Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03552/2016
IA/25351/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision sent to parties on**
On 10 June 2019	**On 11 July 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S A A (NIGERIA)
[ANONYMITY ORDER MADE]

Respondent

Representation:
For the Appellant: Mr Tony Melvin, a Senior Home Office Presenting Officer
For the Respondent: Mr Erum Waheed instructed by Herbert Lewis solicitors

DECISION AND REASONS

Anonymity

The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing on human rights grounds the claimant's appeal against a decision to deport him to Nigeria, of which he is a citizen (appeal no HU/03552/2016).

2. Both the claimant and his wife are foreign criminals: they married in Nigeria in 1998 but the wife overstayed her visa, the husband committed bigamy, and both sought to deceive the United Kingdom immigration authorities about their marital status. They were prosecuted and the claimant received a 12-month custodial sentence, while the wife received an 18-month suspended sentence.

3. The couple have five minor children, all of whom are British citizens. There has never been a deportation order against the wife or the five sons.

4. In July 2018, the Secretary of State gave the claimant's wife ('the wife') 30 months' discretionary leave to remain on *Zambrano* grounds.

5. There is no appeal before the Upper Tribunal on the wife's behalf, following the withdrawal of the Secretary of State's case against her at a hearing in October 2018. The wife's appeal under appeal number HU/23912/2016 is now abandoned by operation of law pursuant to section 104(4A) of the Nationality, Immigration and Asylum Act 2002 (as amended) and the Upper Tribunal has served Notice to that effect. These appeals are no longer linked for hearing.

6. In this, the claimant's appeal, the First-tier Judge made his decision based on a fact-set which no longer exists, that both parties might be removed to Nigeria. The Upper Tribunal gave leave under rule 15(2A) for the claimant to adduce further evidence for this hearing. Some new material was adduced, and that material will be considered in this decision.

7. The claimant does not pursue a challenge to the revocation of his EEA residence card, although that file (IA/25351/2015) has been linked to the human rights appeal throughout. For the avoidance of any further doubt, this decision disposes of both appeals.

Background

8. The core facts in this appeal are as follows. The claimant came to the United Kingdom, on his account, in June 2001. He had been married to the wife since a ceremony in Nigeria in 1998.

9. In January 2004, the claimant purported to marry a French citizen and in March 2004 he applied for an EEA residence document as her spouse. That application was unsuccessful. In August 2004, the first son of the claimant and his Nigerian wife was born to them in the United Kingdom.

10. The claimant did not embark for Nigeria, his country of origin. He had two further sons with his Nigerian wife, in March 2006 and November 2008. On 28 August 2009

the claimant sought indefinite leave to remain on compassionate grounds, which was refused with no right of appeal. He still had not disclosed that he was married to his Nigerian wife.

11. Further attempts to obtain leave to remain on EEA grounds were refused. In June 2010, the couple had their fourth son together. On 21 January 2011 the claimant appealed against refusal of leave to remain on EEA grounds, with reference to his bigamous marriage to the French EEA citizen, withdrawing his appeal on 14 March 2011.

12. On 8 June 2011, the claimant sought naturalisation as a British citizen, which was refused on character grounds. The claimant continued to pursue his claim to EEA residence as the spouse of his claimed French citizen wife, and was successful on that basis on 25 April 2012. He was issued an EEA permanent residence card.

13. However, in February 2013 the claimant and his Nigerian wife had their fifth son together and on 26 March 2013 his Nigerian wife came to adverse notice and it came to light that they had been legally married since long before the purported marriage to a French citizen.

14. On 30 March 2015, the claimant was convicted at the Central Criminal Court of bigamy, use of a false instrument with intent it be accepted as genuine, and obtaining or seeking to obtain the avoidance, postponement or revocation of enforcement action, and sentenced to 12 months' imprisonment. His wife received an 18-month suspended sentence.

15. On 7 July 2015, the Secretary of State revoked the claimant's permanent right of residence card which had been erroneously issued to the claimant on the basis of his French purported spouse. The Secretary of State considered that the bigamous marriage to his French spouse was a marriage of convenience. The claimant appealed against that decision to the First-tier Tribunal (appeal number IA/23531/2015).

