

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: HU/12372/2017**

**THE IMMIGRATION ACTS**

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| **Heard at Royal Courts of Justice** | **Decision & Reasons Promulgated** |
| **On 2 July 2018** | **On 10 July 2018** |
|  |  |

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**M S**

(ANONYMITY DIRECTION MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr J Dingley, Counsel, instructed by Burton & Burton Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge R Sullivan, sitting promulgated on 21 March 2018 in which she dismissed the appeal against the decision to deport him made on 9 February 2017 owing to a number of offences the most significant being on 1 February 2017 when he received twelve months’ imprisonment subsequent to conviction for interfering with a motor vehicle endangering other road users.
2. The appellant’s case is that his deportation would be disproportionate on the basis that his separation from his partner and children, who are British citizens, would be unduly harsh.
3. The respondent did not accept that it would be unduly harsh for the children to live in Tanzania or that it would be unduly harsh for them to remain in the United Kingdom even though he was to be deported because he was not the primary carer and the mother had been able to provide the children with stable parenting. It was not accepted that his deportation would affect the day-to-day welfare so as to outweigh the public interest in deportation, acknowledging that they would as a result experience an emotional impact but that they would be able to overcome that within time as they would be supported by extended family members.
4. When the matter came before the First-tier Tribunal initially before Judge Swinnerton on 21st November 2017, the appeal was allowed. The respondent however successfully appealed to the Upper Tribunal which, for the reasons set out in the decision promulgated on 16th February 2018, remitted it to the First-tier Tribunal for a fresh hearing.
5. The matter then came before Judge Sullivan on 18 March 2018 sitting at Harmondsworth. The appellant’s solicitors sought an adjournment on the basis that Mr Mohzam was unable to attend owing to the weather and problems with his car. The judge declined to do so given that the family travelled from Nottingham to attend the hearing. A further request was made again by fax it being said that Mr Mohzam could attend and anticipated arriving between 2 and 3 p.m. The judge concluded that in light of the appellant’s detention his wife’s attendance from Nottingham and their presence to give oral evidence as well as the detailed witness statements already provided and there are relatively few issues to be determined she would proceed [18]. A further adjournment was made after Mr Mohzam arrived at approximately 4 p.m. It was again refused for reasons set out at [19].
6. The judge concluded:-
7. Most of the appellant’s offending is related to alcohol consumption and that he did not accept that, for him, alcohol consumption is a problem, having taken no meaningful steps to address this part of his offending behaviour [30]; and, that this meant she could not be confident that he had reduced the risk of further offending.
8. That it would be unduly harsh for either the children to live in Tanzania because they are British citizens born here, have never been to Tanzania and are both in education aged 8 and 10 [31(c)]; the children had been upset by the appellant’s absence and detention both were missing his company [31(d)]; that neither boy ever suffered any significant health, had remained in the care of the mother and that it was in the best interests of the boys to continue in education to live with both parents [31];
9. that it had been stressful for the appellant’s partner to manage to balance all her commitments and looking after the children; that it would be unduly harsh for her to live in Tanzania because of her own rich private life in the United Kingdom, her responsibility to the children and the findings made in respect of them [32];
10. The appellants removal would be upsetting for all members of the family and put further pressure on the wife who continued to be in all respects a single mother in full-time employment but the guidance was clear in that it would be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals [34]; and
11. removal would be harsh for all of them, including the children but it would not be unduly harsh for them to remain in the United Kingdom without him. On that basis paragraph 399 did not apply;
12. there are no very compelling circumstances beyond those envisaged at paragraphs 399 and 399A of the Rules [34];
13. that the public interest in the appellant’s deportation is not outweighed by the other factors in this case [36]; that the best interests of the children are a primary consideration it is in their best interests to live with both parents to continue with their education which is deserving in weight and there are in no way to blame for the appellant’s offending [39];
14. that despite factors in his favour [40] given the significant weight to be given to the public interest in the deportation of a foreign criminal, which was given further weight by the appellant’s failure to address the significant element of his offending behaviour [38], his deportation would be proportionate.
15. The appellant sought permission to appeal on the grounds that the judge had erred:-
16. in failing to adjourn the appeal and in doing so had acted unfairly and unreasonably;
17. that the judge had erred in stating that it would be rare for the best interests of the children to outweigh the public interest in deportation;
18. that the judge had failed properly to set out what countervailing factors could outweigh the best interests of the child given the conclusion that requiring them to live in Tanzania would be unduly harsh; the judge failed to consider Section 117C of the Immigration Act; and, had failed to consider the case outside the Immigration Rules.
19. Mr Dingley did not seek to support the first ground of appeal nor do I consider that there is any merit in it. The judge gave adequate and sustainable reasons for not adjourning the appeal and the appellant has failed to show that the hearing was in any way unfair or prejudicial in all the circumstances.
20. Similarly, I do not accept that the judge erred in stating, and that it be a rare case in which the best interests of a child are outweigh the public interest. That is a quotation, albeit unreferenced from AJ (Zimbabwe) [2016] EWCA Civ 1012 at [17] Further, it is not arguable that the judge erred in failing properly to consider the best interests of the children either as the first point in any analysis or second in conducting that analysis with improper reference to the impact to other negative factors such as the actions of the parents.
21. I do not consider that, properly construed, that the judge did so. On the contrary, the judge has set out findings as to the best interests of the children and it is evident that she considered them first. It is also implicit into her finding that it would be unduly harsh to expect them, and indeed the wife, to live in Tanzania that she had proper concern for the best interests of the children.
22. I do, however, accept, just, that as Mr Dingley submitted the judge did not consider directly the impact on the children of separation. This is dealt with obliquely but there does not appear to be any findings as to what the effect of separation from the father would be.
23. On that basis, I consider that the decision of the First-tier Tribunal did involve the making of an error of law, stated that, and that I would proceed to remake the appeal on that point. I then heard further evidence from the appellant and his wife, as well as submissions from Mr Clarke and Mr Dingley, before then reserving my decision which I now give.
24. I declined to adjourn the case in order to ask for a psychological report to be provided. Mr Dingley did not explain there had been no formal request made for a report to be compiled and it was clear that it had last been considered in November last year but not followed through.
25. The appellant adopted his witness statement of 28 June 2018. Cross-examined, he said that they had not been to the GP or any other professionals with regard to any problems arising from the children’s behaviour. He said there were no other documents relating to and from the school and after some prompting said they had a month ago received a further report from the school. In re-examination the appellant said that the children are much happier now that he has been released.
26. I then heard evidence from the appellant’s partner who adopted her witness statement. In cross-examination she said that she had not taken the children to a GP or other professional because there was no physical problem. She said that they had received some counselling in school because of the behavioural problems which had arisen but that she had not obtained copies of these as she did not want more intrusion into the children’s lives. She said that they had considered the psychologist’s report in the past but that it would take approximately six weeks to put together because the psychologist would need to observe the children over that period. She said that she had been focussed in giving her energies towards looking after the children. It is why there was no documents from the school beyond those which had been provided. She said that she thought that the children had done reasonably well despite the problems and she did not think it was fair for her to be criticised for the support she had given them. She said that the children are doing as well as they can because she was not going to let them down. That there had been a matter of fact in separation in that the children had not wished to engage socially with no friends, stopped them taking activities which had previously been undertaken with their father; the younger boy had become withdrawn and had got into fights that he had not wanted her to take him to things that his father had previously taken him.

