Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00747/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 October 2015	**On 6 November 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LUKMAN DAWODU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr G Franco, Counsel, instructed by Mandy Peters Solicitors

DECISION AND REASONS

1. I see no need for and do not make an order restricting publication of details of this appeal.

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant" against the decision of the Secretary of State to make him the subject of a deportation order with reference to Section 32(5) of the UK Borders Act 2007. The First-tier Tribunal allowed the appeal and the

Secretary of State contends that the First-tier Tribunal's decision was wrong in law.

3. I begin by considering carefully the First-tier Tribunal's decision.

4. It notes that the claimant is a citizen of Nigeria who was born in 1959 and so is now 56 years old.

5. The claimant's immediate family members are in the United Kingdom with permission although they are not settled there. His wife has lived in the United Kingdom since 2004. They have five children. The eldest, a daughter, was born in 1992 and a son was born in 1997. They were both adults by the time the First-tier Tribunal decided the case and are of little relevance to the decision. There are three younger children: a daughter born in June 2001, a daughter born in December 2005 and a son born in February 2009. They are now aged 14, 9 and 6.

6. The claimant visited his family with permission using a multiple entry visit visa.

7. Although the claimant and his wife lived together until about December 2009, their relationship deteriorated and the claimant returned to Nigeria where he remained until May 2013. He then entered the United Kingdom at Manchester Airport using a forged passport falsely identifying him as a citizen of France. He was detected and prosecuted and pleaded guilty to offences he had committed and he was sent to prison for twelve months. That is the matter that led to his being subject to deportation.

8. The claimant had applied for visit visas in March 2010 and September 2010. Both applications were unsuccessful.

9. He initially applied for asylum when he realised he was in difficulties but the case before the First-tier Tribunal was conducted solely on the basis that his deportation would be a disproportionate interference in his private and family life.

10. He sought to excuse his efforts to get into the United Kingdom by saying he wanted to be back with his family.

11. The Secretary of State's case was simple. The claimant was a foreign criminal as defined in statute and he should be deported. The Secretary of State had considered each of the minor children. They were each in the United Kingdom with leave which was due to expire in September 2014 but which had been extended until March 2017. It is implicit in the Decision that leave was extended this way and the details were confirmed expressly at the hearing.

12. It was found that the children could keep some sort of contact with their father in the event of his removal. They were cared for well by their mother in the United Kingdom. The Secretary of State did not accept that the claimant was in a genuine and subsisting marriage with his wife.

13. The First-tier Tribunal heard evidence and submissions and made its findings.

14. The Judge accepted that the claimant had been absent from the United Kingdom from 2009 because of marital difficulties but had returned in May 2013. The claimant and his wife had five children. The Judge was satisfied that there was a genuine and subsisting parental relationship with all of the children although the three minor children were the ones that were relevant for the purposes of paragraph 399 of HC 395. The Judge was also satisfied that the claimant had a genuine and subsisting relationship with his wife although the judge noted that "it seems to me that this is a less important aspect of the appeal overall because the [claimant's] status was most clearly precarious up to 2009 and, of course, it has since been precarious".

15. The Judge accepted that when the claimant returned to Nigeria he had tried unsuccessfully to establish a business. He was "facing a very uncertain economic future in Nigeria".

16. There was little communication between the claimant and his family between 2009 and 2013. The Judge found that the claimant had been

> "... doing his best to act responsibly and well as a father towards all of his children. As a consequence he has improved the family relationship as a whole. He does very practical and responsible tasks such as taking the younger children to and from primary school; he assists with cooking and doing general household chores. All of this is very much to the [claimant's] credit and serves to show the extent to which he is building perfectly loving and good relationships with his children".

17. The Judge was unimpressed with the suggestion that the claimant could maintain communication with his children from Nigeria. No doubt he could but it was the Judge's view that the claimant had re-established himself within the nuclear family and was fulfilling properly his role as father and that was something to be encouraged on grounds of public policy.

18. The Judge said at paragraph 49 of its decision:

> "These children would be affected in a way that would be unduly harsh for them to have to leave this country."

19. The Judge explained that this was because the children, particularly the younger two, have only ever really known life in the United Kingdom. They all benefited from their relationship with their father. Although recognising that their primary carer had been their mother for much of their lives the Judge found at paragraph 50 that:

> "Since the [claimant's] return to the United Kingdom he has played what I see as an extremely important valuable role in relation to these children and a role that should not be underestimated, or, in fact, undermined. Not only would it be hard for these children to go to Nigeria but it would be unduly harsh for them to go to Nigeria. It will be unduly harsh for them to stay in this country without that person that they now know as their father, a

person that they love and look up to and who can be a responsible guide for them in their lives. The overall conclusion I reach is that paragraph 399(a) (b) does apply to the circumstances of this [claimant] and his family".

20. The Judge then directed himself to the requirements of Section 117 of the Nationality, Immigration and Asylum Act 2002. The Judge noted that the claimant speaks English well, that he was willing to live work for his living if that were permissible and he had been occupied productively in the United Kingdom. For example he had contributed to the home in a way that enabled his wife to develop her work as a seamstress. The Judge then reminded himself that Section 117C referred to the public interest in deportation increasing with the seriousness of the offence. The Judge found that the offence was at the lower end of the bracket that qualified a person for deportation and therefore, in his judgment, there was less interest in removal. Nevertheless, he was careful to direct himself that there *was* a public interest in deportation but he concluded that deportation would be wrong in this case.

