Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/09579/2018**

THE IMMIGRATION ACTS

Heard at Field House
On 20 February 2020

Decision & Reasons Promulgated
On 5 March 2020

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

OLUSEUN [O]

(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr S. Kotas, Home Office Presenting Officer

For the Respondent: Mr A. Bandegani of Counsel for the Respondent

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Nigeria. He initially arrived in the United Kingdom on 3 November 1997 and applied for asylum. He was 15 years old at that time. His application

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was refused and his subsequent appeal was dismissed in a determination promulgated on 8 October 2003.

2. Meanwhile, he had married his wife on 1 February 2003 and they have children who were born on 26 May 2004, 30 July 2007, 18 December 2009 and 10 July 2011. The Appellant has also taken responsibility for a niece who was born on 30 April 1997 and a nephew, who was born on 19 October 2002. On 19 August 2010 the Respondent was granted indefinite leave to remain outside of the Immigration Rules.

3. On 24 August 2016, the Respondent was sentenced to four years imprisonment on one count of conspiracy to dishonestly and one count of possession of an article for use in fraud. The Appellant made a decision to make a deportation order on 31 October 2016. Representations were made on his behalf, but his human rights claim was refused on 12 April 2018. He appealed and his appeal was allowed by First-tier Tribunal Judge Black in a decision promulgated on 26 September 2019. The Appellant appealed against this decision and First-tier Tribunal Judge Holmes granted her permission to appeal on 18 December 2019. The Appellant filed and served a Rule 24 Response and a Rule 15 notice on 12 February 2020.

ERROR OF LAW HEARING

4. At the start of the hearing the Home Office Presenting Officer handed up a number of authorities. The Home Office Presenting Officer and Counsel for the Respondent both made oral submissions and I have referred to them below, where relevant.

ERROR OF LAW DECISION

5. As noted by Counsel, First-tier Tribunal Judge Black gave a short summary of the relevant statute provision, Immigration Rules and some of the appropriate case law in paragraph 13 of her decision. The Respondent had been sentenced to four years in prison and, therefore, she particularly noted that Jackson LJ held in paragraph 37 of *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 that:

> "In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because of the

> circumstances so described set out particularly significant factors bearing upon the respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)".

6. The Respondent had not relied on Exceptions 1 and, in relation to Exception 2, the judge concentrated on the effect of his deportation on the children in his family unit. When addressing whether it would be unduly harsh for the children to accompany the Appellant to Nigeria or remain here without him, the First-tier Tribunal Judge Black had referred to *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 in passing in paragraph 13 of her decision but she did not direct herself of paragraph 27 of that decision where Lord Carnwath found that:

> "Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:
>
> > "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher." "

7. At best, in paragraph 17 First-tier Tribunal Judge Black found that "the evidence including the expert SW report in my view reaches the threshold for "unduly harsh" as the consequences for the children would be severe".

8. In addition, she did not identify which the particular consequences that would be harsh in any particularity. In paragraphs 14 and 15 of her decision she had noted various findings by the independent social worker. However, the report went no further than concluding that "the emotional and practical interests of the children would be harmed in the event of the appellant being deported". The independent social worker concentrated on the effect on the Appellant's

son, O, and his nephew, M, and noted that it has not been feasible to prolong the interview with the three young girls given the level of upset that they had displayed. As a consequence, there was no evidence about these letter children which could reasonably be said to have reached the "unduly harsh" threshold.

9. In relation to O, it was noted that the Appellant took him to football coaching and matches and generally encouraged him. There was also a letter from O's football coach, which confirmed that the Appellant had a very positive effect on O. However, again there was no evidence which was capable of reaching the "unduly harsh" threshold. In relation to M, the independent's social worker's report confirmed that his behaviour at school had improved since the Appellant returned to the family home. She also noted that M's best friend had been stabbed and that this had also affected his stability whilst the Appellant was in prison. This was not mentioned by First-tier Tribunal Judge Black in her decision. She concluded that M was at risk of emotional harm if the Appellant was deported but failed to identify how this would meet the elevated threshold of being "unduly" harsh.

10. At paragraph 17, First-tier Tribunal Judge Black also stated that she was "further satisfied that for these children there are very compelling circumstances. I find that these are circumstances which go beyond those envisaged in the exceptions in the Rules". However, her exercise in relation to whether there were very compelling circumstances was dependent upon her making a lawful assessment of whether expecting the children to remain here would be unduly harsh, which she had not.

11. Her findings also did not correlate with her self-direction that in paragraph 38 of *NA* Jackson LJ found that:

> "The best interests of children certainly carry weight as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25, [2013] I AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of these children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals…"

12. In addition, the further factors which First-tier Tribunal Judge Black took into account in paragraph 16 of her decision were not ones which could not be addressed if the Appellant were to be deported. The Appellant had told the independent social worker that his wife had done a marvellous job when he was in prison. It would also be possible for her to seek alternative employment. There was no evidence to suggest that the family were presently at risk of homelessness. The evidence also suggested that the Appellant's wife and family were close to his wife's mother and sibling and there was no medical evidence about the Appellant's wife's current or prospective mental health.

13. For all of these reasons, I find that there were errors of law in First-tier Tribunal Judge Black's decision.

DECISION

(1) The Secretary of State for the Home Department's appeal is allowed.

(2) First-tier Tribunal Judge Black's decision is set aside in its entirety, as it will be necessary for the evidence to be considered again.

(3) The appeal is remitted to the First-tier Tribunal to be heard *de novo* before a First-tier Tribunal Judge other than First-tier Tribunal Judge Black or Holmes.

Nadine Finch

Signed Date 25 February 2020

Upper Tribunal Judge Finch