Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11405/2019

THE IMMIGRATION ACTS

Heard at Field House
On 5 October 2020

Decision & Reasons Promulgated
On 26 October 2020

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

M A
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the appellant: Mr M Marziano, legal representative from Westkin Associates
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

© CROWN COPYRIGHT 2020

Introduction

1. This is the remaking of the decision in the appellant's appeal following my previous conclusion that the First-tier Tribunal's decision dismissing the appeal should be set aside by virtue of an error of law. My earlier decision, promulgated on 26 February 2020, is appended to this remaking decision.

2. In summary, I found that the First-tier Tribunal's assessment of the unduly harsh issue under section 117C(5) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"), as amended, had been erroneously predicated upon the law as it was understood before the judgment of the Supreme Court in KO (Nigeria) [2018] UKSC 53; [2018] 1 WLR 5273.

3. Although I set aside the First-tier Tribunal's decision, I preserved the following conclusions as a starting point for my remaking decision:

    i. the appellant has a genuine and subsisting relationship with his partner, R, and a genuine and subsisting parental relationship with the four relevant children;

    ii. R and the four children are all "qualifying" for the purposes of section 117C(5) NIAA 2002;

    iii. it would be "unduly harsh" for R and the four children to go and live in Nigeria;

    iv. the appellant cannot rely on the private life exception under section 117C(4) NIAA 2002;

    v. the appellant cannot show "very compelling circumstances over and above" those described in the two exceptions.

4. Neither party has suggested that any of the above matters should now be revisited.

5. The issue in this appeal is therefore a narrow one: would it be unduly harsh on the four children and/or R if the appellant were to be deported to Nigeria and they remained in the United Kingdom?

The relevant legal framework

6. The overarching authoritative statement of the law is contained within the well-known passage of Lord Carnwath's judgment in KO (Nigeria), at paragraph 23:

    > "23. On the other hand the 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 (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) 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."

7. At paragraph 26, there was approval of the Upper Tribunal's guidance as to the meaning of "unduly harsh", with reference to paragraph 46 of MK (Sierra Leone) [2015] UKUT 223 (IAC):

> "46. 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."

8. A large number of judgments of the Court of Appeal followed in the wake of KO (Nigeria), many of them dealing with whether, on the particular facts, it had been open to either the First-tier Tribunal or the Upper Tribunal to conclude that it would be unduly harsh on children to be separated from a parent. Then, on 4 September 2020, the Court handed down its judgment in HA (Iraq) [2020] EWCA Civ 1176. This provided clarification as to the correct approach to the unduly harsh issue. For the purposes of the present case, the following passages of Underhill LJ's judgment are relevant:

> "44. In order to establish that the word "unduly" was not directed to the relative seriousness issue it was necessary for Lord Carnwath to say to what it was in fact directed. That is what he does in the first part of the paragraph. The effect of what he says is that "unduly" is directed to the degree of harshness required: some level of harshness is to be regarded as "acceptable or justifiable" in the context of the public interest in the deportation of foreign criminals, and what "unduly" does is to provide that Exception 2 will only apply where the harshness goes beyond that level. Lord Carnwath's focus is not primarily on how to define the "acceptable" level of harshness. It is true that he refers to a degree of harshness "going beyond what would necessarily be involved for any child faced with the deportation of a parent", but that cannot be read entirely literally: it is hard to see how one would define the level of harshness that would "necessarily" be suffered by "any" child (indeed one can imagine unusual cases where the deportation of a parent would not be "harsh" for the child at all, even where there was a genuine and subsisting relationship). The underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category.
>
> …
>
> 51. The essential point is that the criterion of undue harshness sets a bar which is "elevated" and carries a "much stronger emphasis" than mere undesirability: see para. 27 of Lord Carnwath's judgment, approving the UT's self-direction in

MK (Sierra Leone), and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders): see para. 23. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.

52. However, while recognising the "elevated" nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of "very compelling circumstances" in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving IT (Jamaica), if that were so the position of medium offenders and their families would be no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of "very compelling circumstances" to be satisfied have no application in this context (I have already made this point – see para. 34 above). The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal (see Lord Carnwath's reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders.

53. Observations of that kind are, I hope, helpful, but they cannot identify an objectively measurable standard. It is inherent in the nature of an exercise of the kind required by section 117C (5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be "unduly harsh" in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value.

