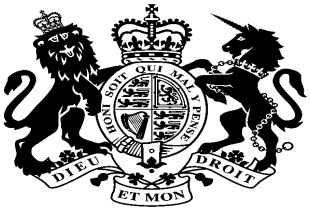

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03306/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 5 November 2021	**On the 23 December 2021**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

P.O.O
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Ms G. Brown of Counsel, instructed by Migrant Legal Action**
For the Respondent: **Mr S. Whitwell, Senior Home Office Presenting Officer**

DECISION AND DIRECTIONS

1. The Appellant is a national of Nigeria born in 1980. The Respondent intends to deport him. The Appellant resists that deportation on human rights grounds.

Background and Matters in Issue

2. The Appellant claims that he entered the United Kingdom in 1996, when he was 16 years old. He thought that he was being sent here so that he could study, but in fact he was taken to a house in Bristol and placed with a family who mistreated him.

3. He managed to leave Bristol sometime in 1999/2000 and make his way to London, where he met N, a woman who was to become his partner. N and the Appellant have three children, all boys, together. C1 was born in 2004 and is now 17. C2 was born in 2007 and is now 14. C3 was born in 2009 and is now 12.

4. I note that whilst this early history is not expressly challenged the Secretary of State it is only formally accepted that the Appellant has been in the UK since late 2003, this concession being based on C1's date of birth.

5. On the 14th May 2010 the Appellant was convicted of 5 counts of using false documents and sentenced to 12 months imprisonment. The particulars were that he has used credit cards in other people's names to buy goods up to the value of £20,000. A number of further convictions followed between May 2011 and June 2016, none of which resulted in an immediate custodial sentence. The conviction in 2011 arose from offending which took place before the 2010 conviction: the Appellant was driving a vehicle using a fake licence and was uninsured. He received a suspended sentence. The remaining offences included other driving offences and possession of cannabis.

6. The Respondent served notice of her intention to deport the Appellant on the 16th March 2016. The Appellant responded by making a protection claim, and by asserting that it would be a disproportionate interference with his Article 8 rights to deport him. He further asserted that it would be a violation of Article 3 to remove him to Nigeria because he would not there receive appropriate treatment for a medical condition. Those claims were rejected by the Respondent in her letter of the 26th September 2017, and the deportation order signed on the 20th March 2017 maintained.

7. The Appellant appealed to the First-tier Tribunal. His appeal was dismissed on the 16th July 2018 by First-tier Tribunal Judge Burnett. The Appellant appealed against that decision and on the 29th January 2019 the decision of Judge Burnett was set aside by the Upper Tribunal. Sitting as a panel Lord Beckett and Upper Tribunal Judge Gill found that the decision of Judge Burnett was flawed for material error of law. In assessing whether this deportation would be 'unduly harsh' for the Appellant's children Judge Burnett had weighed in the balance the nature and repetition of the Appellant's offending behaviour: this was subsequently held in KO (Nigeria) v Secretary of State for the Home Department [2015] UKUT 223 to be an erroneous approach. Further the Tribunal had erred in failing to have proper regard to the

specific evidence of a social worker about the impact on these children. The Upper Tribunal was however content that certain aspects of Judge Burnett's decision should be preserved. These were his findings that:

i) The Appellant's protection appeal be dismissed;

ii) There was no merit in the health claim;

iii) The appeal fell to be dismissed on 'private life' grounds under paragraph 399A of the Rules. Although the Appellant has lived in the UK for more than half his life he has not had leave during that time;

iv) There is a risk of re-offending due to the Appellant's continued use of cannabis (Lord Beckett and Judge Gill found that this finding was preserved subject to any new evidence being produced).

8. The matter was set down for a further hearing before Judge Gill on the 24th October 2019. On that date the Secretary of State was represented by Senior Presenting Officer Mr Jarvis, who applied for the matter to be adjourned pending a review of the decision. Another case had raised the question of whether someone in the Appellant's position might have a claim to derivative rights of residence under Regulation 16(5)(c) of the Immigration (European Economic Area) Regulations 2016. Mr Jarvis asked that the matter be adjourned until that case had been heard. Judge Gill agreed. By the time that Mr Jarvis' lead case had been heard, the UK had left the EU, and Regulation 16 was no longer part of our law: Velaj (EEA Regulations – interpretation; Reg 16(5); Zambrano) [2021] UKUT 00235 (IAC). That issue has therefore now fallen away.

