Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10128/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decisions & Reasons Promulgated**
On 17th July 2017	**On 09th August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

KOLADE OLUSANYA FAJUYITAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Celia Record (Counsel)
For the Respondent: Mr T Wilding (Senior HOPO)

DETERMINATION AND REASONS

1. For the purposes of this appeal, the references to the Appellant and to the Respondent are those references as existed in the Tribunal below and had been maintained as such in this Tribunal, together with a reference to their representatives.

2. This is an appeal against the determination of First-tier Tribunal J C Hamilton, promulgated on 4th November 2015, following a hearing at Taylor House on 17th August 2015. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

3. The Appellant is a male, a citizen of Nigeria, who was born on 15 July 1991. He is 26 years of age. He appealed against the making of a deportation order against him on 7 October 2015. He is currently in Nigeria, having returned there voluntarily in September 2015. His right to appeal was therefore being exercised from abroad before the Tribunal of J C Hamilton, and is similarly being exercised from abroad now.

The Appellant's Claim

4. The Appellant came to the UK as a visitor with his parents in August 2002 and was subsequently granted indefinite leave to remain. Whereas his father went on to apply for, and was granted British citizenship, the Appellant did not so. He was granted with, and remained with, indefinite leave to remain on 10th October 2008. He had lived in the UK lawfully for twelve years. He went to college here and undertook a part-time job in this country. On 28th November 2012, however, the Appellant went to a mobile phone shop with the intention of stealing a phone. He asked to look for a phone and then ran off with the telephone. He returned on 8th December 2012, this time with a hammer, to the same shop and threatened to smash a display cabinet and stole an unspecified number of telephones. A few days later on 26th December 2012, he returned once again to the same shop with a hammer and once again smashed the display cabinet and stole telephones. As previously, he waved his hammer at the employees, but denies any intention to hurt anyone.

5. On 3rd June 2013, the Appellant pleaded guilty at Woolwich Crown Court to one theft of shoplifting and two counts of robbery.

6. The Appellant has a partner, [JF], who is a British Canadian national resident in the UK, and there is a child of this relationship, who was referred to in the Tribunal below as "J". He is a British citizen by virtue of his mother's nationality.

7. On 1st July 2013, the Appellant was sentenced to a total of three years' imprisonment at Woolwich Crown Court. He was subsequently on 1st August 2013 served with a liability to deportation notice, and invited to make representations, following which the deportation order was confirmed on 16th August 2014.

The Judge's Determination

8. In his determination, Judge J C Hamilton considered the Appellant's circumstances, including the fact that he had lived in the UK from the age of 11 onwards, had been educated and had worked in the UK. As the judge observes, "these were his formative years". The judge noted how the case law suggested that from the age of 7 onwards, "that a child starts to form social relationships and relates to his environment independent of its parents" (paragraph 65). The judge did not ignore the fact that the Appellant had nevertheless lived in Nigeria until he was 11 years of age and his family were originally from Nigeria, such that "they clearly have continuing links with Nigeria" and the Appellant has at least one sister there, notwithstanding the fact that he had spent now fourteen years in the UK, such that "the likelihood is that he retains cultural and other ties to Nigeria" (paragraph 66). The judge also observed that, at the time that the Appellant had formed his relationship with his partner, [JF], neither his nor her immigration status was precarious, and this was conceded by the Respondent Secretary of State in the decision letter (see paragraph 73).

9. The core of the judge's determination, however, is in relation to the impact of his deportation on his child, "J". The judge dealt with this pointing out that, for the child, "the adverse consequences of remaining in the UK are likely to be that he will be deprived of a proper relationship with his father". The child was aged 3 years, and, "this is a time when he would normally be bonding with his father". Given that the Appellant had been in prison, the judge also recognised that, "the Appellant's son has limited knowledge of his father and has the benefit of a supportive extended family". Nevertheless, this was no substitute for the emotional and developmental benefits for a 3 year old child that are associated with being brought up by both parents in his formative years (paragraph 92). The judge then went on to conclude that it will be unduly harsh for the Appellant's partner and child to live in Nigeria with him, given that neither of them had been to Nigeria. He also observed that, "expecting her to separate from her child in order to live with the Appellant would also be unduly harsh" (see paragraph 94(1)). The judge held that it was a "finely balanced decision" and on its own particular facts, but that he would have to conclude that it will be unduly harsh for the Appellant's son to grow up in the UK without him (see paragraph 94(3)). In coming to this conclusion, the judge had regard to Section 117C of the 2002 Act and to paragraph 399B of the Immigration Rules (see paragraph 95). The conclusion reached by the judge was that it will be disproportionate to the child's Article 8 rights and interests for the Appellant to be deported and the judge allowed the appeal on human rights grounds (see paragraph 96).