…

56. The second point focuses on what are said to be the risks of treating *KO* as establishing a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent". Lord Carnwath does not in fact use that phrase, but a reference to "nothing out of the ordinary" appears in UTJ Southern's decision. I see rather more force in this submission. As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold "acceptable" level. It is not necessarily wrong to describe that as an "ordinary" level of harshness, and I note that Lord Carnwath did not jib at UTJ Southern's use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, "ordinary" is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of "undue" harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-

> encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.
>
> 57. I make those points in response to the Appellants' submissions. But I am anxious to avoid setting off a further chain of exposition. Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of the parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying KO (Nigeria) in accordance with the guidance at paras. 50-53 above."

9. Since the hearing in the present appeal, the Court of Appeal has handed down a further judgment on the issue of deportation and the unduly harsh issue. Having considered AA (Nigeria) [2020] EWCA Civ 1236, I did not find it necessary to seek further written submissions from the parties. The judgment adds nothing over and above what is said in HA (Iraq) and both representatives made full submissions on that case before me. The clarificatory aspects of HA (Iraq) are hopefully summarised at paragraph 12 of AA (Nigeria):

> "12. As explained in HA (Iraq) at [44] and [50] to [53], this does not posit some objectively measurable standard of harshness which is acceptable, but sets a bar which is more elevated than mere undesirability but not as high as the "very compelling circumstances" test in s.117C(6). Beyond that, further exposition of the phrase "unduly harsh" is of limited value. Moreover, as made clear at [56]-[57], it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances. It is not possible to identify a baseline of "ordinariness"."

10. In the carrying out my assessment of the unduly harsh issue, I have directed myself in line with all of the guidance set out above.

The evidence

11. By way of documentary evidence, I have considered the following:

    i. the respondent's original appeal bundle, under cover of letter dated 21 August 2019;

    ii. the appellant's first bundle, which is neither indexed nor paginated. It includes a variety of documents relating to the appellant's health, his immigration history, and the education of his eldest son;

iii. the appellant's second bundle, indexed and paginated 1-47. This includes witness statements for the appellant, R, his mother, a report from an Independent Social Worker, and medical evidence relating to the appellant's significant mental health conditions;

iv. an email from Mr M Flanagan, Consultant Nurse and Clinical Lead at i-Access Drug and Alcohol Service, dated 28 September 2020

12. The appellant, R, and his mother, all attended the resumed hearing and gave oral evidence, a full record of which is contained in the record of proceedings. I do not propose to set that evidence out here in any detail. In summary, the appellant provided an account of his life in the United Kingdom from his arrival at the age of seven, through his education, and into his use of drugs, his diagnosis of HIV, criminal behaviour, and mental health problems. He gave details of a medication programme which aims to keep him drug-free. He explained that he plays an important role in the lives of his children, with a particular emphasis on the two older boys, J and N. He does not believe that any external support would be a proper substitute for his presence in the children's lives. He has concerns about his partner's ability to cope if he were deported. He told me that he did not believe his sister or brother would be able to provide very much additional help if he was not in this country as they have their own lives and responsibilities.

13. R provided a history of their relationship and the difficulties faced as result of the appellant's drug addiction, criminality, and mental health problems. She has acknowledged the support provided to her by the appellant's mother over the course of time, particularly whilst he was in prison. She currently works as a Teaching Assistant in a primary school and has found it a real struggle to continue to do so as well as caring for children and dealing with the appellant's own difficulties. Notwithstanding that, she has emphasised the importance of the appellant's role in the lives of the children, in particular that of their eldest, J. She has concerns about J's wellbeing at the moment and believed things would get worse if the appellant were removed. J has been aware of the appellant's precarious position in this country for some time and has displayed anger and aggression at school.

14. The appellant's mother confirmed that she has done all she could to provide practical support at appropriate times, particularly whilst the appellant was in prison. She works full-time as a cleaner and a carer, whereas she was only working on a part-time basis when providing additional help for the family some time ago. She confirmed that she would offer to do all she could in the future.

