Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03953/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2018	**On 10 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMUDALAT [L]
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms J Elliott-Kelly, Counsel

DECISION AND REASONS ON ERROR OF LAW

1. In this case, it is the Secretary of State who appeals with permission against the decision of the First-tier Tribunal. However, it is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Ms [L] as "the appellant" and to the Secretary of State as "the respondent".

2. The appellant is a citizen of Nigeria who gives her date of birth as 12 February 1980. She has four children (E, D, J and R) who are not parties to this appeal. Her highly chequered immigration history is set out in

the notice of decision and it is unnecessary to repeat it here. She has appealed the decision of the respondent, dated 26 January 2016, to refuse her human rights claim and to proceed with her removal in accordance with a deportation order which was signed on 26 January 2016. The appellant was convicted on 22 March 2012 of two offences: (1) conspiracy to do an act to facilitate the commission of a breach of UK immigration law by a non-EU person and (2) with intent knowingly to possess a false/improperly obtained/another's identity document. She was sentenced on 3 April 2012 to a total of three years' imprisonment.

3. The appellant's appeal was first heard by the First-tier Tribunal on 22 March 2017. In a determination promulgated on 11 April 2017, Judge of the First-tier Tribunal S J Clarke allowed the appeal. However, her decision was subsequently set aside by the Upper Tribunal which remitted the appeal to the First-tier Tribunal for a fresh hearing by a different judge.

4. The appeal was reheard at Taylor House on 8 March 2018 by Judge of the First-tier Tribunal Herbert OBE. In a decision promulgated on 17 April 2018, he allowed the appeal on article 8 grounds. His key findings may be summarised as follows:

   (1) there is strong public interest in removing foreign criminals, particularly one who has been part of a conspiracy to breach immigration law. If the appellant had neither a partner nor children there would be no reason why she should not be removed;

   (2) the appellant has a genuine and subsisting relationship with a 'qualifying partner'. This relationship was formed when her immigration status was precarious;

   (3) the appellant's partner's health conditions presented significant difficulty to him joining the appellant in Nigeria;

   (4) the appellant's partner has an older child from a previous relationship who lives with his mother whom he sees three or four times a month;

   (5) the appellant's partner is an essential carer for the children, J and R, and also E, who is just out of care;

   (6) E is a vulnerable adult;

   (7) the appellant has subsisting parental relationships with all four of her children, three of whom are 'qualifying children';

   (8) the effect of the appellant's deportation on the children would be unduly harsh because of their vulnerabilities. J is severely autistic. D remains in care. The children have relationships with each other;

   (9) E would also be adversely affected by the removal of his mother;

(10) once D leaves care, it is highly likely that he would return to the appellant's care and have increasing contact with her and his siblings. It was in D's best interests to continue to have face-to-face contact with his mother;

(11) the appellant could not relocate to Nigeria with J and R without extreme hardship. Both children are British citizens and entitled to education and health care in the UK. J requires a specialist school as a result of his autism. He has very poor social skills and very limited ability to self-care. He has no awareness of danger and his sleep difficulties are extreme. Despite the country of origin information report stating that day care for autistic children is available, the judge took judicial notice as a result of his own visits to Nigeria and an awareness of human rights and health facilities available in that country that there is no specialist care at all;

(12) the appellant's partner would not accompany the appellant. He is the only wage earner and could not be expected to substitute for the appellant and care for J on his own; and

(13) the appellant has been assessed of posing a low risk of reoffending with a low risk of harm to the general public. She has engaged with all probation contacts whilst on licence. Nearly 8 years have passed since her arrest without any further offending. The judge took into account the circumstances of her conviction, including the domestic abuse which she and her children were suffering at the hands of her previous partner.

5. The respondent again sought permission to appeal, which was granted by Judge the First-tier Tribunal Saffer on 30 July 2018. The grounds can be summarised as follows:

(1) the judge failed to give clear reasons why it would be unduly harsh on the appellant's four children for the appellant to be removed and what weight was attributed to the public interest in the decision. The judge appeared to have glossed over the appellant's immigration and criminal history. Although the judge had given consideration to the low risk of reoffending, there was no evidence that there had been due consideration of deterrence and public revulsion;

(2) the appellant's eldest child, E, was an adult at the date of decision and was living independently from his mother. The judge speculated that he would choose to live with his mother in the future;

(3) the judge referred in a number of places to a child called Kelvin which appeared to be a mistaken reference to the child, D, calling into question the care with which the judge had made his decision. It was possible he had mixed up appeal hearings;

(4) contact between the appellant and her child, D, was restricted to face-to-face meetings on a quarterly basis and it was speculative

for the judge to consider he might be returned to the care of the appellant;

(5) the judge found it would be unduly harsh for the appellant's partner and their two children, J and R, to relocate to Nigeria. The main reason given by the judge for this finding was based on his own knowledge of healthcare facilities in Nigeria following his visits there. To rely on this information, the judge would need to address the country of origin information request provided by the respondent; and

(6) the judge did not provide clear reasons why the appellant's partner would be unable to care for J and R if the decision were made not to follow the appellant to Nigeria in the event of her deportation. The fact J is autistic is not a reason showing he would not be able to look after the children adequately.

