Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **HU/05378/2017**

THE IMMIGRATION ACTS

At **Field House** **Decision & Reasons Promulgated**
On **07.01.2019** On **16.01.2019**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

RMM

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Nabila Mallick* (counsel instructed by North Kensington Law Centre)
For the respondent: Mr Toby Lindsay

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Jeremy Callow), sitting at Taylor House on 6 July, to dismiss a human rights appeal against deportation by a citizen of Zambia, born 1972. The appellant, his wife and son, born 2000, had all arrived here on visit visas in 2001: a daughter (now a British citizen) was born on 5 September 2003, but in 2008 an application for discretionary leave to remain was rejected for non-payment of the required fee. Also in 2008, the appellant was sentenced to 15 months' imprisonment for using a Zambian passport with a false visa to get work.

2. That resulted first in the appellant's being excluded from discretionary leave given to his wife and son on a renewed application, and then in notice of intention to deport. An appeal against that came to a final end with refusal of permission to appeal by the Upper Tribunal in 2011,

NOTE: the anonymity direction made at first instance will continue, pending re-hearing

following which deportation orders were made against all of them, later revoked in the cases of the wife and son.

3. This appeal followed refusal of further submissions for revocation of the deportation order against the appellant on 9 March 2017. Ground 4, criticizing the judge for delaying from 6 July 2018 to 1 October in sending out his decision is misconceived: as shown quite clearly at the foot, he wrote it on 17 September. More important are those dealing with the substance.

4. At paragraph 32 the judge referred to *Devaseelan* (Second Appeals - ECHR - Extra-Territorial Effect) [2002] UKIAT 702*, but acknowledged that there had been a good deal of water under the bridge since the previous appeal. He rightly rejected a submission by Miss Mallick that the appellant's conviction was now spent, so of no effect: as he pointed out, the validity of the deportation order had to be judged as things stood when it was made.

5. On the other hand, the judge realized he needed to carry out the balancing exercise between the public interest, and those of the appellant and his family as at the date of the hearing. At 33, he noted the situation of the appellant's children, and went on

> "While it might be unduly harsh to be separated, the fact of harshness has to be considered in the light of the appellant's immigration and criminal history."

6. This showed the judge acknowledging, not only that it would be in the children's best interests to remain in this country, but that, on their situation alone, it would be unduly harsh to require them either to leave, or to go on living here without their father. The judge was writing before *KO (Nigeria) & others* [2018] UKSC 53, so cannot be criticized for not referring to it.

7. However, the principles set out by the Supreme Court still had to be applied. The judge (see his 15) held it necessary for there to be 'very compelling reasons' in a case of this kind; but, for the reasons given in *KO* at 23, that was wrong. The other main principle, for present purposes (see *KO* at 32) effectively overrules the view of the law as previously understood from *MM (Uganda) & another* [2016] EWCA Civ 450: whether a decision is unduly harsh to children must depend on their position, and not on a parent's criminal or immigration history.

8. On the other hand, at 33 the Supreme Court approved Judge Southern's decision in the lead case (the passages cited need to be read in full), and it is clear that something more than the ordinary effects of "… any disruption of a genuine and subsisting parental relationship arising from deportation" is required for the effect of the decision to be unduly harsh.

9. The appellant's son was already grown-up at the date of the hearing, and, as his mother told the judge (see paragraph 4) was himself serving a sentence of six months' imprisonment, presumably in a young offenders' institution. He is no longer a 'qualifying child', and does not enter into the equation.

10. So far as the daughter is concerned, the respondent may well accept that her own best interests as a British citizen of 15, here since birth, lie in staying in this country, either with or without her father. Whether it would be unduly harsh for her to be required to do so without him needs to be re-assessed in the light of all the relevant evidence, including the independent social worker's report, but on the basis set out at paragraphs 32 and 33 of *KO*.

11. For the reasons I have given, this case needs to be re-assessed on a full view of the evidence about the appellant's daughter, in the light of *KO*. As agreed before me, this can best be done by way of a fresh hearing on that basis, before another first-tier judge.

Appeal allowed: first-tier decision set aside
Fresh hearing at Taylor House, not before Judge Callow

(a judge of the Upper Tribunal)
7 January 2019