Submissions

15. Mr Whitwell relied on his skeleton argument, dated 5 October 2020. He acknowledged that splitting up the family unit may have harsh consequences for R and the children, but submitted that it would not be unduly harsh, having regard to KO (Nigeria) and HA (Iraq). He submitted that the possibility of social services providing input for the family unit could be considered and the fact that there had been no such assistance to date was indicative of R's ability to cope without the appellant. He noted that R was not receiving any treatment for depression or anxiety

at the moment. There were other family members in the United Kingdom who have and would continue to provide assistance. J did not have an Education Health Care Plan, nor had he been diagnosed with any conditions. With reference to the case of Imran (section 117C(5); children, unduly harsh) [2020] UKUT 83 (IAC), Mr Whitwell submitted that the evidence in the present case did not disclose anything "more" than simply the importance of the appellant in the lives of his children, or their emotional attachment to him, or indeed the emotional harm that would be likely to result from separation.

16. Mr Marziano relied on his skeleton argument. There was no dispute as to the appropriate legal framework. He relied upon the conclusions of the Independent Social Worker, but acknowledged that emotional detriment to the children that might be expected as a result of separation was not, by itself, sufficient for the appellant to succeed. However, he submitted that there were additional features in this case. He submitted that the R's evidence had been both impassioned and cogent. This family unit had, he submitted, experienced a good deal of difficulty over time. The appellant had been addicted to drugs and had committed crimes as result. In addition to this he had significant mental health problems and HIV. R herself had suffered from depression and anxiety, although it was accepted that he she was not currently under treatment. Despite this, the couple were bringing up four children together. Mr Marziano emphasise the position of J, who was aware of his father's difficult position and was displaying worrying signs at school, as evidenced by letters from that institution. Practical help from other family members may be available, but that could not replace the appellant's role in the children's lives. It was submitted that if social services had to get involved, it would be indicative of the fact that the position had already become unduly harsh for the children. In summary, it was submitted that when the situation of this family unit was placed in its proper context, the unduly harsh test was met.

Findings of fact

17. There is little, if any, dispute as to much of the factual matrix in this case. The appellant arrived in United Kingdom at the age of seven and has resided here ever since. He has accumulated 20 convictions in relation to 43 offences. The convictions have ranged from driving offences, to burglary, to possession of Class A and B drugs, to possession of offensive weapons, and affray. I find that the last convictions occurred on 8 July 2019 and that the last period of imprisonment was for two weeks in May 2017 I accept that the offending took place when he was addicted to various drugs, a problem that the appellant has suffered from since the age of 15 or 16. In 2018 he was sectioned under the Mental Health Act as result of a suicide attempt, and he has been under the care of mental health services ever since. On the basis of the undisputed evidence contained in the appellant's second bundle, I find that the appellant has been diagnosed with the following conditions:

   i. mental and behavioural disorder due to use of opioids;

   ii. mental and behavioural disorder due to use of cocaine;

   iii. mental and behavioural disorder due to use of cannabinoids.

18. The most recent report on the appellant's mental health conditions indicates that the situation remains fragile. There is said to be a medium-high risk to self, a medium-high risk to others, and a medium risk from others. R and the children are said to be protective factors (with R being described as "extremely supportive"), and it is reported that his mother has provided additional practical support.

19. As a result of the substance misuse, the appellant has been on a medicated treatment programme since August 2019. I accept that the appellant has in fact been drug-free since that time and that he is engaging well with the programme. A letter from the relevant Substance Misuse Specialist, dated 20 February 2020, contains the following passage:

> "As stated, he remains abstinent from illicit drugs and is improving with regard to his mental health. However, should these current services not be available to Mr [MA], the likely prognosis would be a sudden relapse back to illicit opiates as he would be withdrawing quite heavily and more than likely he would have a severe downturn in his mental health, possibly leading to suicidal ideation and even suicide attempts."

20. The appellant's current drug-free status and the risks to his overall mental health as result of being removed from protective factors and the current treatment regime is also emphasised in the email from Mr Flanagan. Deportation would, it is said, have a "devastating impact" on the appellant and the other family members. I find that to be an opinion honestly provided and in keeping with other sources.

21. The evidence shows that the appellant was diagnosed with HIV in 2018 and has been on relevant treatment ever since.

22. I find that the appellant began his relationship with R in 2006. It is quite clear that they have a very strong relationship. As Mr Marziano fairly put it, "they have been through a lot together." I find that R has indeed been "extremely supportive" of the appellant notwithstanding the stress and anxiety that his offending and mental health problems must undoubtedly have caused her. I say this in the context of the fact that the couple's four children were born between August 2008 and April 2016, a period in which the appellant was accruing convictions, spending some time in prison, and is likely to have been suffering from mental health problems as result of his substance misuse.

