Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24867/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th May 2019	**On 15th May 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

KK
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Ward of Counsel, instructed by James & Co Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Norton-Taylor promulgated on 9 October 2018, in which the Appellant's appeal against the decision to refuse his human rights claim (in the context of deportation) dated 19 October 2016 was dismissed.

2. The Appellant is a national of Sierra Leone, who arrived in the United Kingdom on 29 July 2001. His asylum claim was refused and his appeal against refusal dismissed in October 2001. The Appellant remained in the United Kingdom unlawfully and obtained a false British passport, with which he obtained work and a false British passport for his younger child.

3. On 24 June 2016, the Appellant pleaded guilty to four offences involving the possession and use of the false passport for which he was sentenced to a total of 16 months' imprisonment. Further to his criminal convictions, the Respondent made a decision to deport the Appellant on 9 July 2016 on the basis that his presence in the United Kingdom was not conducive to the public good. The Appellant then made a human right claim, the refusal of which is the subject of this appeal.

4. The Respondent refused the application the basis that although it was accepted that the Appellant had a genuine and subsisting relationship with his two children in the United Kingdom (one of whom is a Qualifying Child for the purposes of paragraph 399(a) of the Immigration Rules and section 117C(5) of the Nationality, Immigration and Asylum Act 2002) for whom it would be unduly harsh to relocate to Sierra Leone with the Appellant; it was not considered to be unduly harsh for the children to remain in the United Kingdom with their mother following the Appellant's deportation. There were no other applicable exceptions to deportation on private or family life grounds.

5. Judge Norton-Taylor dismissed the appeal in a decision promulgated on 9 October 2018 on the basis that it would not be unduly harsh for the Appellant's children to remain in the United Kingdom without him and there were no exceptions to deportation under the Immigration Rules. The "unduly harsh" test applied was that as set out by the Court of Appeal in MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 617, with reference not only to the children's best interests but also to the overall circumstances, including the wider public interest considerations for the deportation of foreign national offenders.

The appeal

6. The Appellant appeals on the sole ground that the First-tier Tribunal materially erred in law in applying the wrong test of "unduly harsh", that set out in MM (Uganda) having been expressly overturned by the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 after promulgation of the decision of the First-tier Tribunal.

7. At the oral hearing, Mr Kotas accepted on behalf of the Respondent that there was an error of law in the decision following the subsequent decision of the Supreme Court in KO. However, it was submitted that the error was not material on the basis that the unchallenged factual findings of the First-tier Tribunal could not meet the high threshold of "unduly harsh" as set out by the Supreme Court. In any event, if the error of law was

material, the same submissions would be made as to how the appeal should be remade.

8. I indicated to the parties at the hearing that I found a material error of law in the decision of the First-tier Tribunal (for the reasons set out more fully below). No further evidence was to be relied upon by either party and therefore submissions were made as to the re-making of the appeal as follows.

9. On behalf of the Respondent, Mr Kotas submitted that on the basis of the findings of fact in the First-tier Tribunal, it was accepted that there would be an adverse impact on the Appellant's children remaining in the United Kingdom without him, but that it would not be unduly harsh. The Appellant's claim was premised on his ex-partner's medical conditions and needs, with the impact of these on the children without the Appellant to provide assistance and support. It was submitted that the First-tier Tribunal Judge gave anxious scrutiny to the medical evidence and rejected a large part of it; albeit it was accepted that the Appellant's ex-partner was HIV positive and suffered from anxiety and depression. There was an almost complete lack of evidence from the Appellant's ex-partner herself and nothing to suggest that she was unfit or lacked capacity to give evidence in these proceedings. There was no alternative explanation for her lack of evidence. The First-tier Tribunal found that the Appellant's ex-partner was able to care for the children, albeit that at times, her health impacted on her ability to carry out her parental duties.

10. In accordance with the Supreme Court's decision in KO, the threshold for showing that deportation would be unduly harsh on the children is a high one. In light of the findings of the First-tier Tribunal, it was submitted that although there would be an adverse impact on the children, it would not be sufficiently high to meet the threshold as unduly harsh.