16. He also appealed against the deportation order signed by the Secretary of State on 16 January 2016 and served on him on 29 January 2016 (appeal number HU/05352/2016).

Sentencing Judge's remarks

17. I have regard, as I must, to the sentencing judge's remarks in the criminal proceedings. On 24 April 2015, Mr Recorder Day QC said this in relation to the present claimant:

> "You, [claimant], entered this country unlawfully in 2000 and have remained here in breach of immigration and border control since then, until being given a permanent resident card in 2012, which was only given to you as a result of the sham marriage referred to in the indictment, which has now been revoked as a result of your conviction. …

> I have no doubt that you decided to attempt to regularise your immigration status at the time your wife was pregnant with your first child, who was born in August 2004, some seven or so months after the sham marriage. …
>
> The sham bigamous marriage was well planned and sophisticatedly executed, and would have given you the right to stay in this country indefinitely as the spouse of an European Union national, as result of which you have enhanced your employment opportunities in order to be able to look after your now burgeoning family.
>
> Well, these are serious offences, which not only demonstrate the fact that each of you is deeply dishonest, but also strike at the heart of the immigration and border controls of this country. It has been said that deterrent sentences are appropriate. …
>
> There is no specific guideline in respect of the immigration, bigamy and sham marriage offences, but the authorities to which I have been referred suggest a custodial sentence of between 12 and 18 months. Accordingly, on any view it is agreed, and it could not otherwise be said, that each of these offences for which you have to be sentenced passes the custody threshold. … "

18. The sentencing judge expressly took account of the effect of imprisonment of one or both of their parents on the couple's 5 young children, who had written letters to the Court, and he mitigated that effect in relation the sentence for their mother, the Nigerian wife, by suspending her sentence for 2 years.

19. Turning to the appropriate sentence for the claimant, he took a sterner view:

> "So far as [the claimant is] concerned, I am afraid I cannot take such a merciful or lenient course. On count 3, you will go to prison for 12 months, on count 4 for 6 months, and on count 5, 12 months. These sentences will run concurrently, making a total of 12 months' imprisonment in all."

20. The Secretary of State took the sentencing remarks into account in deciding to deport the claimant.

Procedural history

21. On 5 December 2016, First-tier Judge Metzer dismissed the claimant's appeal against both the revocation of his EEA residence certificate and the Secretary of State's decision to make and maintain a deportation order.

22. The claimant appealed to the Upper Tribunal. Properly understood, his appeal was confined to the human rights aspect of the proposed removal.

23. The decision was remitted to the First-tier Tribunal by Lady Rae and Upper Tribunal Judge Blum for a full rehearing.

24. On 11 June 2018, First-tier Judge Andonian remade the decision, allowing the appeal against deportation on human rights grounds, with reference to the effect of removal on the children of the marriage.

25. On 21 June 2018, the Secretary of State appealed to the Upper Tribunal, arguing that insufficient weight had been given to the public interest in deportation and the seriousness of the offences committed.

26. On 19 July 2018, the Secretary of State granted discretionary leave for 30 months to the claimant's wife, with reference to paragraphs GEN1.10 and GEN1.11 of the Immigration Rules HC 395 (as amended). The claimant's wife is not entitled to have recourse to public funds but will not need to leave the United Kingdom until, at the earliest, 19 January 2021. The Upper Tribunal is no longer seised of any appeal in respect of the wife.

27. On 8 November 2018, the Upper Tribunal (Mrs Justice May and Upper Tribunal Judge Gleeson) found a material error of law and gave directions. We granted the Secretary of State's request to withdraw his case before the Upper Tribunal in relation to the wife.

28. We gave further directions in this appeal on 22 March 2019, narrowing the basis of challenge, with the concurrence of the parties, to the proper approach to the unduly harsh test in section 117D of the Nationality, Immigration and Asylum Act 2002 (as amended) as it affects foreign criminals sentenced to a period of imprisonment longer than 4 years, with reference to *KO (Nigeria) and others v Secretary of State for the Home Department* [2018] UKSC 53. We emphasised that:

> "9. This appeal will be retained in the Upper Tribunal for remaking and it is very important that any relevant evidence about whether it would be unduly harsh for the children to remain in the United Kingdom with their mother, but without their father, is produced in good time for the hearing remaking this decision. The sort of evidence that we would expect to see is updated correspondence from the general medical practitioner, accompanied by GP notes (original documents), the original documents in relation to the eldest boy's football contract, and any other relevant documents, original documents from the schools about the children, and if possible a report from social services. All of these will take some time to obtain, so the commissioning of them should begin straight away."

