not want in any way to commend his

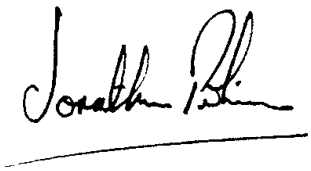
structure or organisation of the Decision and Reasons I find that the necessary points have been considered and rational conclusions reached and that the decision is not materially wrong in law.

41. It follows that I dismiss the Secretary of State's appeal.

42. I do not know what leave the Secretary of State will grant the claimant as a result of this decision. The claimant must understand that there is nothing in the First-tier Tribunal's decision or my consideration of it that gives her the slightest reason to think that her criminality has been in any way excused or overlooked. If, as might happen, she is permitted to stay for the sake of the children, she must not assume for a moment that she has established a human right to remain after they have achieved their majorities.

Notice of Decision

43. The Secretary of State's appeal is dismissed.



Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 17 September 2019