11. On behalf of the Appellant, it was submitted that on the facts of the present case, there was a stronger than usual family life between the Appellant and his children, with whom he had been living from birth up to 2018. The findings of the First-tier Tribunal were that the Appellant had a significant involvement in his children's lives and played an active parental role. If the Appellant were to be deported, the adverse impact on the children would be unduly harsh. In particular, it was accepted that the children's mother had a low level of literacy and therefore the children would lose the help with their schoolwork that the Appellant has provided to date. Further, the Appellant's elder child was acknowledged by the First-tier Tribunal as at times being a young carer for her mother, when she has suffered from anxiety and depression (albeit this happened on a less frequent basis than the Appellant claimed). Overall, it was submitted that beyond the normal adverse impact on children when a parent is deported, the additional factors in this case which make deportation unduly harsh are the health and literacy problems of the mother in the United Kingdom, meaning that the children are more reliant on the Appellant for support than would normally be the case.

Findings and reasons

12. In this appeal, the First-tier Tribunal applied the meaning of "unduly harsh" as it was set out in authority at the time of promulgation of the decision, namely the Court of Appeal's decision in MM (Uganda), but through no fault of its own has been shown to have erred in law in that regard, for the reasons set out by the Supreme Court in KO, which was handed down after the decision under challenge. The decision of the First-tier Tribunal set this out expressly from paragraph 66 to 80 of the decision, first considering the best interests of the children and secondly the competing public interest considerations (now shown not to be a relevant factor when assessing whether deportation is unduly harsh), concluding as follows:

> *"79. Weighing up the matters I have set out above, and taking my findings of fact into account, I have ultimately reached the conclusion that whilst the Appellant's deportation would have "harsh" consequences for X and Y, these would not be "unduly harsh".*
>
> *80. This has been a difficult case to decide, and rightly so given the nature of the issues involved. If the test was centred on the children alone my conclusion would probably have been different. However, the current legal landscape presents a formidable challenge to all those facing deportation. Here the best interests of two children, while significant, are, on the facts of this case, outweighed by the public interest matters on the Respondent's side of the balance sheet. The combination of the general public interest, the particulars of the Appellant's offending, and his immigration history, represents simply too much."*

13. The Respondent accepts, in light of the decision in KO, that the First-tier Tribunal's decision involved an error of law and given the indication in paragraph 80 that this was a difficult case which the Judge would probably have decided the other way if the test of "unduly harsh" was focused on the position of the children alone (as has now been confirmed is the correct approach), I find that this was a material error. It is therefore necessary to set aside the decision of the First-tier Tribunal and the decision must be remade on the correct legal test.

14. There was no challenge by either party to any the factual findings made by the First-tier Tribunal in this appeal, none of which in relation to the family circumstances or best interests of the children are infected by the error of law and therefore in remaking the decision under appeal, the relevant findings as to the Appellant's relationship with his ex-partner and two children, the Appellant's ex-partner's health and circumstances and the best interests of the children are preserved and are set out in full below.

> *"The Appellant's relationship with MB, X, and Y*

…

42. I find that the Appellant has had very significant involvement in the lives of his children from their respective births to the present day. Despite my adverse findings on certain other aspects of the Appellant's evidence, there has been a consistent thread from him as to his devotion to his children, together with his impact with their lives. What he said corresponds in broad terms with what is said both of the social worker reports, the Tribunal's decision in the appeals of MB and the children (at paragraph 28), what the Appellant has told his probation officer (31), and what X has written (29-30). Mr Armstrong noted the absence of supportive letters from the children's schools. I take account of that, but it does not, of itself, fatally undermine the overall weight of the evidence before me on this particular issue.

43. In light of the foregoing I find that the Appellant has taken an active parental role in helping his children, particularly X, with homework and engages with them and helps them to participate in social activities such as attending church, birthday parties, and other matters. I accept that the Appellant has shown this involvement both in the past (except for the period when he was imprisoned) and since he stopped living with the children in June of this year.

MB's health and other consequential circumstances

44. The evidence before me shows that MB is HIV positive. Having said that, the evidence also indicates that she is asymptomatic, and has been doing very well in respect of her viral load in compliance with relevant medication (26-28). Nothing in the medical evidence suggests that there has been any adverse changes in her circumstances insofar as the HIV is concerned. I appreciate that the author of the latest social services report states that MB's CD count has been "very high", but with all due respect, there is no medical evidence to support this, and, nothing from MB herself to give context of the assertion. Overall, I find that the HIV is well-managed does not represent a significant barrier to MBs functionality or ability to care for X and Y.