23. I find that without the protective factors of R and his children, it is highly likely that the appellant would, as the documentary evidence suggests, relapse quickly into a state of drugs misuse and deteriorating mental health. I find that R is fully aware of this possibility: it would be wholly artificial to conclude otherwise.

24. I find that R is not currently under treatment for specific mental health conditions. However, I found her to be a generally impressive witness and I accept that she has been under treatment in the past for depression and anxiety. The absence of treatment now does not mean that an individual is not suffering from relevant symptoms, or that their mental health would not deteriorate if certain trigger factors came to pass. Here, I accept the combined evidence from R herself, the Independent Social Worker, and the appellant's mother, to the effect that she (R) had significantly

struggled, at the very least emotionally, when the appellant was last in prison, and that the current situation was placing a lot of stress on her. In her words, it was "driving me mad". I find that the appellant's deportation would result in a very real deterioration in R's mental; wellbeing. It is likely that she would need to seek treatment for her mental health.

25. I find that R is currently working as a full-time Teaching Assistant in a primary school.

26. I find that the children are healthy.

27. The evidence clearly establishes that the appellant has a close relationship with all of them. The Independent Social Worker's report, upon which I attach significant weight, suggests that the two older children in particular enjoy a very good father/son bond, and that they would not only miss him if he were to be deported, but would also worry about his wellbeing.

28. I find it to be more likely than not that the appellant has the strongest connection with his eldest child, J. The evidence shows that in addition to the usual day-to-day interactions, football is a source of particular importance for them both, with the appellant taking J to football at weekends, as well as providing emotional support.

29. Both the appellant and R have given evidence that J has struggled as result of the uncertainty surrounding his father's position in the United Kingdom. R has said that he is not doing well at school, is angry, and that trust has become a problem for him. J has said that he is afraid of the current situation. She confirmed that he has been aware of his father's status and these deportation proceedings since Year 6. She described J as being difficult now and posed the question of what would happen to him if the appellant were deported. The clear implication is that, in her view, things would get worse. I accept her evidence as being reliable. In my view, she is very well placed to speak about her own son's situation.

30. In addition, what R has said fits in with evidence from J's primary school in the form of two letters, dated 5 April and 28 June 2019 (contained in the appellant's first bundle). The former addresses the impact of the appellant's mental health problems and precarious status in this country on J and his younger brother, N. The school was of the view that the boys required ongoing support, that N was receiving counselling funded by the school, and that there was a risk of exclusion in respect of them both. The second letter focuses on J (who was then in Year 6). It records an escalation in his poor behaviour at school, resulting in a Fixed Period Exclusion. It is appropriate to quote directly from the letter:

> "As a school, we continue to believe that [J's] behaviour is stemming from the trauma he continues to experience around the possibility of his father being deported. [J] has understandably developed a sense of injustice and has made comments such as, "You must have to be white to stay in this country." Whilst [J] is surrounded by a loving family and supported teachers at school, this is faced with the reality of losing regular contact with his father and growing up without a father figure.

> … Since my last letter, [J] is now receiving weekly counselling sessions funded by the school, due to his stress and anger around his family situation. [J] remains in a state of crisis and is very much at risk of permanent exclusion, which is exceptionally worrying at a time when he is transitioning to secondary school."

31. I find that these passages are an accurate reflection of J's behaviour and his perception of his situation at that time.

32. J is now in Year 8. It would have been of assistance to have a letter from his current school. However, taking the evidence as a whole, I find that R's evidence is reliable in respect of how matters now stand. I find that J continues to be "very angry" and is fearful of the family's situation. An example of this was a recent fight at school. I accept that he is receiving support from his school, but not through external agencies such as CAMHS.

33. I accept the evidence from the appellant's mother that when he (the appellant) was last in prison, she visited the house regularly to help out. She recalled, reliably in my view, that J was crying and missing his father at that time. I take this evidence in the context of R's explanation that she had told J and N that their father had gone away temporarily as a punishment for doing wrong things.

34. On the basis of his mother's reliable evidence, I find that N is receiving 1:1 support in Year 6 on the basis of his behavioural difficulties. As with his older brother, there is no outside input or any diagnosed conditions.

35. I turn to the issue of support from other family members in the United Kingdom. I find that the appellant's mother did provide fairly significant practical support in the past, particularly when the appellant was in prison. There is clearly a good relationship between her and the family unit. I accept that, as a single mother herself, she does not want to see R in the same position that she experienced when bringing up the appellant and his siblings. I find that when she was providing the previous assistance, she was working part-time, but is now working full-time and that her capacity to provide a similar level of practical help is more limited, although not precluded altogether.