29. On 30 May 2019, the Upper Tribunal received a bundle of documents from Dylan Conrad Kreolle, the claimant's then solicitors, and at the hearing today we received a small number of additional documents, to which no objection was taken on the Secretary of State's behalf.

30. By an email dated 3 June 2019 at 13:27, Dylan Conrad Kreolle applied to be removed from the record as they were no longer instructed by the claimant. Mr Waheed has been Counsel throughout and prepared a skeleton argument in which he indicated that Herbert Lewis (Solicitors) now represent the claimant. No notice of acting from that firm has yet reached the file but Mr Waheed assured the Tribunal that one had been sent.

31. That is the basis on which the remaking came before the Upper Tribunal today.

First-tier Tribunal decision

32. The First-tier Judge noted that the immigration appeal against the revocation of the residence card (IA/23531/2015) was no longer live but had been linked to HU/03522/2016, the deportation appeal on human rights grounds. He recorded that the couple, both Nigerian citizens, had 5 British citizen sons, all United Kingdom-born. The eldest was born in August 2004 (age 15), March 2006 (age 13), November 2008 (age 10), June 2010 (age 9) and February 2013 (age 6). None of them has ever lived in Nigeria.

33. The claimant and his Nigerian wife had a traditional wedding ceremony in Nigeria on 27 June 1998, when the claimant was about 20, and his wife a year or so younger. The Judge found that ceremony be a genuine marriage, not just an engagement ceremony as they claimed. The wife had undergone nurse's training in the United Kingdom, obtained qualifications, and worked in the NHS, albeit illegally, before beginning a law degree at the University of Buckingham.

34. The claimant had not worked in Nigeria, where he was studying business management. In the United Kingdom he worked as a support worker, and helped to run a restaurant, charcoal grilling chicken. He has since said that this was his business and that he was a prosperous successful business with his own named sauce brand.

35. The two elder boys gave evidence in the First-tier Tribunal, saying how fond they are of their father and that they would miss him if he went to Nigeria, in particular in relation to their sporting activities. The second eldest said that the wife had found it difficult coping with 5 boys without her husband.

36. The Judge found that it was not reasonable to expect these British children to go and live in Nigeria and that it would be unduly harsh to expect them to do so. He found that the children regarded their father as a role model and that he was a hands-on father who took a great interest in them and in their well-being. He found that it would be unduly harsh to expect the claimant's wife to remain in the United Kingdom without him. He had regard to social services reports on the children and the family, and noted that as the boys grew up, the wife would 'require the input and assistance of the [claimant] increasingly…as they are growing up their needs will increase'. He found the claimant and his wife to be totally unreliable witnesses but loving parents, to whom the children were attached.

37. While the claimant was incarcerated, the wife fell into arrears with the mortgage and with her council tax payments; she relied on charitable donations from the Red Cross and on food banks. Her inability to work legally now or to rely on public funds put her, and the children, at risk of destitution.

38. That was the basis on which the First-tier Judge allowed the appeal.

Upper Tribunal hearing

39. At the hearing today, I received Mr Waheed's submissions for the claimant in writing. He did not wish to add to them orally and there were no oral or written submissions on behalf of the Secretary of State. Mr Waheed relied on the bundle of documentary evidence before me. None of the witnesses gave oral evidence and Mr Tufan indicated that he did not wish to cross-examine the claimant or his wife, who were present.

40. The evidence therefore stands unchallenged, to the extent that it is consistent with the evidence in the claimant's bundle, and with other evidence before me. In his witness statement, the claimant says that he is very sorry for his mistakes; before going to prison, he was a successful restaurateur, working 16 hours a day, paying the mortgage and providing for his family. He had his own branded sauce.