Grounds of Application

10. The grounds of application state that there were a whole host of well-established authorities to the effect that simply because a family is going to be split up, did not mean that there would be "unduly harsh consequence" such that it would render deportation to be disproportionate

and unlawful, without anything more. These are cases such as **Lee v SSHD [2011] EWCA Civ 348**, **CT (Vietnam) [2016] EWCA Civ 488**, **LC (China) [2014] EWCA Civ 1310**; **NA (Pakistan) [2016] EWCA Civ 662**; and **AJ (Zimbabwe) [2016] EWCA Civ 1012**.

11. In particular, in the case of **NA (Pakistan) [2016] EWCA Civ 662**, it is made clear that, "the desirability of children being with both parents is a common place of family life". That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in **CT (Vietnam) [2016] EWCA Civ 488** at paragraph 38:

> "Neither the British nationality of the Respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation".

12. Similarly, in **AJ (Zimbabwe) [2016] EWCA Civ 1012**, it was stated that,

> "It was not open to the FTT to find that the separation of the children from the father/stepfather was a compelling reason to allow the Respondent to remain. Far from being an exceptional circumstance, this is an everyday situation as the authorities I have set out demonstrate. They show that the separating issue of parent and child cannot, without more, be a good reason to outweigh the very powerful public interest in deportation. No doubt the FTT was right to say that these children would unfortunately suffer from the separation but for reasons I have already explained, if the concept of exceptional circumstances can apply in such a case, it would undermine the application of the English Rules" (see paragraph 34 of **NA (Pakistan)**).

13. Finally, the Grounds of Appeal state that there was a failure by the judge to give adequate reasons for findings on material issues.

14. Before the First-tier Tribunal, Judge Osborne refused permission to appeal, pointing out that the judge below had given a determination that was a "careful and well-reasoned decision" and that the judge had set out the "pertinent issues, law and evidence relating to the facts of the appeal". Judge Osborne in refusing permission to appeal had gone on to say that "in appeals of this nature it is a task for the judge to make findings of fact on the basis of the evidence and to provide adequately clear reasons for those findings" and the judge had done precisely this. In particular, the judge had stated at paragraph 89 that the Appellant's son would be deprived of the comparatively high quality of healthcare, education, and social support that is presently available to him as a UK citizen, which he would have to forsake. Secondly, there was nothing in the Respondent's file to suggest that the judge was referred to any of the authorities that had now been listed and referred to in the Grounds of Appeal. If the Respondent wished the judge to consider these then it was incumbent

upon the Respondent to ensure that the judge was provided with copies of those authorities. This did not appear to be the case.

15. One further application for permission to appeal, permission was granted by the Upper Tribunal under UTJ C Hanson. In what is an extensive and comprehensive set of reasons, the UTJ refers to how the judge sets out his findings at paragraph 62 onwards, as well as the references to the Immigration Rules and to the law at paragraphs 51 and 61. The judge had also been satisfied below that the Appellant and his partner were in a subsisting relationship and have a child. However, the judge appears to have formally concluded that there will be unduly harsh consequences for the child simply because a family was going to be split, without properly explaining why. The judge also erred in failing to provide adequate reasons for finding why the separation of the child from the Appellant would result in an unduly harsh outcome for the child.

16. There is no Rule 24 response from the Appellant.

Submissions

17. At the hearing before me on 17th July 2017, the Respondent, who was appealing in the present case before this Tribunal was represented by Mr Wilding, a Senior Home Office Presenting Officer, and he submitted that there was a fundamental failure by the judge to make findings on the issue as to how it would be "unduly harsh" for the Appellant's son if the Appellant were to be deported. Extensive guidance had been given by the Court of Appeal in **NA (Pakistan) [2016] EWCA Civ 662**, where it had been established that not even the status of British citizenship is enough to show exceptional circumstances. Moreover, in the pre-Rule change in the case of **Lee v SSHD [2011] EWCA Civ 348** the same had been said. The fact was that there was a high public interest in the deportation of foreign criminals. This was a matter that the judge had overlooked.