45. There had been a suggestion that she might suffer from some form of epilepsy. Upon examination in January of this year it was said that nothing remarkable was detected. It appears as though further investigation is still ongoing. A consultant neurologist has confirmed that she does not require any anti-epileptic treatment at the present time (23-24). I do not accept that MB in fact suffers from epilepsy.

46. The GP letter dated 28 February 2018 states that MB suffers from non-Hodgkin's lymphoma as a result of her HIV. There is a difficulty with this statement, it seems to me. In a letter from a

consultant physician, who clearly had charge of MBs HIV treatment at the relevant time, it clearly states that tests for lymphoma were "inconclusive" and that symptoms were "resolved" with antiretroviral therapy (26). That letter is dated November 2014. Aside from the February 2018 GP letter, I cannot see any letters from the specialist treating MBs HIV or any other specialist to indicate that non-Hodgkin's lymphoma had in fact ever been diagnosed and/or had returned. The medical position is decidedly unclear. On balance, I would not accept that MB in fact suffers from this condition, as I would expect to see clear evidence from the relevant specialist if this was in fact the case. However, even if the condition is present now, there is no specific and reliable evidence before me to indicate that this has a material impact on MBs ability to function on a day-to-day basis. I find that there is no significant impact as a result of this particular condition, if it is indeed present.

47. The February 2018 GP letter also says that MP is "suffering quite badly" from anxiety and depression, and that this makes work very difficult for her. Unfortunately, the letter does not give any particulars, such as the existence or extent of any treatment, whether she has been seen by specialist, or suchlike. In his oral evidence, the Appellant was oddly unsure about any of this. He told me that MB did not discuss the matter with him, and he clearly had no real information about what one might think was an issue that he would have sought further details on. Combined with the absence of any evidence from MB herself, the Appellant's ignorance is rather telling, and did not assist his claim.

48. On balance, I am willing to accept that MB does suffer from anxiety and depression, but on the evidence before me, and without wishing to diminish the potential impact of these conditions on an individual, I do not accept that these are, by themselves, significantly debilitating. I say this with the following reasons. First, I find that although MB resigned from her job as a care worker earlier this year, she has been able to continue to work on a part-time basis as a cleaner: her conditions have not prevented her from working at all. Second, I do not have evidence from, for example, a psychologist or psychiatrist, to indicate that MB is unable to cope with day-to-day activities, including, for example childcare and general self-care. Third, as mentioned above, I do not have any direct evidence from MB herself about any of her circumstances, including the impact of health conditions on her life. Fourth, the Appellant has been unable to provide evidence of the mental health issues and their particular impact on MB. Fifth, without wishing to criticise the GP, the letter is somewhat vague and does not even describe particular problems reported by MB.

49. There is reference in the two social workers reports of MB suffering from kidney disease. I have found it difficult to locate the precise basis for this assertion. The latest GP letter does not mention this, nor can I see any specific diagnosis and the other medical evidence. As with the non-Hodgkin's lymphoma, I would expect to see clear evidence if a significant medical condition had been diagnosed and was being treated. In the absence of such evidence, and on the balance of probabilities, I do not accept that there is a significant kidney disease. If there is a kidney condition, I find that it is not of a serious nature, or at least does not represent a cause of significant functional impairment.

50. Whilst I have expressed some concerns about the medical situation and made findings of fact which are not supportive of the Appellant's claim that MB is so seriously unwell that she cannot adequately care for the children a consistent basis, that is not say that she is free of medical difficulties. She does suffer from certain conditions, and it is more likely than not that these will have an impact upon her. It is likely that she will suffer from fatigue, pain, and symptoms from anxiety and depression. However, my particular findings on the medical evidence are clearly important when I come to assess the current and future (at least in the short to medium-term) ability of MB to appropriately care for her children.

51. I now turn to this issue. I find that it is more likely than not that MB is, and will continue to be for the foreseeable future, able to appropriately care for X and Y, notwithstanding the Appellant is absent from the United Kingdom should he be deported. This finding is based upon the following matters.

52. First, I would refer back to my findings on the medical evidence, above.

53. Second, the Appellant has asserted in oral evidence that he is the "main carer" of the children. That is, to an extent, an exaggeration. He has not been living with MB and the children since June of this year. It is indeed not the case that MB has provided little or no care to her children during the period between June and the date of hearing. Even though the Appellant has clearly been paying a significant role in his children's lives, the evidence is not showing that he has been the "main carer". The same applies to the situation when he was living together with MB and the children.

