Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13903/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 4 November 2019	**On 28 November 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

NDUKA [O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Mackenzie, counsel instructed by TRP Solicitors
For the Respondent: Mr D Mills, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Nigeria, appealed against the Respondent's decision to refuse to revoke a deportation decision on ECHR grounds.

2. That decision, dated 8 December 2017, maintained the basis of the decision with reference to paragraph 399A of the Immigration Rules and with reference to the human rights basis to remain. The Appellant is married to a British national and has

two children who are of British nationality. His appeal against that decision came before First-tier Tribunal Judge Owens who, on 27 April 2018, dismissed the appeal on human rights grounds.

3. On 28 August 2019 Upper Tribunal Judge Plimmer concluded that the Original Tribunal's decision disclosed an error of law and could not stand and the matter was to be remade in the Upper Tribunal by any Upper Tribunal Judge. Directions were given to update the evidence, but in substance the parties and the judge agreed that the First-tier Tribunal Judge's findings of fact could be preserved.

4. The positive and negative findings are comprehensively set out in the First-tier Tribunal Judge's decision.

5. The judge had set out the basis of the Appellant's case and heard oral evidence which was tested in cross-examination and the Appellant's partner, Ms [B], similarly gave evidence and was cross-examined. The judge, having set out the position in terms of the law, then set out a number of facts found as to the seriousness of the Appellant's offending and the sustainable basis on which the public interest had in deportation, given the criminality of the Appellant. In view of the convictions which had arisen, he therefore looked at the deportation decision with reference to Section 117C(2) of the NIAA 2002 in the context of the ECHR provisions as reflected in the Immigration Rules. He also took into account the relevant IDI guidance of February 2017, and the fact that the Appellant had been in the United Kingdom for over twenty years and, in that context, his criminality.

6. I therefore look at it in the context of the Appellant's convictions on multiple counts of fraud for which he was sentenced to three years and three months' imprisonment and thus rated as a medium offender, and the case law which clearly has in mind medium offenders reflected in NA (Pakistan) v SSHD [2017] 1 WLR 2007. The issue was therefore, in the context of Section 117C(5) of the NIAA 2002 ,whether his deportation would have an unduly harsh effect on his two children and partner if they were to remain in the UK without him.

7. The judge had concluded [D65] that taking into account the importance of the children's nationality and the oldest child's wish to remain in the UK; where they were entitled to be; had better prospects, as well as the opinion of the independent social worker as to the best interests of the children. The judge found it was unduly harsh for the children to relocate to Nigeria with their parents. Thus the judge went on to consider the impact on the children in being in the UK in the absence of their father, it being accepted that it is in the best interests of the children, so far as possible, to grow up knowing and having a meaningful relationship with both parents [D67].

8. I do not take into account in considering this issue the serious nature and gravity of the Appellant's offending and his adverse immigration history. The situation therefore was I proceeded on the findings that were made as to the immigration history of the Appellant (set out in D1-3) and the details of his offending [D4 and D36-37]. I also take into account the findings of the First-tier Tribunal arising from the issues now in consideration, in particular that the Appellant enjoyed a close family life with his partner and children [D28 and 29]. Secondly, the conclusions of the independent social worker, Ms Harris, dated 29 March 2018, which were accepted in their entirety by the Judge [D72] and in particular the conclusions that:-

> "… the loss of the children's father will cause his partner feelings of grief at the loss of her partner which would reduce her coping mechanisms. Both children are likely to experience grief and loss including associated feelings and behaviours such as anger, self-blame and sadness leading to lower self-esteem and self-confidence reducing overall wellbeing. In addition, the physical barriers caused by location would prevent physical contact with their father for the foreseeable future."