36. I find that the appellant does have a brother and a sister residing in this country. Although there was a degree of inconsistency between the evidence of the appellant and that of his mother, on balance I accept that there is not a strong relationship with the brother and that he has not either provided or offered to provide practical assistance in the past or now. In respect of the appellant's sister, I find that she is a single mother of two. Whilst I accept that she may well be willing to provide some assistance, it is more likely than not that this will, by virtue of her own circumstances, limited in scope.

37. There is a discrepancy between the evidence of the appellant and R as to the latter's relationship with her mother. The appellant said that it was "good", whilst R said it was "turbulent". I have found R to be a credible witness and, taking the evidence as a whole, I prefer her evidence on this particular point to that of the appellant. I accept that the relationship has been difficult over the years. It would certainly be

wrong to say that there was no current relationship at all. It is the case that there is a much better relationship between R and her father. I find that both the parents work on a full-time basis. I accept that they have helped out financially in the past and would seek to do so in the future if necessary. I find that R has a sister who is married and has two children. There is no evidence to indicate that she has ever been in a position to provide material assistance.

38. It is a fact that there has to date been no involvement by social services with the family unit.

Conclusions

39. The factual matrix set out above now falls to be placed within the relevant legal framework. The question is whether the impact of the appellant being taken out of lives of his partner and/or the four children would be unduly harsh such as to violate his Article 8 rights and therefore be unlawful under section 6 of the Human Rights Act 1998. The focus is on *this* partner and *these* children. The threshold to be met by the appellant is undoubtedly an elevated one, this begin reflective of the very significant public interest in the deportation of foreign criminals.

40. I begin by stating my assessment of the children's best interests. In short, these lie overwhelmingly with a continuation of the children within a loving family unit with both of their parents. the Appellant plays an integral role in the lives of all four children, and has a strong bond with the two older boys and J in particular. The evidence from the appellant and R, combined with that from the Independent Social Worker and the two older children's primary school points in one direction only: all four children would face a significant adverse impact on their overall wellbeing if their father was removed from their lives. In light of the undisputed conclusion that the family unit cannot go and live in Nigeria together, the children's best interests could only be served by the appellant remaining in the United Kingdom.

41. My best interests assessment forms an integral part of the unduly harsh evaluation, but it is not of course a determinative factor.

42. As the eldest, it is perhaps unsurprising that J is the child who is most "in the picture" in respect of his father's circumstances. He knows that his father has suffered, and continues to suffer, from mental health problems. He is also aware that his father may be deported. Whether J is aware of the underlying reasons for this is rather beside the point. It is J's perception and reaction that is all-important. I have found that J has manifested problematic behaviour at school, and it is likely that this is connected with his father situation. The way in which J deals with his emotions and displays anger and aggression as a vent for this is specific to him: other children may react quite differently to similar circumstances. It is not contingent upon the existence of any diagnosed condition and it may arise out of his strong bond with his father (deriving, for example, from the regular football events), or he may react in the same way if there were no particular elements to that relationship. Again, I am concerned with an individualised evaluative assessment of *this* child, and comparisons with others would be unhelpful and indeed artificial.

43. It is the case that R, her parents, and the appellant's mother, would wish to provide practical and emotional support to J to the best of their abilities. However, I have found that, notwithstanding the support given by the appellant's mother last time his father was in prison, J was very upset then despite the separation being of a temporary nature. If the appellant were now to be deported, J will be fully aware that the separation is highly likely to be very long-term. It is significant that J has stated to be worried about his father, an emotion which indicates not simply an appreciation of the mental health problems and what might be in store in Nigeria, but also a long-term concern over and above the sadness of being separated. The prospects of visits by the family to Nigeria are, I conclude, very slim indeed. In any event, infrequent and relatively short visits would, in my view, have very little ameliorative impact on J. The same applies to the argument that contact could be maintained on a meaningful basis through "modern means of communication".

44. On the practical side of things, it may be the case that J could be taken to his football events and other activities by R or relatives. Yet on an emotional level, I conclude that it is the absence of the appellant which constitutes the relevant consideration here. In my assessment, substitutes are unlikely to mitigate the way in which J will feel and react to his father's removal.