9. The issue in the appeal today is therefore limited to this: would it be a disproportionate interference with the Appellant's family life if he were to be deported? This question is to be addressed with reference to Part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended).

10. On the 6th August 2021 Principle Resident Judge Kopieczek signed a transfer order so that the appeal could be listed before a Judge of the Upper Tribunal other than Judge Gill. This is how the matter has come before me.

The Agreed Facts

11. Before me Ms Brown and Mr Whitwell indicated that the following matters had been agreed between the parties:

- The Appellant has lived in the UK since at least 2003
- He has never had lawful leave
- He has three British children
- His relationship with N, the children's mother, is genuine and subsisting
- The Secretary of State accepts that it would be unduly harsh, and so disproportionate, for the children to go and live in Nigeria
- The Appellant does not advance an argument that his deportation would have unduly harsh consequences for his partner, N

The Evidence

12. The Appellant gave oral evidence before me. He adopted his witness statements dated 25th April 2018 and 22nd October 2021. Therein he explains that he continues to live in the family home, as he has always done, save when he was in prison. His family in this country consist of his partner and their three sons. He also has two cousins whom he sees fairly regularly. In respect of his own natal family the Appellant states that he was born into a well-off Yoruba family in Ibadan. His father is still alive, living in the village, but his mother and two siblings were killed in a fire in 2009. The Appellant has another brother who lives in the USA, and three paternal half-siblings still in Nigeria with their father. The Appellant has not been back to Nigeria for 22 years and has very little contact with anyone there.

13. In both statements and in his oral evidence the Appellant spoke in great detail about his sons. He describes C1 (who was present at the hearing) as a skilled programmer whose preferred subjects were IT and maths – the Appellant said that he can relate to this as these were also his favourite subjects. C2 is also very good at maths and loves football and table tennis. He and C3 both play for a local team and the Appellant and sometimes his wife take them to training and the match every Saturday. The boys enjoy African food that the Appellant cooks for them – C2 often helps and is turning out to be "quite a chef". The Appellant's fears for his children, should his deportation proceed, are encapsulated in this paragraph of his supplementary statement:

> "We are like any other family. We have our ups and downs, but both my partner and I care about our sons wholeheartedly, which is why the thought of being taken away from them causes me unimaginable suffering. I may as well be dead than be without my children. I am scared what my boys would do without me around. We live on an estate in Peckham. There is a threat of crime there all the time.

> Last year, for example, two boys who live locally died. One was stabbed and the other died in an arson attack. This is the reality of the world my sons are growing up in. I have seen kids riding bicycles around our estate at 11 o'clock at night. I would not let my sons do that. Their mum and I believe that they are greater risk because of their shared heritage and therefore, when we go out, we go out as a family. [C1], for example, has not been to the cinema on his own yet…."

14. Ms Brown referred the Appellant to a recent letter from the headmistress of their boys' school which said that the Appellant takes them to and from school. She asked whether the boys were happy with that arrangement, given that they are now 17, 14 and 12. He said that they didn't mind at all since they are all very close. If the boys want to go to the shops with their friends, the Appellant just waits for them and then they go home together. C1 still comes with the other boys in the morning, but sometimes afterschool he goes on his own to the gym. The Appellant understands why C1 wants to do this, as he is getting older, but the Appellant and the boys' mum remain worried – they don't want them getting about on their own, and the journey to school is two buses, there and back. Ms Brown asked the Appellant more about the younger boys' sports training. The Appellant said that C3 plays football for the school team – he trains on Mondays and Wednesdays during school hours and then there is the out of school team. C2 plays basketball for the school – his training sessions are in the early morning, at 7.00am on Mondays and Thursdays. The Appellant and C3 just go with him and wait outside until school starts.

15. The Appellant was asked why his partner was not present at the hearing. He explained that she was unable to attend because she is working. She is the breadwinner for the family because he is not permitted to work. She is a support teacher at a local school but supplements her income by running a breakfast club there. This means that she needs to go early - she leaves at about 7.00am but she is normally home by 3.40pm. In my record of proceedings I have noted that at this point in his evidence the Appellant became very distressed and started to cry. This continued while he explained that he feels very depressed and worried even though he is now on 100mg of Sertraline per day. He also suffers from ongoing pain because of a injury to his knee caused by playing football with the boys a couple of years ago.