9. Ms Harris asserted that losing the access to their primary carer was likely to cause disruption to the children's routine and stability which may impact on their educational progress and development. It was concluded by Ms Harris that the Appellant would not be able to provide the children with the same level of emotional, practical and educational support and would have a detrimental impact

on their continuing positive identity formation as British citizens causing a reduction in their self-esteem and self-confidence. The judge concluded in summary [D73] the absence of the Appellant would have a significant detrimental effect on his children's development, self-esteem and self-confidence and that their mother will find it harder to cope on her own. Thus, not only did the children's best interests lie in being in the UK with their father and mother, but also the presence of the father in the UK would have better long-term prospects for the two children. The children at the material time were British nationals, [JO] was born on 12 March 2011 and [AO], was born on 9 June 2014.

10. The report of Ms Harris and her conclusions therefore were in substance that the Appellant effectively would be separated permanently, if removed from the children, as the family's funds would not stretch to travelling to see him. The Judge considered this matter [D76] and also concluded that whilst there were difficulties through technical problems in maintaining contact, nevertheless the children could speak with their father by phone regularly and use other communications such as Skype. The Judge recognised such contact was not the same meaningful quality as that between a parent and child face to face. The Judge perhaps surprisingly concluded that the Appellant living in a different country will not separate from the family permanently and that the Appellant could have a relationship with his partner and children, albeit:-

> "… one of a lesser quality and he is not precluded from applying to revoke the deportation order after a suitable period has elapsed".

I do not speculate on when such an application could be made or the prospects of success.

11. The report of Ms Harris, so far as I am aware, remained unchanged. The Appellant's evidence to update the matter relating to the children, [JO] and [AO], spoke essentially to his continuing involvement in their daily activities, collection from school, sporting activities and the re-establishment of that relationship with them both since his release from prison. He also spoke, which was unchallenged, to the

extent he was involved in their education assisting them in their homework and studies and the differences in their behaviour and mood in his absence and since his return and the improvement that he has clearly seen. In addition, he recognised the extent to which his conduct has led to a burden upon his partner. He confirmed, and this was not challenged, the extent to which his absence had had an impact upon his partner and children, and the difficulties his partner had had in coping. The Appellant has completed, whilst on probation, two courses directed at helping people avoiding reoffending and the Appellant reasserts his shame and remorse and his determination not to reoffend and take up work as and when he is allowed.

12. The question that really must be answered was whether the evidence sufficient to show that the common place consequences of someone being detained and separated from their family, which would not in the ordinary course of events be regarded as unduly harsh, were not justified by reference to the wellbeing of the children. The case of JG [2019] EWCA Civ 982 has in many respects different facts, but in that case there clearly were issues over the mental health of the child and the possibilities of psychological damage from the absence of the father of the child. The case of JG demonstrated the kind of considerations sufficient to amount to it being unduly harsh within the context of Section 117C(5) NIAA 2002.

13. It is said that greater help is to be found in the decision of PG (Jamaica) [2019] EWCA Civ 1213 in which Mr Justice Holroyde said [D39]:-

> "Formulating the issue in that way, there is in my view only one answer to the question. I recognise of course the human realities of the situation, and I do not doubt that SAT (the Appellant) and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or children in this country."

He accepted the submissions of counsel for the Secretary of State as to the point and agreed with the point that:-

> "Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another and have to face one or more of their children going through 'a difficult period' for one reason or another and the fact that a parent who is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children."

14. It was thus said by Mr Mills that it was quite a difficult factual threshold to establish that something was unduly harsh: In other words the degree of harshness goes beyond that necessarily involved for a partner or children of a foreign criminal facing deportation.

15. Mr Mackenzie argued with reference to JG (Jamaica) 12 June 2019 (PG is 11 July 2019), that in JG [2019] EWCA Civ 982, that the threshold of it being unduly harsh was met if there was evidence showing a harsh effect on a child which went in any way beyond what was normally to be expected where the parent was deported. It was not necessary that the effect should go substantially or extensively beyond that normally expected. He argued that the question – whether the harsh effect goes materially beyond that which is normally to be expected – was consistent with what was said by the Supreme Court in KO [2018] UKSC 60 about the need for the Rules to be straightforward and for the court's area of discretion to be reduced rather than widened. Mr Mackenzie argued that the Rules are found to have explicitly reduced rather than widened the considerations and have, it was said, led to the conclusion that it is not necessary in any given case to delve into exactly how far the effect of deportation goes beyond the norm: To do so would be contrary to the principle identified in KO. Mr Mackenzie argued that it was clear from the cases cited that emotional, psychological and developmental damage properly evidenced by medical and/or social work professionals may suffice to show the threshold is met.