45. Mr Whitwell submitted that, if necessary, social services could step in and provide assistance to the family unit in the appellant's absence. Unfortunately, I have not been provided with any evidence about the duties of social services towards families in need of support. I appreciate that it is for the appellant to make out his case, but as the respondent relying on this point, it would be useful for her to make reference to relevant statutory provisions and/or guidance. I have certainly not been referred to any sort of programme or guidance in respect of assistance from social services to children whose parent has been deported.

46. In the event, and as a general reference point, I have had regard to section 17 of the Children Act 1989. Sub-section (1) provides that there is a general duty upon a local authority to safeguard and promote the welfare of children within their area who are in need by providing relevant services appropriate to those children's needs. Sub-section (10) provides that a child is in need if:

> "(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services
>
> …"

47. I appreciate that this is not a comprehensive view of all circumstances in which social services may become involved with a particular family. However, it does lend solid support to Mr Marziano's submission that the intervention of social services may be an indication that matters have already progressed to a very poor state of affairs, which in turn supports the argument that the impact on J would, at that stage, be

unduly harsh. On the facts of this particular case, my assessment is that the immediate significant emotional impact on J arising from the appellant's deportation is unlikely to be mitigated by generalised social services input, even if that were put in place prior to him becoming a child in need.

48. In summary, with the focus on J and not on what might be "ordinarily expected" in a separation scenario, my evaluative assessment is that there is indeed something "more" in this case (to use the term from Imran, a decision which of course must be read in light of HA (Iraq)), to what the respondent acknowledges would be a harsh impact. This young boy is currently struggling with the prospect of a separation, a struggle which has manifested itself in anger and physical aggression at school. If separation were to materialise, I conclude that it is likely that J's behaviour and wellbeing would significantly deteriorate, and what has been manifested already is likely to get much worse. His current fear for his father's prospects will be exacerbated and prolonged. Evaluating matters on the basis of his particular characteristics, the impact on J's life would go beyond bleakness. Forms of emotional and practical support from other family members, whilst perhaps of some utility, not take off the sharp edges of that. Ultimately, I conclude that the appellant's deportation would be unduly harsh on J.

49. I turn now to the position of R, which must be seen in the context of her experiences during the course of her relationship with the appellant, together with her current and prospective circumstances. It is clear that she has persevered with her relationship through troubled times brought about by the appellant's offending and mental health. I have found that she has become a protective factor for the appellant and she will be aware of this. Conversely, the appellant has remained committed to their relationship and been a good father to their children. The prospect of losing him is highly likely to cause her very significant distress. She would lose her partner and become a single mother of four overnight.

50. She would, as has occurred in the past, be able to turn to other family members for some support. This would no doubt help. However, in my assessment, that would only go so far.

51. On the particular facts of this case, four factors lead me to conclude that the impact on R would not simply be harsh, but would be unduly so. First, that the relationship has, as I have indicated above, involved significant difficulties and, to use the phrase employed by Mr Marziano in submissions, a degree of "co-dependency" has evolved. Separation would obviously rupture this. Second, and following on from the first matter, it is highly likely that R will hold a genuine fear for the appellant's health if he were deported to Nigeria, as reported by the Independent Social Worker. She is well aware of his past substance misuse, his fragile mental health, and his HIV, and has expressed her fear that there would be a risk to his life in that country. As with J, this fear is likely to be an ongoing feature. Third, it is inevitable that she will be confronted by the distress of her children losing their father and it is likely that this will in turn have an impact on her. Over and above the general impact of this, R will see the effects on J. For the reasons set out above, I have concluded that it would be unduly harsh on J of his father were to be deported. In turn, this conclusion would

have a very significant impact on R. Even if the elevated threshold were not met in respect of J, his suffering would, when seen in combination with the first and second factors, nonetheless constitute an important factor when assessing the impact on R. Fourth, R's ability to cope when the appellant was last in prison was not, on the evidence, robust and she did receive assistance from the appellant's mother. That was in the context of what she knew was only a temporary separation. Deportation would be another matter altogether. I have found that she is likely to face a deterioration in her mental wellbeing, whether treatment would be required or not.

52. As result of my conclusions on J and R, the exception under section 117C(5) is satisfied and the appellant succeeds in his appeal.

Anonymity

53. I maintain the anonymity direction given previously. I do so on the basis not simply of the presence of minor children, but also the fact that the Appellant suffers from health conditions including HIV.

Notice of Decision

54. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. That decision has been set aside.