16. The bundle contains documentary evidence that the Appellant volunteers at a charity shop run by Mind. He told me that he is normally there every weekday except Thursdays. This is his routine – he takes the boys to school, goes to the shop and does a shift there, then leaves at 3.00pm to collect the boys. He says its good for him

because he is busy all day - mixing with people and doing things. This keeps his mind off the deportation. If he is ever home on his own he becomes preoccupied with worry and gets upset when he thinks about his sons. At this point in his evidence the Appellant began to cry again. I note that the bundle contains a letter from the Appellant's GP which states that he has expressed suicidal and self-harming thoughts in the past, and has been prescribed anti-depressants.

17. In response to Mr Whitwell's questions the Appellant said that he would like to work if he were permitted to do so. He wants to work for his family. He would like to do something IT based. If that happened, then the boys would be going to school on their own.

18. Mr Whitwell asked the Appellant what he had meant in his statement when she said that he and his wife had their "ups and downs". He said that sometimes they got annoyed with each other and argued about stupid things. They would for instance sometimes argue about the children because they do things differently – "she is English and I am African". They might for instance have a difference about what to eat – whether to cook Nigerian food. The Appellant said "she is my wife its normal we argue, but I would never leave her".

19. The Appellant confirmed that he does have some family in the UK other than his wife and children. He has a cousin who lives in Teddington and another one who he sees more frequently. She lives on the Walworth Road.

20. Mr Whitwell asked the Appellant about his use of cannabis. This was clearly a feature of the decision in the First-tier Tribunal, which had regarded his persistent smoking to be an obstacle to his rehabilitation. The Appellant said that he had last smoked 3-4 years ago. He could not recall the exact date but did not think he had smoked since he got a patch from the doctor; he certainly did not think that he had smoked since the hearing of his appeal in May 2018.

21. Mr Whitwell put it to him that Ms Davies (an independent social worker) had recorded that his last use of cannabis was January 2019. The Appellant said that if that's what she had understood him to say she was mistaken – maybe it was his accent, or maybe they had become confused talking about cannabis or cigarettes. Mr Whitwell read to the Appellant from her report. It said that when they had met on the 17th April 2019 he had shown her an app on his phone which said that he had been abstinent for 47 days. The Appellant said that this app had related to cigarette use – he still has it on his phone today. He offered to show me but I indicated that I did not need to see it.

22. Finally Mr Whitwell asked the Appellant to explain the key reason why he should not be deported. He said that it was not just about practical matters such as taking the kids to school. The Appellant once again started to cry as he explained that for him it's about being there as a father:

> "The area where I live is difficult. An estate in Peckham there are a lot of things going on there. Kids out late riding round on bikes, they are not behaving. She cannot protect them from that. I don't want them to fall into the wrong crowd"

23. The Appellant said that if he was working, he would be working for his sons. They would see him going to work and providing for his family. He would always be around to tell them what to do and what not to do. He would be there to help them with their homework etc. He could still keep an eye on them. He could call them anytime, go and get them: he has a tracker on his phone so he always knows where they are.

24. The Appellant's son C1 provided a witness statement. His evidence included this:

> "My dad is a big part of my life. He has always been there for me. He is a part of everything I do. He picks us up from school after dark to make sure that me and my brothers are safe. Once in year 7 when I was walking home from school a boy tried to come up to me and rob me. Since that day dad has been taking me to and from school every day.
>
> We play football in the park at weekends and during holidays. Dad cooks African food for us. We go to the cinema as a family. Nothing would be the same without him. I need my dad around to teach me about life from the male point of view. My mum cannot do that, just like she cannot play football with us at weekend. I need both my mum and my dad.
>
> …
>
> Dad teaches me about my Nigerian culture, including Yoruba which is his mother tongue. Mum cannot speak Yoruba so she cannot teach me the language. I am proud of my British-Nigerian heritage. I know other children who are of shared heritage like me. My mum's family is British and so without my dad around, there would not be another family member to teach me Yoruba, cook African food or take us to Nigerian parties.

> I look up to my dad, because I can see how much he cares about me and my brothers. He says that when I am older I will have to look after him like he looks after me now. To see him go would be devastating for me and my family".