18. Second, the more recent judgment of **WZ (China) [2017] EWCA Civ 795**, actually saw Sir Stanley Burnton conclude that,

> "I cannot see how a Tribunal properly applying the law as it was at the date it heard the Appellant's appeal, and given the public interest in the deportation of a person sentenced to two years' imprisonment the weight that was appropriate, I have allowed his appeal. I take into account that until he committed his offence he had been of good character, and that the reports before the Tribunal showed that he was unlikely to reoffend. I bear in mind that he has an established family life in this country ..." (see paragraph 14).

Mr Wilding submitted that this was a statement that was very similar to the situation that appertained in the instant case. As Sir Stanley Burnton had indicated, "none of these facts takes his case out of the ordinary" and this was an entirely "ordinary" case in that respect as well.

19. Third, if consideration is now given to the determination of this appeal by Judge J C Hamilton, it is plain that the same errors have been made, submitted Mr Wilding. For example, the judge simply proceeds to conclude that there are adverse consequences of remaining in the UK for the child "J" if his father, the Appellant, is deported. What appeared at paragraph 92 was, what had been referred to by the Court of Appeal as the "common place of family life", and it was the "ordinary" case where there is an inevitable splitting up of the family following deportation. Similarly, if one looks at paragraph 94, the judge, in three separate subparagraphs simply proceeds to conclude that the consequences for the Appellant's child will be unduly harsh if the deportation were to proceed.

20. Finally, at paragraphs 64 to 66 of the determination the judge makes observations in relation to whether someone who has committed crimes can be said to be socially or culturally integrated into the UK, which were beyond his remit. Mr Wilding drew my attention at this point to the case of **Rocky Gurung [2012] EWCA Civ 62**, where the Court of Appeal had criticised the Tribunal below on the basis that,

> "Much of the determination has the appearance of a search for reasons for not deporting him rather than – as in our view it ought to have been, an enquiry into whether, despite the statutory policy of automatic deportation, Article 8 of the Convention would be violated by its implementation" (see paragraph 21).

21. For all these reasons, Mr Wilding submitted that the only appropriate course of action was for this matter to be remitted back to the First-tier Tribunal, so that an intention can be focused on how the mere splitting up of the family would have adverse consequences for the Appellant's child in a way that would make the deportation "unduly harsh" and disproportionate.

22. For her part, Miss Record, drew my attention to the skeleton argument that was before the First-tier Tribunal, dated 12th August 2016. She submitted that this was nothing more than a disagreement with the decision of the judge below. It was not the case that matters had not been properly considered and gone into.

23. First, if one looks at paragraph 65, it explained that the judge has had regard to the fact that the Appellant has been in the UK from the age of 11 onwards and that from the 7 years of age onwards, he would have been in a position to form social relationships and relate to the environment around him.

24. Second, the decision letter conceded that the Appellant formed a relationship with his partner, [JF], at a time when the status of neither was precarious (see paragraph 73).

25. Third, the judge had regard to the assessor's report from the OASy who confirmed that the Appellant posed a medium risk of serious harm to the

public, which meant that he "was unlikely to do so unless there was a change in his circumstances" (paragraph 80). The judge also referred to the fact that, "the Appellant expressed a high level of remorse for his actions" and that the sentencing judge had referred to this as something which "was obviously not a hopeless case". It was just unfortunate for the Appellant that he had committed three offences, because had he committed one he would have had a non-custodial sentence.

26. Fourth, the judge recognised that the Appellant's "family had been highly supportive. All the witnesses I heard from were consistent in their description of the shock, disapproval and concern experienced by the family ..." (paragraph 84).

27. Fifth, the judge noted how in his letter to the Crown Court Judge, the Appellant's father had said that, "as far as I am aware he has never been in any trouble with the law during his years n the UK", although it was the case, as the judge openly recognised, that the Appellant had received a reprimand and two cautions, but this only showed, as the judge found, that the father only had "limited knowledge of his son's activities". Nevertheless, it was the case that "the Appellant's offending was clearly brought home to his family and his need for support and guidance" (paragraph 85).

28. Sixth, the judge observed that, "almost all criminals who have been caught claim to be remorseful" and that "it is difficult to give a great deal of weight to such expressions of remorse". Nevertheless the judge took a clear view that,

> "It does seem likely that the significant adverse consequences of his offending behaviour will have brought home to the Appellant, the likely consequences of further criminal activity in the future. Furthermore, I have found that the Appellant has a genuine relationship with his partner and his son. I therefore find it likely that the possibility of losing these relationships will have led the Appellant to reflect about the consequences of his behaviour and further diminish the chances of future offending" (paragraph 86).