55. I remake the decision by allowing the appeal.

Signed: *H Norton-Taylor* Date: 20 October 2020

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a reduced fee award of £40.00 on the basis that whilst the appellant has succeeded, much of my reasoning in this case has been based upon evidence post-dating the respondent's refusal of the human rights claim.

Signed: *H Norton-Taylor* Date: 20 October 2020

Upper Tribunal Judge Norton-Taylor

APPENDIX: ERROR OF LAW

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11405/2019

THE IMMIGRATION ACTS

Heard at Field House
On 18 February 2020
Extempore

Decision & Reasons Promulgated

…………………………………

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

M A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mr M Marziano, Counsel, instructed by Westkin Associates
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant appeals against the decision of First-tier Tribunal Judge Graves ("the judge"), promulgated on 24 September 2019, by which she dismissed the Appellant's

© CROWN COPYRIGHT 2020

appeal against the Respondent's decision of 13 June 2019, refusing his human rights claim, a claim that was made in the context of deportation proceedings based upon the Appellant's significant criminal history.

2. Importantly for the purposes of the present appeal, the Appellant had had a previous appeal before the First-tier Tribunal in 2018. By a decision promulgated on 22 June 2018, First-tier Tribunal Judge Nightingale dismissed the Appellant's appeal against a previous refusal of a human rights claim by the Respondent. Again, this claim had been made in the context of deportation action. Judge Nightingale considered the Appellant's case in the context of the relevant statutory framework including in particular section 117C(5) of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"). She found that the Appellant was in a genuine and subsisting relationship with a partner and with four children (although my understanding is that the Appellant has six children in total, two of whom are not relevant for present purposes and were not relevant in the case before Judge Nightingale) and that it would have been "unduly harsh" for the children to go and live in Nigeria. In considering section 117C(5) of the 2002 Act, the judge was applying the law as it was then understood to be, prior to the judgment of the Supreme Court in KO (Nigeria) [2018] UKSC 53; [2018] 1 WLR 5273 (a judgment handed down on 24 October 2018).

3. Thus, when Judge Nightingale concluded that it would not be "unduly harsh" for the Appellant to be separated from his partner, and perhaps more importantly the relevant children, she was doing so on the basis that his criminal conduct was part and parcel of that assessment following the judgment of the Court of Appeal in MM (Uganda) [2016] EWCA Civ 617. This much is clear enough in light of paragraph 58 of the judge's decision which I now quote in full:

> "In view of this Appellant's history, the type of offending in which he has engaged, his continued offending and the risk I consider he presents of further offending in the future, I find that it would not be unduly harsh for his children to remain in the United Kingdom following his deportation to Nigeria. Notwithstanding the effect of that deportation upon his children, I find that weight to be given to the Respondent's lawful aim here is such that the exception found in the Immigration Rules and also, at Section 117C does not apply."

Judge Nightingale's decision was the subject of an application for permission to appeal.

4. By a decision dated 3 December 2018, Deputy Upper Tribunal Judge Jordan refused permission. In paragraph 2 of that decision he stated:

> "The crucial issue is whether it was unduly harsh upon the children to require the Appellant's removal. There was little or no evidence to suggest it was unduly harsh. Paragraphs 55 to 58 of the determination set out clear reasons for the judge's decision."

5. It is in my judgment clear enough from Judge Jordan's decision that his view of the merits of the purported challenge was assessed with reference to the material part of

Judge Nightingale's decision which I have referred to above. It is also apparent from Judge Jordan's decision that the advent of the judgment in KO (Nigeria), which predated his decision by two months, or so was not raised at any stage and was not considered by him as what is commonly referred to as a "Robinson obvious" point.

The decision of the First-tier Tribunal

6. When Judge Graves came to consider the Appellant's subsequent appeal (which had arisen following the Respondent's acceptance of further representations as a fresh claim under paragraph 353 of the Immigration Rules), she clearly placed significant reliance upon the decision of Judge Nightingale (see paragraphs 41 through to 48). Of particular significance is what is said in paragraph 48:

> "The Appellant says there is good reason to depart from Judge Nightingale's assessment of whether it would be unduly harsh for the children to be expected to remain here, once he is deported. He relies on letters from the children's school, which raise very real concerns about the impact on the two older boys, knowing their father is to be returned to Nigeria. It was previously found that it would usually be in the best interests of the children to be raised with both parents, but this finding was outweighed by the serious and persistent nature of the Appellant's offending. That finding was specifically upheld by the Upper Tribunal."