25. I was also provided with a statement from the Appellant's son C2, who says that he will feel heartbroken if his father is not there anymore, and adds this:

> "It would affect my mum too if dad was not around, because she loves him just as we do. It would be too hard for her to do everything by herself. My dad cooks for us, cleans the house, we go places together and he takes us to do sports. He even takes us to and picks us up from school. When we come home from school we can usually smell the food dad has cooked for us. He makes pounded yam and eggusi soup. Mum has learnt to cook some Nigerian food too, but only dad can make the more complicated dishes, because you have to be from Nigeria to make those.
>
> …
>
> Dad is family. We cannot celebrate birthdays and Christmas without him. He cares for us and protects us. Most my friends have both their mum and their dad around so, I would be very sad if my dad was not around anymore.
>
> When people ask me where I am from I do not just say that I am from England. I say that I am half Nigerian and half British. I play football for my school team and there are about six or seven of us who are Nigerian; either fully Nigerian or like me, half Nigerian and half another 'country'. If someone asked me what my favourite food is, I would say pounded yam and eggusi soup, which is Nigerian. I have both my mum and dad's culture and they are as important as each other to me".

26. C3 did not provide a statement because of his young age, but I have carefully read the answers he gave in response to questions posed by Ms Davies. Football features a lot. He says that his mum and dad are kind to him. His dad helps him to do his homework, teaches him skills in football and is funny.

27. The Appellant's partner has provided a witness statement. She confirms that she lives with the Appellant and their children. She has lived in Peckham all her life and some of her own family still live there too. She explains that she met the Appellant when they were both young. She was with her mum in a food shop in Peckham the day that they met in 2001 and she "knew from very early on" that he was the

person she wanted to be with. He moved in with her and her parents not long after that first meeting. Even though he was young he was always a great father: "I couldn't have done it without him by my side". She candidly admits that she knew about his lack of immigration status before the children were born, but she didn't really care. She was in love. Her description of more recent family life is consonant with that given by the Appellant. She works at the school and he cooks Nigerian food, collects the boys from school etc. She writes that both she and the Appellant grew up with both of their parents around, and that it is very important to them that their sons continue to have them both in their lives. It gives them confidence and discipline. She worries about them growing up without a male role model, and that they would be vulnerable to peer pressure, including gangs, if he was not around. She is worried about them travelling to and from school, and being out after dark. She thinks it would be too much for her if she were a single parent. The statement is supported by numerous photographs of the family together at various events and location.

28. In April 2018 the children in the family were interviewed by Diane Jackson, an independent social worker. She came to the family home for three hours, and prior to the visit had access to questionnaires completed by the boys, as well as information provided by their school, the scout group attended by C1 and statements by the Appellant and his partner. She subsequently visited the home a second time. Ms Jackson records that the Appellant has always lived in the family home, apart from the period when he was imprisoned when he was away for 3 months. At that time C1 was nearly 6, C2 was 2 and C3 was a baby. Because they were so young they were not told that he was in prison. The Appellant's partner simply told them that he was away – he called every evening to speak to them on the phone. The boys confirmed to Ms Jackson that their father always takes them places and their parents explained to her it is because they are so afraid of knife crime in their local area.

29. Asked to comment upon the likely consequences for the boys should the Appellant be deported from the UK Ms Jackson believes it very likely that they would be "angry and devastated". She cites C2's response that he would be "broken" if his father was to leave. In her professional opinion this would be a loss akin to bereavement. It would be likely that the Appellant's partner and children would suffer depression. Her ability to offer her sons support would be limited by her own bereavement. The boys' schoolwork would suffer. Because they are so dependant on their father's support, in its absence Ms Jackson considers that they would be "very vulnerable to alternative support mechanisms", i.e. gangs. She cites research by Sheldon Thomas, and ex-gang member himself, to the effect that the main reason that boys join gangs is the absence of a strong male figure in their lives. In this context gangs operate as an "alternative family".

Ms Jackson has worked with several families where this has happened. In her addendum report of June 2019 she includes a newspaper article reporting that the borough where the family live has the second highest loss of life through knife crime in London.