41. The family home is now threatened with repossession and the mortgage arrears are huge. The Council and children's services will not help them. The claimant and his wife have had to sell their valuables and rely on charity and food banks to keep going. The Red Cross had been providing £40 a week on a temporary basis, but that had now ended.

42. The claimant said that his wife was now unable to work following surgery (he does not say for what); she had constant pain and the claimant did all the ironing, cooking, washing and taking the children to and from school, as well as taking the eldest to football training and matches (home and away).

43. The wife in her witness statement said that while the claimant was in prison, she had not been able to keep up with the football schedule or other activities, which the boys did with him. His absence had been emotionally and financially devastating. The eldest boy was now under contract to a football team, MK Dons; the next child was preparing for his GCSE examinations, with his father's help.

44. The wife described the serious pain she has following her operation, which makes her blood pressure spiral out of control. She has vitamin D insufficiency and is in constant pain, which dominates her life and increases her anxiety and depression. Medication does not help the pain and she is no longer able to work. There is nobody else to replace what the claimant does for the family; as well as all the household tasks, he helps her perform her recommended physiotherapy, which she is too weak to undertake alone.

45. The bundle includes a social work report, but it is not updated, as I directed: this is the social worker report considered by the First-tier Tribunal and dates back to 8 February 2018. There is also a document, undated, from the claimant's general medical practitioner about the vitamin D deficiency issue the wife has; a letter of 2 August 2018 suggesting that she is skipping her blood tests which are needed to monitor her medication; some 2016 correspondence about the breast mass for which she had an operation; a letter dated 20 March 2019 regarding a physiotherapy referral; copy prescriptions; and some GP notes.

46. There are two letters dated 11 January 2019 from the surgery, from Dr Thomas Gillham, saying only that the wife is unable to begin working at some (unspecified) employer because she is 'experiencing a poor state of health…receiving medical attention under our care'. No particulars are given.

47. There is a quantity of evidence about the children's schooling and sports activity. Original documents were not provided but Mr Tufan took no issue with that. It is clear that both at the John Henry Newman Catholic School and in their sporting activities, the boys work hard and are doing well.

48. From page 138, there is a manuscript schedule of how the children's activities are managed. I note that, contrary to the evidence in both parents' statements, on Monday the wife does half of the school runs and one of the football training runs; on Tuesday she takes three children to school and does one pickup, as well as one football training run; on Wednesday she does one of the morning and afternoon school runs, and one of the football training runs; on Thursday she does the afternoon school run for three boys and a morning drop off for the other two, as well as supervising the homework of three of the children; while on Friday she does school drop off for three boys, collects the other two, and takes one of the children to tennis while the claimant supervises homework for the other four boys. On Saturdays, the claimant deals with the son with an MK Dons contract, while the wife takes the other three boys to various sporting activities. On Sunday, she takes two of the boys to the Sunday League game.

49. There are letters from the New Zion Christian Fellowship, the British Red Cross, the parish priest of Our Lady, Queen of Apostles Catholic Church, and Watford Elim, confirming the family's financial difficulties and their strength as a team.

50. A letter from a teacher who is also a Norwich City Football Club Academy Scout explains how well the eldest plays and that the claimant has been supportive of his children's training. He describes the claimant's 'incredible dedication' to the family. Two personal friends write to say that they have lent the family money but cannot do so anymore as they have not been repaid and they have their own expenses.

51. The remaining documents are the 2015 OASys assessment, and information about the claimant's former business venture, Mr Bob's Street Kitchen. There is evidence about the mortgage arrears, loans from Cash Converters, and of a Hertfordshire County Councils' Child and Family assessment (CFA) from 2016.

52. The CFA report speaks warmly of the family bonds, noting that the claimant has 'significant extended family members from both sides of the maternal and paternal divides' in Nigeria. The arrangements made to lighten the burden of the mortgage are also recorded. The family circumstances remain precarious in the United Kingdom even with Red Cross support, and regular use of food banks.

53. The claimant and his wife were unwilling to share the outcome of the CFA with other agencies, did not disclose their bank statements, and '[failed] to maintain a

fully transparent assessment' which the author of the report ascribed to immigration concerns.