16. Having considered this matter and the extent to which there plainly is a discretion and judgment to be made, I concluded in the light of the social worker's report that the removal of the Appellant would mean that the children would suffer significant detriment to their well-being, development and educational processes from his

absence. His partner's difficulties as a single parent would not help in that matter, and nor would she be able to essentially compensate for his absence.

17. In the circumstances I conclude, helped as I have been by the independent social worker's assessment who had, as the report makes plain, a full opportunity to consider this matter, the evidence upon which having seen the children and considered the issues with her professional eye, that the conclusion was justified as a result of her observations of the strong parental child bond between the children and their mother and father, and the extent of their respective involvement in the emotional support and physical comfort of the children. Ms Harris concluded as follows (AB48, page 24/41 of the report):-

> "Both Jamal and Aleena are having their basic physical, emotional, educational and health needs met and no concerns were identified in relation to the Welfare Checklist … In my view, if their father is removed to Nigeria both children are likely to experience grief and loss … including associated feelings and behaviours such as anger, self-blame and extreme sadness, leading to lowered self-esteem and self-confidence, reducing overall wellbeing. In addition, the physical barriers caused by location would prevent physical contact with their father for the foreseeable future. Losing access to their primary carer is likely to cause disruption to the children's routine and stability which may impact on their educational progress and development.
>
> Both children are currently able to meet the Five Outcomes for Children and Young People identified in Every Child Matters. However if Mr [O] is deported to Nigeria they will be disadvantaged by his inability to provide the same level of emotional, practical and educational support. He would also be unable to support his children to participate in religious and social activities and events.
>
> Additionally, both Jamal and Aleena currently relate to themselves as children with two accessible parents and it is reasonable for them to expect this to continue. Mr [O]'s removal may have a detrimental impact on their continuing positive identity formation as British Citizens causing a reduction in their self-esteem and self-confidence."

Ms Harris confirmed the extent to which the Appellant and his partner currently provide stability, order and routine, and that if deported to Nigeria he was likely to suffer from the unwanted separation.

18. Whilst Ms Harris couched her remarks in terms of "may" have a detrimental effect, it seemed to me in the light of the experience of when he was imprisoned that there was a greater likelihood that it will have that detrimental effect: Inevitably so with the break-up of the close family relationship (my emphasis). In the circumstances, therefore, I concluded on all the evidence, including the photographic evidence, that the impact of removal would be unduly harsh within the terms of Exception 2 to Section 117C and in the context similarly of the Immigration Rules and the provisions in paragraphs 398, 399.

19. I concluded Article 8 ECHR family/private life rights were engaged and the Respondent's decision was a significant interference. I found the Respondent's decision was lawful and served Article 8(2) ECHR purposes. I concluded, based upon the findings that were made by the First-tier Tribunal Judge, that this was a case where the likely consequences were such that it was unduly harsh for the Appellant to be deported. In reaching that view I have attached considerable weight to the seriousness of the offence which wholly justified an immediate custodial sentence in terms of the risk to the public interest, firefighters, local residents and others who are affected by an arsonist's criminality. However, I do not hold that against the children but I took into account the more serious the offence the greater was the public interest in deportation and that Parliament has produced the Exceptions which plainly, if engaged, as I find one to be, demonstrated that the Respondent's decision was disproportionate

NOTICE OF DECISION

20. The appeal is allowed under Article 8 ECHR.

ANONYMITY DIRECTION

21. No anonymity direction was sought nor is one required.

TO THE RESPONDENT

FEE AWARD

A fee was paid of £140.00. In the circumstances of this case the appeal has substantially succeeded on after arising material and I conclude in this case that no fee award is appropriate.

Signed Date 11 November 2019

Deputy Upper Tribunal Judge Davey