54. Third, MB cared for the children was the Appellant was in prison. There is no evidence to indicate that the children were neglected to the extent the social services intervention was required.

55. Fourth, whilst MB had no recourse to public funds in the past, the respondent has changed his position and now varied

this restriction. MB does now have a course to benefits, and this represents a material safety net in respect of her position, and in turn that of the children. This is been a material change the situation since 2017 report and the correspondence from the Distance Advice Bureau prior to the family eviction from the previous property.

56. Fifth, the social workers report from 2017 describes MB as being "very unwell and unable to meet the children's needs in an appropriate manner" (15). That is a serious statement to make and I give it very careful consideration. Although I appreciate that this was written a year before the hearing, the evidence as a whole does not support such an assertion, at least as things currently stand. It is noteworthy that the latest report does not make a similar assertion.

57. Sixth, the 2017 social workers report does not state that the Appellant's absence from the children's lives would lead to the real possibility of them being taken into local authority care. I do not read the last bullet point on 15 as an assertion to the contrary. There was, as far as I can see, no suggestion that the children should actually be removed from MB's care. There is no reference in the most recent report to X and Y being at risk of going into local authority care.

58. Seventh, the most recent social workers report, while supportive of the Appellant's claim in certain respects, indicates that MB's health issues do not appear to arise on a frequent basis insofar as having an adverse impact on her parental duties. For example, it says at page 6 that, "[MB's] health problems… can at times impact on her parental duties…". At pages 3-4 there is reference to X having been identified as a young carer because she "sometimes" takes on a caring role when MB is unwell. Finally, at page 7, it is said that the Appellant "is the main support and protective and safety factor for the children, should [MB's] health deteriorate". These last two references are certainly important, and I take full account of the contents. They do however run consistently with what I find to be the relatively infrequent nature of episodes of significant ill-health on MB's part. Whilst there was some discussion at the hearing about the meaning of the words "is" and "should" in the last sentence on page 7, I have concluded that these do not refer to current fluctuations in MBs conditions, but to a speculative view as to what might happen in the future: in other words, the Appellant would take on a greater role is/should MBs health deteriorate at some future point. On the evidence before me (the point I wish to emphasise), such an eventuality is speculative and, I find, unlikely. This reading of that final sentence is more consistent with other aspects of the report, refer to earlier in this paragraph. Ultimately, fact-finding is not an exact science, on

my assessment of the frequency of these episodes must be seen in the context of the evidence as a whole.

59. Eighth, I have taken particular account of the reference in the latest report to X being identified as a "young carer" and that she sometimes assist with laundry, preparing small meals, and doing some shopping errands when MB is unwell (page 4). It is also said that X can call on the Appellant for help. I accept that this has been the case and it certainly counts in favour of the Appellant's case as regards X's best interests. In terms of my assessment of MBs overall ability to properly care for the children, when taking the evidence as a whole and especially my view on the frequency of MB being so unwell that her parental responsibility is are adversely affected, it does not alter my core finding, as expressed in paragraph 51, above. In light of my assessment of the infrequency of MBs episodes of particular ill-health, I find that X's role as a young carer (as described in the report) is not performed on a regular basis, nor is it a level that is likely to represent a substantially detrimental impact on her overall well-being.

60. Ninth, social services are involved as a result of the eviction issue back in June 2018. The social services report shows that there is a Children in Need plan, and it is likely that additional support is, or would be, available from social services if necessary. There has been no suggestion that the plan was put in place as a result of concerns over MBs ability to care for the children: as I understand it, this occurred because of the eviction and consequent precarious housing situation.

61. Tenth, I do accept that the Appellant has been contacted by either MB or X to lend additional assistance after he left the family home in June 2018. This is consistent with his general involvement with his children, but, taking the evidence as a whole, I find that this has not occurred on a frequent basis.

62. Eleventh, it is said by the Appellant that MB has very low literacy skills. There is no evidence from MB herself on this, and it is only mentioned briefly in the 2017 social workers report as being an issue reported by MB. It is the case of MB was previously working as a carer, a job that I would find would require at least a degree of basic literacy ability (no evidence the country has been put before me). Taking the evidence as a whole, I do not accept that MB has little or no literacy skills. I'm willing to accept that they may be on the low side, I find that she is able to conduct her first a reasonable standard. In any event, it would be the case that if she did require assistance, social services would be in a position to provide this, particularly that there is a plan in place for the family unit.