54. The writer of the report concludes that it is inevitable that the family would struggle and potentially become destitute in Nigeria despite the loose family links there and that 'Nigeria being a third world country does not have any credible social security services which supports the most vulnerable in society' and that return to Nigeria would amount to inhuman and degrading treatment. It is not clear from the report what was the source or foundation for those observations or conclusions.

55. No safeguarding concerns were identified and Hertfordshire CC ended its involvement with the family following the CFA report.

56. There are copies of the birth certificates of the children and letters from the children themselves, both recent and when the claimant was detained. Those letters express concern about the loss of his input into their training in football and tennis, as well as a strong, loving relationship with their father whom one of the boys described as 'a father in a million'.

Claimant's skeleton argument

57. Mr Waheed's skeleton argument is admirably concise. He notes the dates of birth of the children and the subject of this appeal. He reminds the Tribunal that the issue is whether the maintenance of the Secretary of State's decision will have unduly harsh consequences for his British citizen children. He invites the Tribunal to agree that the evidence 'reliably demonstrates that [the claimant's] role within the family as being one of active involvement, particularly as regards the children's sporting aspirations'.

58. Mr Waheed argues that the deportation raises four issues: the effect on the wife; her ability to replicate his role as regards the boys; and whether there would be unduly harsh consequences for the children, if the claimant were deported.

59. The evidence, says Mr Waheed, demonstrates that the wife, for financial and logistical reasons, will be unable to cope with raising the children alone, in circumstances of destitution, and that there is a real risk that she will choose, instead, to accompany him to Nigeria with the children. At present, the children enjoy not just the ordinary benefits of British citizenship but also, as far as the eldest is concerned, the real prospect of football success due to his acceptance into the MK Dons Football Club Academy Programme. Mr Waheed also relies on the effect on the children of their mother's ill health and their father's absence, if he were to be removed.

60. There being no other evidence or submissions, I reserved my decision.

Legal framework: 'unduly harsh' after *KO (Nigeria)*

61. Section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) was inserted by the Immigration Act 2014. So far as relevant to this appeal, it is as follows:

> **"117C Article 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. …
>
> (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."

62. In *KO (Nigeria) and others v Secretary of State for the Home Department* [2018] UKSC 53, the Supreme Court resolved the apparent conflict between two decisions of the Upper Tribunal, one of which had been approved by the Court of Appeal, holding that the situation of children should be considered in the 'real world' context that the foreign criminal parent would have to return to their country of origin; that there was a degree of 'due harshness' in any such removal; and, in effect, that much more needs to be shown for removal of the foreign criminal parent to be 'unduly harsh'. Lord Carnwath, with whom the other members of the Court agreed, said this at [23]:

> "23. … [T]he expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of reasonableness under section 117B (6), taking account of the public interest in the deportation of foreign criminals. Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C (1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the

> cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor … can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C (6) with respect to sentences of four years or more."

63. Further guidance was given by the Upper Tribunal in *RA* (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC), stating that the Tribunal is still required to approach section 117C as set out by Lord Justice Jackson in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662; that section 117C(6) is applicable whether or not the sentence exceeds 4 years; that 'determining the seriousness of the particular offence will normally be by reference to the length of sentence imposed and what the sentencing Judge had to say about seriousness and mitigation' but that the ultimate decision is for the Tribunal deciding the case, on the facts before it. The Upper Tribunal held that ordinarily, rehabilitation will not bear material weight in favour of a foreign criminal.

64. In *MS* (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) the Upper Tribunal examined the effect of section 117C(6), which requires 'very compelling circumstances, over and above those described in exceptions 1 and 2…such as to outweigh the public interest in the deportation of a foreign criminal', the Tribunal must have regard to the seriousness of the particular offence of which the foreign criminal was convicted, and that nothing in *KO (Nigeria)* demands a contrary conclusion. The Upper Tribunal also found that there was nothing in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 which required the Tribunal when applying section 117C(6) to eschew the principle of public deterrence, as an element of the public interest.

65. In *NI (Bangladesh) & Ors v Secretary of State for the Home Department* [2019] EWCA Civ 713, Lord Justice Floyd considered the situation where both parents were required to return to their country of origin. That is no longer the situation in this appeal, and I derive no assistance from the reasoning in that brief judgment.