30. Another area of concern for Ms Jackson is the loss for the boys of one side – ie the Nigerian – of their dual heritage. She comments on the centrality of Nigerian culture, in terms of food etc, in the household. She does not believe that the Appellant's partner – a white single mother - would be able to compensate for this loss to her dual heritage sons. She would not be equipped to maintain their knowledge and understanding of that aspect of their identities, but further would have limited insight into the racism that continues to affect the lives of black and ethnic communities in the UK. Although the boys could of course maintain some contact with their father through 'modern means of communication' this is not a substitute for actual family life: such relationships for children depend on physical presence, hugs and kisses. Modern means of communication cannot maintain relationships between people on anything other than a superficial level.

31. In respect of the risk of reoffending Ms Jackson opines that it is unlikely that he would do so again because he understands the jeopardy that this has placed his family life in: he is "terrified" of losing the boys. Dr Lisa Davies, a Consultant Forensic Psychologist, who conducted an in-depth assessment of the Appellant on this issue, concurs. The Appellant told Ms Jackson that he is aware that his children are innocent of his mistakes, and yet it is them who will suffer the most. She notes that the judge who sentenced the Appellant for the index offence in 2010 appeared to accept that he had been motivated to try and get money so he could travel to Nigeria after the death of his mother and siblings.

Legal Framework

32. On the 14th May 2010 the Appellant was sentenced to 12 months imprisonment. As such he is liable to automatic deportation pursuant to s32 of the Borders Act 2007. He can only defeat that proposed action if he can demonstrate that one of the exceptions, set out in s33 of the Act, is engaged. He submits that his deportation would be a disproportionate interference with his Article 8 rights in this country, and so unlawful under s6 of the Human Rights Act 1998.

33. In any case where Article 8 is raised the framework for enquiry is set out in Part 5A of the Nationality, Immigration and Asylum Act 2002, in particular s117A-s117D. Of particular relevance here is s117C:

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.

(4) Exception 1 applies where—

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

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

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

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

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

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

34. I am asked by the Appellant to first consider 'exception 2' at s117C(5). He submits that it would be unduly harsh for his sons if he had to leave the UK. Pursuant to the decisions in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 and HA (Iraq) and RA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 I must exclude from that assessment any reference to the Appellant's criminality. The focus must be on the impact on the children. It is implicit in the drafting that parliament regards some level of harshness as acceptable for the children of deportees, in the context of the public interest in removing those who commit crimes in the UK. The appeal cannot therefore be allowed

simply because the decision is harsh. There must be an *enhanced* degree of harshness sufficient to outweigh the public interest in the deportation of a medium offender: the term 'unduly' carries a much stronger emphasis than mere undesirability MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC). At [§56] of HA (Iraq) the Court explains how decision makers might approach such an assessment:

> 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.

35. In the event that the Appellant cannot take this 'short cut' to demonstrating proportionality he asks me to consider s117C(6) and conduct a global appraisal of the facts and assess for myself whether the decision is disproportionate. In Akinyemi v Secretary of State for the Home Department [2017] EWCA Civ 236 the Court of Appeal held that it is not to be read literally. "Over and above" does not necessarily mean that one of the other exceptions needs to be met and then some *additional* compelling factor identified: it simply denotes that the threshold is a very high one, and that some degree of detriment 'over and above' is required. In Secretary of State for the Home Department v Garzon [2018] EWCA Civ 1225 the test was held to be a wide ranging and holistic one, which must properly reflect the United Kingdom's obligations under Article 8. The rules represent a complete code which are designed in all cases to result in a

conclusion compatible with Article 8: HA (Iraq) (*supra*). This means that at all stages, and at s117C(6) in particular, decision makers must apply the principles derived from Strasbourg jurisprudence: HA (Iraq), Unuane v United Kingdom (*Application no. 80343/17*). It also means that in all cases the decision maker must recognise the substantial weight to be attached to the public interest in the deportation of foreign criminals: HA (Iraq), KO (Nigeria), SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550.

My Findings

36. The issue before me is a narrow one, since it is accepted that there is a family life shared here, and that the Appellant's deportation will necessarily interfere with it.