29. Miss Record ended her submissions with the statement that, contrary to what was being said in relation to the judge's conclusion at paragraph 92, namely, that the consequences of the deportation would be "unduly harsh" for the Appellant's child, evidence had been put before the judge to demonstrate precisely this. This evidence lay in the statement of [JF] at paragraphs 5 to 6, which confirm the 3 year old child actually being conscious of, and in need of the presence of his father in his life. In any event, submitted Miss Record, the position of the child was only one factor, and the judge had regard to numerous other factors, such as remorse, and the family support, and the sentencing judge treating this as not a hopeless case.

30. In reply, Mr Wilding submitted that the only aspect of the case which the judge self-identified, as coming to the aid of the Appellant, was the adverse consequences of the deportation upon his child, and in this regard, he had failed to make the findings to demonstrate how such consequences can be said to be "unduly harsh, on the facts as found by him".

No Error of Law

31. I am satisfied that the making of the decision by the judge did not involve the making of an error of law (see Section 12(1) of TCEA 2007). My reasons are as follows.

32. First, I agree with Judge Osborne bellow, who had initially refused permission to appeal, when he had pointed out that the judge JC Hamilton actually given a determination that was a "careful and well-reasoned decision." This is because he had set out the "pertinent issues, law and evidence relating to the facts of the appeal". Judge Osborne had correctly stated, in my view, that "in appeals of this nature it is a task for the judge to make findings of fact on the basis of the evidence and to provide adequately clear reasons for those findings" and the judge had done precisely this. It is well established that 'perversity' is a high hurdle and that all too often practitioners use this epithet when it has no application (see **R (Iran) [2005] EWCA 285**, at paras 11-12). I agree with Judge Osborne that at paragraph 89 Judge JC Hamilton had referred to the fact that the Appellant's son would be deprived of the comparatively high quality of healthcare, education, and social support that is presently available to him as a UK citizen, which he would have to forsake. Furthermore, there was nothing in the Respondent's file to suggest that the judge was referred to any of the authorities that had now been listed and referred to in the Grounds of Appeal. If the Respondent wished the judge to consider these then it was incumbent upon the Respondent to ensure that the judge was provided with copies of those authorities. This was now a disagreement with the findings of the judge who was carrying out a proper judicial function which he was entrusted to carry out.

33. Second, I have considered the grant of permission by UTJ Hanson subsequently, who in observing how Judge JC Hamilton was satisfied that the Appellant and his partner were in a subsisting relationship and have a child, had then simply moved onto concluding that there will be unduly harsh consequences for the child simply because a family was going to be split, without properly explaining why. Upon closer examination in this Tribunal, I am not satisfied that this is in fact the case. JC Hamilton did provide adequate reasons for finding why the separation of the child from the Appellant would result in an unduly harsh outcome for the child. He had given his conclusion at paragraph 92, namely, that the consequences of the deportation would be "unduly harsh" for the Appellant's child. The evidence for this was not lacking. It was before the Judge in the form of the statement of [JF] at paragraphs 5 to 6. These confirm that he 3 year old child actually being conscious of, and in need of the presence of his

father in his life. It would have been otherwise if the evidence had not been available before the Judge.

34. Third, the relationship between the Appellant and his child was but only one factor. It was incumbent upon the Judge to give consideration to the wider issues applicable as well. It is in fact in this context that the Determination of Judge JC Hamilton needs to be considered. At paragraph 65 he explains that the Appellant has been in the UK from the age of 11 onwards and that from the 7 years of age onwards, he would have been in a position to form social relationships and relate to the environment around him. The decision letter had also conceded that the Appellant formed a relationship with his partner, [JF], at a time when the status of neither was precarious (see paragraph 73). Judge JC Hamilton also gave consideration to the assessor's report from the OASy and this confirmed that the Appellant posed a medium risk of serious harm to the public, which meant that he "was unlikely to do so unless there was a change in his circumstances" (paragraph 80). The judge also referred to the fact that, "the Appellant expressed a high level of remorse for his actions" and that the sentencing judge had referred to this as something which "was obviously not a hopeless case". It was just unfortunate for the Appellant that he had committed three offences, because had he committed one he would have had a non-custodial sentence.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 8th August 2017