66. In *Secretary of State for the Home Department v JG (Jamaica)* [2019] EWCA Civ 982, the Court of Appeal considered its own judgments in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, [2017] 1 WLR 207, *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803, [2016] 1 WLR 4203 and *NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239 in the light of the Supreme Court's judgment in *KO (Nigeria),* concluding (contrary to the view of the Upper Tribunal in *MS*) that section 117C(6) applies only where a foreign criminal has been sentenced to at least 4 years' imprisonment.

67. Lord Justice Underhill, with whom Lady Justice King and Lord Justice Moylan agreed, summarised the Court's approach at [16]:

> "16. The upshot of those decisions, so far as concerns the present case, is that in so far as the Respondent sought to rely on the effect of his deportation on his son (who, being a British citizen, was a qualifying child) it would not be enough to

> show that that effect would be "unduly harsh", in the sense explained in *KO*. That would satisfy Exception 1, but because his case fell within section 117C (6) he needed to show something over and above that, which meant showing that the circumstances in his case were, in Jackson LJ's phrase in *NA*, "especially compelling". In short, at the risk of sounding flippant, he needed to show that the impact on his son was "*extra* unduly harsh".”

68. That being the state of the jurisprudence, the question is how it applies to the circumstances of this family.

Analysis

69. There is no question of the children, or their mother, being required to leave the United Kingdom. The boys are British citizens and their mother has leave to remain. Nor is there any question that the claimant has a genuine and subsisting relationship both with his partner, and his five sons, as acknowledged in the sentencing remarks, to which I have had regard.

70. The question is whether it would be unduly harsh for the wife, or the boys, to remain in the United Kingdom without the claimant. The family’s circumstances are very precarious financially, as the discretionary leave granted to the wife does not permit her to work and the claimant also is not allowed to work. They are surviving on charity and food banks, as they have no access to public funds. It is not suggested that if the claimant is not deported, he would be given the right to work and revive his business interests.

71. The claimant and his Nigerian wife as parents currently share the school runs and sporting fixtures and training journeys equally. I give weight to that evidence. I place very limited weight on their assertion to the contrary in their witness statements: the daily schedule was advanced in their bundle of evidence and it gives the lie to their assertion that the wife is too unwell to participate. I have regard to the long-term untruth which this couple told the United Kingdom immigration authorities about their marriage circumstances and the claimant’s persistent attempts to seek leave to remain on the basis of his bigamous marriage to a French woman, while (given the dates of birth of the boys) it is clear that the relationship between the claimant and his Nigerian wife continued.

72. So far as the wife is concerned, the evidence about her health difficulties is sparse and not particularly up to date. She managed without the claimant while he was in prison, but she fell behind on the mortgage and the family are facing repossession of their home. There is very little detail of this in the bundle before me.

73. So far as the boys are concerned, they are healthy and hardworking children who do well at school and in their sporting achievements. One of them has been signed to MK Dons and two others also have given consent on 4 June 2019 (less than a week before the Upper Tribunal hearing) to be considered as triallists for Peterborough United Football Club Academy. There is, of course, no certainty that taking part in a trial would result in their achieving junior football contracts like their brother, but it

may do so. The youngest is a good tennis player. Their embryonic sporting careers would suffer if their father were removed, because of the logistical difficulties of getting them to the right training places and times, and to matches, plus the training which he provides at home.

74. The question is whether the difficulties which the boys will experience in their sporting careers is enough to oust the public interest in deporting foreign criminals. I am quite satisfied that it is not. While it will certainly be 'duly harsh' for the wife and the boys to have to do without the claimant, if that is what they decide to do, the circumstances outlined in the skeleton argument and in the bundle to not reach the heightened element of severity or bleakness which section 117C requires.

75. Nor do I consider (if section 117C(6) is applicable) that the sporting difficulties amount to 'very exceptional circumstances' over and above Exception 2. It follows that the Secretary of State's challenge to the First-tier Tribunal decision is successful and this appeal must be dismissed.

Decision

76. For the foregoing reasons, my decision is as follows:

The previous decision involved the making of an error on a point of law. I set aside the previous decision and substitute a decision dismissing the claimant's appeal.

Signed *Judith AJC Gleeson* Date: 17 June 2019

Upper Tribunal Judge Gleeson