37. In his submissions Mr Whitwell asked me to focus on the positive features of the boys' lives. Their stable home will be maintained: if the Appellant were to be removed they would still have the same mum, the same house, the same schools, the same friends. They could maintain contact with their Nigerian family through visiting their father's two cousins who live in London. They could maintain contact with him through video calls and messaging services. The boys are a credit to their parents: they are all well behaved good students. There is nothing to suggest that they presently exhibit any anti-social tendencies. As to the fears expressed about them living in an area with a high crime rate, Mr Whitwell referred me to the reasoning in Secretary of State v PG (Jamaica) [2019] EWCA Civ 1213 in which the Court ruled that the Upper Tribunal had erred in law in placing weight on that family's concern that one of the teenage boys had been threatened with a knife [at §39]:

> "…Although no detail was provided to this court of the circumstances of what I have referred to as the knife incident, there seems no reason to doubt that it was both a comfort and an advantage for SAT and the children, in particular R, that PG was available to intervene when his son was a victim of crime. I agree, however, with Mr Lewis's submission that the knife incident, serious though it may have been, cannot of itself elevate this case above the norm. 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".

38. Mr Whitwell emphasised the elevated nature of the test and submitted that the absence of Nigerian cooking, or their dad not being able to take them to school, is plainly insufficient to meet that high test. He also asked me to take into account the evidence of the Appellant that if he is permitted to stay he would like to work and

provide for his sons: this would inevitably entail absence from the family home.

39. I have considered all of Mr Whitwell's very well made submissions, and the reasons for refusal letter. I am mindful that the test of 'undue' harshness requires a level of detriment to these children sufficient to outweigh the very substantial public interest in the deportation of foreign criminals. I am nonetheless satisfied that in this case that high threshold has been met.

40. Having regard to the guidance set out at paragraph 56 of HA (Iraq) I have taken into account the fact that this is a father who has always, apart from the months that he was serving his sentence, lived with his sons. They have never known any different. As such they are likely to be negatively impacted to a greater degree than, for instance, children who live with their mother or other carer and only see their father intermittently. That is a factor that I have attached some weight to.

41. I have also given consideration to the ages of the children. C1 is approaching the age where he can be more independent of his parents; in due course he will hopefully be going to university. To that extent, the interference with the parent – child relationship will be limited in duration. The same cannot however be said of his siblings. C2 is today 14 and C3 is only 12. C3 would therefore face a substantial proportion of his childhood without his father. Those years are especially formative, and I accept the opinion of social worker Diane Jackson that for boys, having a positive male role model is particularly important at that time. That prolonged interference, particularly for C3, is a matter that I have attached some weight to.

42. I accept that these boys have a very high degree of emotional attachment to their father. That is clear from their own evidence, given through the medium of their written answers, and their responses to Ms Jackson. They are evidently very attached to him. I do not think it could be said that he is necessarily a primary attachment figure, but certainly he and his partner present as a strong team and it appears that they are at least as close to their father as they are to their mother. I accept the evidence of their mother, and Ms Jackson, and indeed the boys themselves, that they would be devastated by the removal of their father, and that it would be a loss akin to bereavement. I have considered, and reject, Mr Whitwell's characterisation of this family relationship. He submitted that the Appellant's involvement in his sons' lives amounts to cooking them Nigerian food, helping with homework, and taking them to and from school. That is, with respect, an unnecessarily reductive analysis, which fails to have regard to the importance to children of everyday interaction with a parent – a passing hug, a pat on the head, a smile at a joke are all likely to make a child feel valued and secure.

I accept the evidence that the boys are emotionally very attached to their father and that they would, as C2 puts it, be "broken" by his absence. This is a matter that I have attached significant weight to.

43. The judgment in HA (Iraq) suggests that one potentially relevant factor may be the financial circumstances of the family. Whilst I have no reason to doubt the Appellant's evidence that if he was permitted to work he would do so, because he wants to support his family, I think it would be impermissibly speculative to find that allowing him to remain here would foreseeably lead to an improvement in what must be the currently strained finances faced by the family. I have no idea whether the Appellant could, as he indicated, get a job in IT. What I can say is that if he were to be deported the immediate financial impact on the family would be negligible, since he is not presently earning anything. I have therefore treated this as a neutral factor at best. Indeed it could be argued that the financial situation of the family would in the short term improve, since there would be one less mouth to feed.

44. The list of factors in HA (Iraq) is not of course exhaustive. There may be other factors in a particular case which merit weight in the balancing exercise. In this case there are two. Both concern the childrens' identities as young black boys living in London.