7. In the following paragraph the judge goes on to comment on evidence from the children's school and raises a concern that that institution appeared to be unaware of certain aspects of the Appellant's behaviour. The judge was of the view that if the school had been apprised of this a different view might have been taken as to the possible impact of his deportation on the children.

8. In the following paragraph the judge assesses the Appellant's health conditions and essentially concludes that these did not represent "very compelling circumstances over and above" those described in either of the two exceptions set out in the 2002 Act or the relevant Rules.

The grounds of appeal and grant of permission

9. The succinct grounds of appeal assert that the judge erred in placing significant reliance upon the decision of Judge Nightingale, a decision that was in a material respect flawed in light of KO (Nigeria). It is said that this error infected Judge Graves' assessment of the "unduly harsh" issue.

10. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 8 January 2020.

The hearing

11. At the hearing before me Mr Marziano relied upon the grounds and his helpful skeleton argument. He submitted that the judge's error was material because she had made no separate assessment of either the children's best interests or the

"unduly harsh" test that could be properly removed from the reliance upon Judge Nightingale's decision. He acknowledged that there was no challenge to the judge's conclusion on very compelling circumstances.

12. Mr Avery acknowledged that there was an error by the judge as regards the "unduly harsh" test, but submitted that this was immaterial on the basis that there simply had not been sufficient evidence provided to show that the relevant threshold could possibly have been met.

Decision on error of law

13. I conclude that the judge has erred in law and that the error is material.

14. It is clear that Judge Graves placed considerable reliance upon the decision of Judge Nightingale, including her conclusions on the "unduly harsh" issue. As has been discussed previously, Judge Nightingale's assessment on that question was flawed in light of KO (Nigeria). Following the Supreme Court's judgment, the Appellant's criminal conduct was not relevant to the question of whether it would be "unduly harsh" for the children to be separated from him.

15. Judge Graves' reference to Judge Nightingale's decision being upheld by the Upper Tribunal, whilst factually correct, does not cure the error. Judge Jordan was, for whatever reason, not apprised of the KO (Nigeria) point at the time at which he refused permission in December 2018. It cannot properly be said that he was specifically concluding that Judge Nightingale had erred but that error was not arguably material in light of the evidence.

16. Judge Graves' error in relying on what Judge Nightingale had previously said is material for the following reasons. First, I agree with Mr Marziano's submission that she has not undertaken a best interests assessment or indeed an assessment of the "unduly harsh" test which can properly be said to be separable from the flawed reliance upon Judge Nightingale's assessment. Second, as I read paragraph 49, there are no actual findings of fact (as opposed to concerns about particular items of evidence) and therefore it cannot be said that on the face of the decision, and but for the flawed reliance upon Judge Nightingale's decision, the conclusion on the "unduly harsh" test was inevitable.

17. In light of the above the judge's decision must be set aside.

Disposal

18. This appeal shall be retained in the Upper Tribunal for a resumed hearing to take place in due course. The following findings are preserved as a starting point for the remaking decision in this appeal:

    i. The Appellant has a genuine and subsisting relationship with his partner and a genuine and subsisting parental relationship with the four relevant children;

ii. The Appellant's partner and the four children are all "qualifying" for the purposes of sub-sections 117C(5) and (6) of the 2002 Act;

iii. It would be "unduly harsh" for the four children to go and live in Nigeria;

iv. The Appellant cannot rely on the private life exception under section 117C(4) of the 2002 Act;

v. The Appellant cannot show "very compelling circumstances over and above" those described in the two exceptions.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

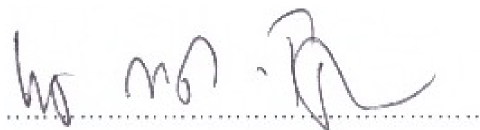
The appeal is adjourned and shall be listed for a resumed hearing in the Upper Tribunal

Directions to the parties

1) **Any further evidence relied upon by either party shall be filed and served no later than 14 days before the resumed hearing;**

2) **Oral evidence from the Appellant and his partner will be permitted at the resumed hearing but only if updated witness statements are provided in accordance with direction 1;**

3) **Both parties are to file and serve skeleton arguments no later than five days before the resumed hearing.**



Signed Date: 24 February 2020
Upper Tribunal Judge Norton-Taylor