21. In many ways I have considerable sympathy with the First-tier Tribunal Judge. He has clearly considered family unity to be highly desirable unity and he decided that on the facts of the case the usual consequences of deportation ought not follow. Nevertheless it is appropriate to note the claimant's family members are not settled in the United Kingdom and even if they were they could remove to their country of nationality.

22. I have to ask myself if the First-tier Tribunal's decision is right in law. I conclude that it is not. I have listened carefully to the submissions of Counsel and noted the favourable findings that have been made and no doubt correctly made.

23. I am not able to understand or agree with the conclusion that deportation in this case would be unduly harsh.

24. The Upper Tribunal is clearly uncertain about the proper approach to take when discerning the meaning of "unduly harsh".

25. I was referred to **MAB (Para 399; "unduly harsh") USA [2015] UKUT 00435 (IAC)** which was a decision of Upper Tribunal Judge Grubb with Deputy Upper Tribunal Judge Phillips. Here, the Tribunal expressed the view that unduly harsh is to be assessed "solely upon an evaluation of the consequences that impact on the individual concerned". It then said that something will be "unduly harsh" if it is more than "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging". Harshness was to be understood as being "severe" or "bleak" and they were "unduly" harsh if they were "inordinately" or "excessively" harsh taking account of all of the circumstances of the individual. There is a further decision in the Upper Tribunal by Judge Southern at **KMO (Section 117 – unduly harsh) Nigeria [2015] UKUT 00543 (IAC)**. This was written in the clear knowledge of the decision in **MAB** and expressed a contrary view. It was Judge Southern's view that because Section 117

expressly recognises that the public interest in deportation increases with the seriousness of the offence the phrase "unduly harsh" should be construed with regard to the seriousness of the offence.

26. If I had to choose between the two approaches I would prefer the approach suggested by Judge Southern for the reasons indicated. However, in my judgement it is not necessary to choose between them in this case. This is because the offence could hardly be less serious and still attract automatic deportation. The sentence was the minimum necessary. It is not an offence of violence. The claimant admitted his guilt. Parliament says that the offence attracts deportation because it was punished with twelve month's imprisonment but it is free of aggravating features. This should not be read as me condoning or approving the claimant's criminal behaviour. A person is not sentenced to twelve months' imprisonment for committing an offence that is other than serious but it is right to say that there are many more serious offences that have to be punished by the courts and, in my judgement, many of them will attract a sentence of less than the four years' imprisonment and therefore will not be subject to the need for very compelling circumstances "over and above" the circumstances outlined in section 117C(4) and (5).

27. The First-tier Tribunal Judge has not identified any factors which on either interpretation make the degree of hardship undue. There will be bad consequences. That is what deportation does to people. Therefore, although this was a case where the father's return to the family fold has improved family relationships, the case could not be put on the basis that his arrival has transformed a failing family into a successful family. This is not a case, for example, of exceptional dependency because a child has a particularly challenging health problem or of a mother incapable of managing on her own. There is a certain unattractive irony in a person's prospects of avoiding deportation being inversely proportionate to his partner's competence but that is because deportation appeals rarely succeed because of the impact of removal on the offender but because of the impact of removal of an offender's family.

28. I have considered the skeleton arguments and replies set out by the claimant. I cannot accept that the First-tier Tribunal has explained its finding that removal would be unduly harsh. Further, although the claimant's deportation will be unpleasant and undesirable the facts found are not, in my judgement, capable of being unduly harsh. The First-tier Tribunal therefore erred in law.

29. Anticipating this as a possible outcome I ask the parties to assist me about how I should proceed if I found that the First-tier Tribunal had erred in law. Mr Franco invited me to order a further hearing. I see no need for that. I have gone through the witness statements. It is quite clear that it is in the best interests of the children that their father is allowed to remain with them in the United Kingdom but their best interests, although a primary consideration, are not determinative. The family has managed in the father's absence and no doubt could do so again.

30. This is not a case where the Judge had material capable of supporting a finding that it would be unduly harsh. In my judgement the evidence does not support the conclusions. It only supports the conclusion that there will be harshness and disappointment and sadness.

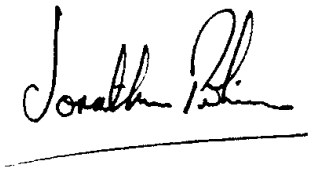
31. I also noted that Mr Franco indicated that in the event of the case having to be decided again he would like to adduce further evidence but the evidence has not been prepared. It is open to the claimants to make a fresh application if they want to, whether that is based on the psychological harm to the family on removal or psychological harm to the claimant in the event of his return. It is not right to give a further opportunity to the claimant to produce evidence that they did not produce when they had the opportunity to present their appeal.

32. There is nothing here to suggest to me that there would be any harm to the claimant on return that would come near to engaging the protection of Article 3 of the European Convention on Human Rights.

Notice of Decision

33. The First-tier Tribunal erred in law. I allow the Secretary of State's appeal I set aside the decision of the First-tier Tribunal and I substitute a decision dismissing the claimant's appeal against the Secretary of State's decision.

Signed
Dated 30 October 2015



Jonathan Perkins
Judge of the Upper Tribunal