45. The Appellant has repeatedly expressed a concern about the likelihood that his sons could be victims of – or worse, drawn into - crime. The statements of both he and his partner speak of the behaviour of the young people in their Peckham estate and how afraid they are for their sons. The Appellant gives examples of young boys murdered in their area and this accords with the evidence cited by Ms Jackson to the effect that Southwark has one of the highest rates of knife crime in the capital – second only to neighbouring Newham. C1 himself relates an incident in which someone attempted to rob him in the street.

46. Mr Whitwell was right to point out that these particular boys are good, law-abiding and hard-working students, but this does not mean that their parents' concerns are fanciful. Black boys are overwhelmingly disproportionately affected by knife crime, and as the article appended by Ms Jackson alludes to, it is a tragic fact that many of these children have simply been in the wrong place at the wrong time. This is the context in which the Appellant makes a point of taking his children to and from school each day, even though they are evidently old enough to make that journey alone. As Ms Jackson sets out, it is also documented fact that young boys – of any ethnic group – are vulnerable to exploitation by 'alternative family' where they are lacking a stable male role model in their own.

47. In response to this evidence, Mr Whitwell referred me to the reasoning in PG Jamaica, which he submitted to still be good law. In that case the Court held that an incident in which one of the children involved was threatened with a knife could not "in itself elevate this case beyond the norm". I note that in the same passage the Court refers to the "commonplace" consequences of deportation not being sufficient to meet the test: the very approach subsequently deprecated by the Court in HA (Iraq). That tension need not, however, be addressed here. That is because I make it clear that the statistically real risk that the boys face of being victims of/drawn into London street crime is not a factor which "in itself" would be sufficient to demonstrate undue harshness. It is one factor among many that I have attached some weight to.

48. The second matter relating to the boys' ethnic origin is in respect of the importance attached to them of their Nigerian cultural heritage. It is clear from the evidence that as supportive as their mother is, she is not sufficiently familiar with that culture to be able to teach them Yoruba, provide them with any information about Yoruba culture, or indeed cook egusi soup. Each of the boys made a point of saying how much they enjoy their father's African cooking; photographs in the bundle show them in Nigerian clothing; C2 speaks of how he plays in a team with other Nigerian boys; C1 is happy to be learning Yoruba from his father. It is an identity that they are proud of and connect to. Ms Jackson expresses concern that without their father's presence in the home their connection to that heritage will be weakened and challenged, and that would be to their detriment. It is a concern that I share. I am not satisfied that sporadic contact with their two second cousins in London, or telephone calls to their father, would be of sufficient proximity to compensate for that loss. Their mother would be in the difficult position of being a single white mother to three mixed race boys. Her ability to understand racism, or the challenges they might face growing up and going out into the world, is necessarily informed by her own experience. That is a matter that I have attached significant weight to.

49. The test is a high one, but as the Court of Appeal have now made clear, that does not necessarily mean that it will only be met rarely. The focus must be on the child in question but the test does not invite me to measure the harm to these children against some hierarchy of suffering caused to the children of all deportees. There is no baseline of ordinariness. Nevertheless I am satisfied that this ordinary family will suffer extraordinary pain and disruption if the Appellant were to be deported. Mr Whitwell is quite right to suggest that helping your sons with their homework or preparing dinner is just what fathers do, and that parliament plainly intended the measures in Part 5A to interfere with those roles where the public interest demands it. The particular circumstances of these children are however such that the 'standard' role played by their father has taken on additional, and

important, dimensions. In a difficult environment he offers them protection from very real harms experienced by other boys in their estate. As dual heritage boys he gives them their only real connection to one half of their identities, teaching them the language and culture of Nigeria. He is also best placed, as a black man himself, to help them navigate the challenges that they may face in society at large. All of these features of this family life mean that the parent-child relationship is here particularly close. For all of those reasons I am satisfied that it would be unduly harsh for these boys if he were to be deported. It follows that I need not explore any other issues arising under s117C(6).

Anonymity Order

50. The Appellant is a foreign criminal who should not ordinarily benefit from an order protecting his identity. I am however concerned that identification of the Appellant could lead to the identification of his British children. That would be contrary to their best interests. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Presidential Guidance Note No 1 of 2013: Anonymity Orders, and the *obiter dicta* of Underhill LJ at paragraph 6 of HA (Iraq), I consider it appropriate to make an order in the following terms:

> "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 his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decision

51. The appeal is allowed on human rights grounds.

52. There is an order for anonymity.

Upper Tribunal Judge Bruce
20th
December 2021