6. In his decision to grant permission to appeal, Judge Saffer stated as follows:

> *"It is arguable that the Judge has incorporated his own knowledge of life in Nigeria within the question of how harsh it would be to return without giving the parties the chance to comment on it and has given inadequate weight to the public interest in deporting foreign nationals who conspire to breach immigration laws through arranging sham marriages. All grounds may be argued."*

7. I heard oral submissions from the representatives as to whether the decision of Judge Herbert is set aside because it contains a material error of law.

8. Mr Tufan, expanding on the written grounds, argued that parts of the decision appeared to have been copied and pasted from others. He highlighted the references to the child Kelvin, pointing out that the date of birth given was not that of D. He argued that the test to show that removal was unduly harsh was very high, as explained by the Court of Appeal in *MM (Uganda) v SSHD* [2016] EWCA Civ 617. He argued that the judge's consideration of the issue was all "one way" and, in other words, did not give sufficient consideration to the public interest in deportation. He also highlighted paragraph [71] of the decision in which the judge had relied on his own knowledge of circumstances in Nigeria. He argued that this error was material to the outcome of the appeal.

9. Ms Elliott-Kelly relied on her detailed and helpful skeleton argument. In her submission, the decision of the judge did not contain any material errors of law. The decision should be read as a whole. It was clear that the references to Kelvin were intended to be references to the child D. Kelvin was in fact the child of the appellant's partner. She argued that the judge had directed himself correctly in law and that the respondent's arguments amounted to no more than disagreement with the decision, dressed up as a reasons challenge. The decision was

rational. There must be cases where deportation would be unduly harsh and, she submitted, this was one of them.

10. Ms Elliott-Kelly pointed to the numerous references in the decision to the public interest in deportation and also to the judge's acknowledgement of the seriousness of the offence. The judge had directed himself in terms of the factors listed by Lord Reed in *Hesham Ali v SSHD* [2016] 1 WLR 4799.

11. I asked Ms Elliott-Kelly, who had appeared in the First-tier Tribunal, whether any evidence had been adduced which entitled the judge to form the view that it was likely that D would return to the appellant's care at some point. She told me that the appellant had been unable to pursue care proceedings while her immigration status was unresolved. She agreed it was always risky, as she put it, for a tribunal judge to rely on judicial notice. However, she argued that any error in relation to the judge's reliance on his own knowledge of children returning to their parents after leaving care was immaterial in this case because the judge had already found that the interruption in the current contact arrangements would be unduly harsh.

12. In any event, argued Ms Elliott-Kelly, the most compelling feature of the case concerned the child J. I pointed out that the judge had also relied on judicial knowledge with respect to his conclusions relating to J. I asked what evidence had been before the judge relating to the availability or otherwise of care for autistic children in Nigeria. I was shown the responses to two separate country of origin information requests obtained by the respondent. The first of these, dated September 2015, asked whether there were facilities and treatment available in Nigeria regarding speech and language therapy. The response stated that there are various NGOs and schools in Nigeria which provide education and support services for children who are disabled and also have learning difficulties. There are speech and language therapy services available although most of them are not run by professional speech therapists. The second document asked whether there is any sufficient support in Nigeria for children with autism regarding their health care and education. The reply stated that treatment by child psychiatrists and child psychologists is available and day care for autistic children is available.

13. Although he does not refer to it, it appears that the judge also had before him a section of the US State Department country report of 2016. This states that public schools remain substandard and limited facilities preclude access to education for many children. In some states children accused of witchcraft were killed or suffered abuse. Mental health care services were almost non-existent. Persons with disabilities faced social stigma, exploitation and discrimination. Many families viewed children with disabilities who could not contribute to family income as liabilities and sometimes severely abused or neglected

them. People with intellectual disabilities were stigmatised, sometimes even within the community of persons with disabilities. Very few children with disabilities were enrolled in school.

14. Ms Elliott-Kelly again argued that any error in the judge's approach was immaterial. All the judge had to find was that J's removal would be unduly harsh and it was sufficient to find that this threshold was passed as a result of the interruption to current arrangements.