63. Twelfth, I do accept that there are no other family members or close friends who have been willing or able to provide

alternative support. This is relevant, but it does not detract from my overall view of MBs own caring abilities.

64. Thirteenth, in respect of all the findings set out above, I have endeavoured to evaluate various sources of evidence and weigh them up in the around. It is not case where I am simply rejecting any particular item as being entirely incredible. It is the overall picture, assessed on the balance of probabilities, which is all-important.

...

67. I start by assessing the children's best interests and my obligation under section 55 of the 2009 Act, and in so doing I leave out of account any adverse matters relating to the Appellant's conduct. It is very clear that the children's best interests lie in having the Appellant as part of their lives in United Kingdom. They have a strong bond with their father and he has always played as an active role in their lives. I fully accept that the children would be very, very upset by the departure of their father. It is likely that this would have an adverse emotional impact on their lives. In addition, his departure would put a strain on MB, and this would be upsetting for the children as well. I have of course factored in MBs health problems (as I have found them to be), the impact of these on her caring abilities (as I found these to be), and the consequences of this on X and Y. There is no doubt that their lives would be adversely affected on emotional and practical level.

68. In turn, difficulties in home life can of course have a knock-on effect to schooling. I take this into account as well. In this regard, I do however note that the latest social workers report indicates that the respective schools are well aware of the familial situation and put in place to deal with any emotional difficulties (page 4).

69. The Appellant's practical involvement in their lives is also important, and a facet of the best interests assessment.

70. I wish to make it clear that my factual findings show that the children will be adequately cared for by their mother if the Appellant is deported, and that there is no realistic prospect care proceedings being instigated were this eventuality to arise."

15. As above, no further evidence was relied upon by either party and submissions were made as to the outcome of the appeal on the basis of these findings of fact, which are comprehensive and to which no further findings needs to be added.

16. The issue in this appeal is whether in the circumstances set out above, the Appellant's deportation would be unduly harsh on his two children, remaining in the United Kingdom without him, it being accepted by the

Respondent that their removal to Sierra Leone with him would be unduly harsh. If so, the Appellant would meet the exception to deportation set out in paragraph 399(a) of the Immigration Rules, as replicated in section 117C(5) of the Nationality, Immigration and Asylum Act 2002.

17. The meaning of unduly harsh is now set out in the Supreme Court's decision in KO. In paragraph 23, Lord Carnworth held as follows:

> *"On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. 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 the 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. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with the requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."*

18. Within the Supreme Court's consideration of the specific appeal in KO, further reference is made to the authoritative guidance on the meaning of unduly harsh given in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), which held in paragraph 46:

> *"By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something more severe, or bleak. It is the antithesis of pleasant and comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."*

19. In the present appeal, aside from the strength of the parental relationship between the Appellant and his children, the two main factors relied upon to take the circumstances over the threshold of unduly harsh, to go beyond the likely consequences on any child faced with the deportation of a parent, are primarily the mental and physical state of their mother and her low literacy skills. The former requiring the elder

child to be a young carer, albeit infrequently and albeit without a substantial detrimental impact on her overall well-being. The latter, it is said, to have an impact on the mother's ability to assist children in, for example, the school work.

20. As found by the Judge in the First-tier Tribunal, this is a difficult case on the facts, even applying the test and set out in KO and focusing solely on the situation of the children, due to the findings that the Appellant's mother is able to adequately care for the children, with no realistic prospect care proceedings being instigated if the Appellant were deported. However, I find that considering all of the circumstances as a whole, that on balance it would be unduly harsh for the children, particularly the elder child, to remain in the United Kingdom without the Appellant. This is primarily because of the additional support and help he gives the children (and potentially by extension his ex-partner) in the, albeit infrequent, periods where her parental responsibilities are adversely affected by her ill-health. The Appellant's ex-partner's ill-health, at such times and in the absence of the Appellant, would have additional adverse consequences for the children which go beyond being merely harsh or part of the usual consequences of deportation, but taken together with all of the other factors, make deportation unduly harsh on the children on the facts of this particular case. For these reasons, I find that the Appellant meets the exception to deportation set out in paragraph 399(a) of the Immigration Rules and/or section 117C(5) of the Nationality, Immigration and Asylum Act 2002 and his appeal is therefore allowed on human rights grounds.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

The decision is remade as follows:
The appeal is allowed on human rights grounds.

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 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.

Signed  Date 13th May 2019

Upper Tribunal Judge Jackson