**Discussion**

1. The starting point in this case are the preserved findings of fact reached by the First-tier Tribunal. These include the finding that it would be in the children’s best interest to remain in the United Kingdom and also that it would be unduly harsh to expect either them or their mother to go to live in Tanzania. In assessing the children’s best interests, I note that there is no report from the school indicating problems.
2. Contrary to Mr Clarke’s submissions, I did not consider that the appellant or his wife’s evidence with regard to the difficulties that I have is lacking in credibility. It is, I accept, not supported by documentary evidence but equally it would be surprising in my experience were children not to be impacted by the removal from the family home of one parent, particularly in the case where, as the evidence indicates, that parent had provided a large role in being the parent who remained at home whilst the wife went out to work. That is what happened while the appellant was in custody.
3. It is the appellant’s evidence that now that he was involved closely with their upbringing, taking them to school and being involved to a significant extent on a daily basis. I have no reason to doubt that, but there is no specific evidence from the school as to what effect the separation had had, or what is likely to occur if there the appellant is removed to Tanzania. Nor, for that matter, is there evidence as to how long any problems would last.
4. With regard to any counselling, this appears to be within the school context, and there is insufficient detail about it. I do not accept the reasons given by the appellant’s wife for not providing any detail about it, nor do accept that there is any good reason why more recent school reports have been provided. There is thus little or no objective evidence as to the impact of separation on the children. The evidence of the parents is less reliable and I am not satisfied, in consequence, that removal of the appellant would a have a serious or long lasting effect. It would, I accept have an impact, and it is not in their best interests for their father to be removed from the family but beyond the details of some emotional impact there are no indicators of any specific serious problems with regard either to their mental or physical health, or that these would be long lasting.
5. Having concluded therefore that there would be an impact on the children’s wellbeing contrary to their best interests if the father would be deported, and the next issue is whether that would be unduly harsh, but bearing in mind that the impact is, on the evidence, likely to be limited.
6. In assessing whether the effect of deportation is unduly harsh, consideration must be given to the negative factors which clearly exist in this case as well as the positive factors.
7. I bear in mind AJ (Zimbabwe) at [13] to [14] and [17]:

13 This court has on a number of occasions had cause to emphasise that the mere fact that there will be a detrimental effect on the best interests of the children where the parent (almost always the father) is deported in circumstances where the children cannot follow him does not by itself constitute an exceptional circumstance. In *LC (China)* *v Secretary of State for the Home Department* [[2014] EWCA Civ 1310](http://www.bailii.org/ew/cases/EWCA/Civ/2014/1310.html" \o "Link to BAILII version); [[2015] Imm AR 2](http://www.bailii.org/ew/cases/EWCA/Civ/2014/937.html) the appellant, a citizen of China, had been convicted of two offences of robbery and sentenced to five years' imprisonment. The Secretary of State made a deportation order which was challenged on article 8 grounds. The appellant had two young children who were British citizens and a partner who had indefinite leave to remain in the UK. The FTT held that it would be disproportionate to deport him after taking into account the nature of his offending, the likelihood of his re-offending, the circumstances facing the family if they were all to live in China, and the best interests of the children. The UT held that the FTT had been in error and upheld the order. The Court of Appeal (Moore-Bick, Ryder LJJ and David Richards J) dismissed the appeal. Moore-Bick LJ noted that this was not a case of removing someone who had illegally entered the country – had it been, the decision of the FTT, which placed particular emphasis on the best interests of the children, might well have been sustainable. But here the more important public interest was engaged of deporting a foreign criminal. He observed that:

"…. neither the fact that the appellant's children enjoy British nationality nor the fact that they may be separated from their father for a long time will be sufficient to constitute exceptional circumstances of a kind which outweigh the public interest in his deportation"

14. In *Secretary of State for the Hone Department v CT (Vietnam)* [[2016] EWCA Civ 488](http://www.bailii.org/ew/cases/EWCA/Civ/2016/488.html" \o "Link to BAILII version) a foreign criminal with two firearms offences and a variety of other offending was sentenced to seven and a half years' imprisonment, having earlier served a lengthy sentence. The FTT nonetheless found that his deportation would infringe his article 8 rights. The fact that it was in the best interests of the children for their father to remain in the UK weighed particularly heavily with the tribunal. Rafferty LJ, giving a judgment with which Tomlinson LJ agreed, held that it was not a factor capable of constituting exceptional circumstances (paras.36 and 38):

"The effect on the children was, on the evidence, to leave them unhappy at the prospect of their father being on another continent. I readily accept that description. Experience teaches that most children would so react. I cannot accept the conclusion that, added to a low risk of reoffending, the effect on them tips the balance. These children will not be bereft of both loving parents. Nor was there evidence of a striking condition in either (I ignore the stepchildren by virtue of their age) which his presence in the UK would dispositively resolve. He is said to have "a particular tie" with the Respondent. The son was said to have spoken less confidently when his father was in prison and to have returned to confidence upon his release. That is not exceptional. …

Appellate guidance is clearer now than when the FTT promulgated its decision. As paragraph 24 of *LC (China)* succinctly explains, where the person to be deported has been sentenced to 4 years' imprisonment or more, the weight attached to the public interest in deportation remains very great despite the factors to which paragraph 399 refers. Neither the British nationality of the Respondent's children nor their likely separation from their father for a long time is exceptional circumstances which outweigh the public interest in his deportation. Something more is required to weigh in the balance and nothing of substance offered. The approach of both the FTT and the UT failed to give effect to the clearly expressed Parliamentary intention."

17. These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules if the interests of the children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be largely otiose. In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary.

1. Undue harshness is to be interpreted in accordance with the ordinary meaning. In doing so I consider that the factors set out in Section 117B and 117C of the 2002 Act must be taken into account.
2. The starting point is that the deportation of foreign criminals is in the public interest. This is increased in this case given the nature of the offence and given the appellant’s failure to address significant causes of his offending. Also, the index offence is one which put the appellant’s family and members of the public at risk.
3. In this case, there are additional negative factors which increased the public interest in deporting the appellant. There is his failure to address the significant element of his offending behaviour, that is, his failure to recognise the consumption of alcohol is for him a problem adds significant weight to the public interest in his deportation.
4. In terms of the positive factors, there is a strong family life which has been established whilst the appellant was here lawfully. As found by the judge previously, the appellant speaks English sufficiently well to integrate, has earned money and it is evident that he and his partner have resources such to ensure that he would not be reliant on public funds. These factors are, however, neutral
5. I consider that there is nothing in this case to take it out of the usual consequences of the deportation of a parent, in this case a father. It is clearly, I accept, distressing for all concerned, particularly the children and causes them a significant degree of distress to them and also their parents. But that is what the public interest requires. That is what Parliament has said in the public interest. The structure of the legislation is such that it presupposes separation of children from their parent and the consequences which naturally flow therefrom. I do not, however, consider that the effects in this case could be construed as unduly harsh.
6. Again taking this as a whole I am not satisfied that there are in this case very compelling circumstances over and above those set out in paragraph 399 and 399A of the Rules such that deportation is outweighed by the other factors.
7. For all of these reasons, I find the circumstances are not such that the individual interests of the appellant and his wife and children, either singly or cumulatively outweigh the public interest in deportation. Accordingly, I dismiss the appeal.
8. I maintain the anonymity direction made by the First-tier Tribunal.

**Notice of Decision**

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by dismissing the appeal on similar 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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 6 July 2018



Upper Tribunal Judge Rintoul