15. Ms Elliott-Kelly argued that the judge had given sufficient reasons for finding that the appellant's partner could not look after the children alone. The case relied on by the respondent in his grounds, *BL (Jamaica) v SSHD* [2016] EWCA Civ 357 could be distinguished on its facts. It was not concerned with a disabled child and the foreign national offender had been sentenced to more than four years' imprisonment. In this case, it had been open to the judge to find that J required significant care.

16. Finally, Ms Elliott-Kelly argued that the judge had found in the alternative that, if the rules were not met, there were very compelling circumstances over and above those described in the exceptions to consider the decision disproportionate. In doing so he had applied the balance sheet approach suggested by Lord Thomas in *Hesham Ali*.

17. I have carefully taken account of the submissions made to me and I have decided that the decision the First-tier Tribunal judge does contain a material error of law. I allow the appeal. My reasons are as follows.

18. It is helpful at this point to set out the relevant parts of the law as follows:

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) …
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) … ,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or
(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision;

and in either case (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported."

"117CArticle 8: additional considerations in cases involving foreign criminals

(1)The deportation of foreign criminals is in the public interest.

(2)The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3)In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4)Exception 1 applies where—

(a)C has been lawfully resident in the United Kingdom for most of C's life,

(b)C is socially and culturally integrated in the United Kingdom, and

(c)there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5)Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6)In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires

deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7)The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

19. Although not clearly expressed in the decision, the judge's conclusion was that the appellant satisfied paragraph 399(a) of the rules and section 117C(5) of the Act such that her removal would in the circumstances be disproportionate.

20. I shall take the arguments in turn.

21. The appellant was a marriage fixer, working with a corrupt vicar, to organise sham marriages. I do not accept that the judge failed to show that he had taken full account of the seriousness of the appellant's offending. He set out the circumstances of the offence at [13] and noted the judge's sentencing remarks at [14] to [17]. He noted therefore that the appellant had not played a leading role but was the equivalent of "middle management". She had pleaded not guilty and did not show remorse. However, she had no previous convictions. The judge appears to have accepted what was said about her lifestyle at the time, set out at [20].

22. The judge summarised the Secretary of State's position that the appellant's removal was conducive to the public good and that she did not meet the exceptions to deportation. The judge then began his findings of fact by reminding himself that there was clear seriousness and strong public interest in removing foreign national offenders, particularly one who has been part of the conspiracy to breach immigration law. He accurately summarised the relevant considerations at [53]. At [62] he reminded himself of the provisions of section 117C(2). Finally, at [77], the judge rounded off his decision by stating that the combination of circumstances in the case were compelling and exceptional such that the public interest in deportation was overridden.

23. The grounds argue that the judge erred by failing to give specific consideration to the issues of deterrence and public revulsion at offending. However, in my view, it is sufficient that the judge directed himself in terms of Lord Reed's judgment in *Hesham Ali*. Moreover, it is clear from the separate judgment of Lord Wilson that the consideration to society's revulsion at serious crime should no longer be treated as an aspect of the public interest in deportation (see paragraph 70).

24. I conclude that the challenge to the decision based on a failure by the judge to recognise the strong public interest in removing foreign national offenders is little more than disagreement with the decision.

25. I now turn to the challenges made to the judge's consideration of the evidence as it relates to the appellant's children. I note that E and D are the children of previous relationships. E was born in Nigeria in 1999. D was born in the UK in December 2006. J and R are children from the appellant's relationship with her current partner. Consequently, they are British citizens. J was born in the UK in November 2012. R was born in July 2016, which was after the date of decision.

26. It is a fair criticism of the decision that there are numerous rogue references to a child "Kelvin" at points at which the judge appears to have intended to refer to the child D. There appears to be no other explanation for this than carelessness on the part of the judge. However, looking at the decision as a whole, it is possible to say that the errors are not such that they give rise to a real concern that the judge had in mind a different appeal altogether. The child features in the judge's discussion of the family circumstances in a manner which is appropriate to the evidence. Furthermore, Kelvin is in fact a child who features in the appellant's family, being the child of the appellant's current partner. This is not a reason to set aside the decision.

27. Of greater concern are the judge's findings that E and D, both of whom were made the subject of care orders in September 2012, would in the future return to live with the appellant. In the case of E, this is perhaps less material because, as the judge was plainly aware, he had reached adulthood and left care by the date of hearing. On what basis was the judge able to conclude that D was likely to return to the appellant's care as soon as he was able to?

28. At [31], the judge states that he took judicial notice of the fact that once a child is over 13 it is more likely that he would have increasing levels of contact with his natural parent unless there had been a deterioration in their relationship or some likelihood of significant harm occurring. The judge appears to have reasoned that there was no evidence of the likelihood of harm and therefore it was likely D would have increasing levels of contact with the appellant as he grows older.

29. Plainly, the judge was required to base his conclusions on evidence and he was not entitled to speculate. As said, I asked the representatives whether they could point to anything in the evidence which could have founded the judge's conclusion in relation to D. However, they were unable to do so. It seems to me therefore that the judge erred in his assessment of this particular part of the evidence as it relates to D. The question arises as to whether this error would have affected the outcome of the decision.

30. The answer to that question depends on whether the respondent can successfully challenge the judge's conclusions in relation to her two younger children. If not, then the appellant can successfully resist deportation because it would be unduly harsh on those children to

remove her and therefore any error the assessment in relation to D would become immaterial.

31. In a compassionate decision, the judge took full account the particular vulnerabilities of the children. In respect of J he took note of the fact that the child is severely autistic, with limited speech, insomnia, and difficulty interacting socially and with his ability to feed himself. He is a very young child with significant needs. This is a case in which it might have been open to a judge, properly directed as to the law, to find that the unduly harsh threshold has been met. However, any such conclusion must be firmly grounded on evidence.

32. Insofar as it is argued that it would not be unduly harsh for the family to relocate to Nigeria, the particular circumstances of J are the main consideration. It is at this point that I find the judge made a material error of law which requires the whole decision to be set aside. That is because, at [71], he relied on his own knowledge of that country, which he says he has visited. In the Presidential decision in *EG (post-hearing internet research) Nigeria* [2008] UKAIT 00015, Hodge J said as follows:

> *"5. It is, however, most unwise for a judge to conduct post-hearing research, on the internet or otherwise, into the factual issues which have to be decided in a case. Decisions on factual issues should be made on the basis of the evidence presented on behalf of the parties and such additional evidence as the parties are aware of as being before the judge. To conduct post-hearing research on the internet and to base conclusions on that research without giving the parties the opportunity to comment on it is wrong. If such research is conducted, and this determination gives absolutely no encouragement to such a process, where an immigration judge considers the research may or will affect the decision to be reached, then it will be the judge's duty to reconvene the hearing and supply copies to the parties, in order that the parties can be invited to make such submissions as they might have on it."*

33. The evidence submitted by the respondent to the judge to show that day care for autistic children is available in Nigeria is not impressive. It appears to be no more than the recycling of a MedCOI response from August 2014. Although he did not refer to it, there was also some evidence before the judge which, albeit in very broad terms, painted a troubling picture for disabled children in Nigeria. At the very least, the judge was required to resolve the conflicts in this evidence and to give reasons for preferring one to the other. What he was plainly not entitled to do was to ignore evidence provided by the respondent and to prefer his own knowledge based on his experience of visiting Nigeria. If he were minded to adopt this course, then he should at the very least have given the parties the opportunity to comment on it.

34. Despite Ms Elliott-Kelly's eloquent submissions to persuade me to the contrary, I find the error must be regarded as material because it drives at the heart of the issue of whether it would be unduly harsh to expect J

to accompany his mother to Nigeria. It is not simply a matter of the interruption of the services he currently receives but also a consideration of whether he would be able to access some services in Nigeria.

35. Having decided that the decision must be set aside, I have asked myself whether it is possible to preserve any of the findings made by the judge. However, given the passage of time and the inadequacy of the evidence submitted to date, particularly insofar as it relates to services in Nigeria, I have decided that it is preferable to leave all matters open for the next judge to consider as part of her or his proportionality assessment.

36. I have not made directions because I am aware that the Taylor House hearing centre has its own thorough procedures for case managing deportation appeals. However, I would take this opportunity to remind the appellant that she should assist the tribunal to the best of her ability by providing up-to-date evidence relating to such matters as the care arrangements, health and education of all her children and her relationship with her partner. I should also take this opportunity to point out that, for reasons which are unclear, much of the appellant's evidence is no longer contained within the file. A properly paginated and indexed consolidated bundle will have to be prepared containing all the evidence on which the appellant wishes to rely.

37. If either party proposes to submit evidence relating to care proceedings, they must not do so unless the consent of the relevant Family Court has been obtained. If deemed necessary, the Protocol on communications between judges of the Family Court and Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal of 19 July 2013 can be employed.

38. The respondent has not considered J's diagnosis, which was made after the decision, or the position of R, who was born after the decision, and may wish to do so in order to comply fully with his duties under section 55 of the Borders, Citizenship and Immigration Act 2009.

39. Having considered the Senior President's Practice Direction of 15 September 2012, I make an order under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The appeal is remitted to the First-tier Tribunal for a hearing de novo on all issues.

No anonymity direction is made.

Signed Date 5 October 2018

Deputy Upper Tribunal Judge Froom