Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-003636
(HU/01492/2020); (PA/55273/2021)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 September 2022	**On 6 November 2022**

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O A
(ANONYMITY ORDER MADE)

Respondent

Anonymity

The original appellant (now the respondent) was granted anonymity by the First-tier Tribunal. Pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 we find that it is appropriate to continue the order because the case involves consideration of the welfare of young children. We make clear that the order is not made to protect the reputation of the appellant following his conviction for a criminal offence. No-one shall publish or reveal any information, including the name or address of the original appellant (OA), likely to lead members of the public to identify him. Failure to comply with this order could amount to a contempt of court.

Representation:

For the appellant: Mr T. Melvin, Senior Home Office Presenting Officer
For the respondent: Mr K. Wood of Immigration Advice Service Ltd.

DECISION AND REASONS

1. For continuity, we shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The original appellant (Mr OA) appealed the respondent's (SSHD) decision dated 15 August 2021 to refuse a protection and human rights claim in the context of deportation proceedings.

3. First-tier Tribunal Judge G. Clarke ('the judge') made the following findings:

   (i) The appellant had rebutted the presumption that he was a danger to the community for the purpose of section 72 of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) i.e. he could go on to consider the Refugee Convention ground.

   (ii) The appellant did not have a well-founded fear of persecution for one of the five reasons given in the Refugee Convention if returned to Nigeria i.e. the appeal was dismissed on the Refugee Convention ground.

   (iii) The appellant's removal to Nigeria would not breach Article 3 of the European Convention of Human Rights on health grounds.

   (iv) The appellant did not meet the private life exception to deportation under section 117C(4) NIAA 2002 with reference to Article 8 of the European Convention.

   (v) The appellant did meet the family life exception to deportation under section 117C(5) NIAA 2002 because it would be 'unduly harsh' on at least one of his children to continue family life in Nigeria (the 'go' scenario) or to remain in the UK without him (the 'stay' scenario) i.e. the appeal was allowed on human rights grounds.

4. The appellant did not apply for permission to appeal to the Upper Tribunal to challenge the negative findings summarised at (ii)-(iv) above. Those findings stand.

5. The respondent was granted permission to appeal to the Upper Tribunal to challenge the findings at (v) above. The First-tier Tribunal judge who granted permission stated that the grounds were arguable, but did not state why.

6. The Secretary of State's grounds make general submissions and cite a series of cases relating to deportation. Under the heading of 'Background' the grounds summarised the nature of the offence and the length of sentence. The second paragraph stated:

   '2. To avoid deportation, A must show how he can bring himself within one of the S117c (sic) Exceptions, as repeated in the Immigration Rules at

399 and 399A. In this instance, the appellant relies on his children residing in the UK. It is the SSHD's case is (sic) that it would not be unduly harsh for them to remain in the UK if the appellant is deported.'

7. Only after this paragraph is there a standardised heading of: 'Ground one: Making a material misdirection of law/failing to give adequate reasons for findings on a material matter.' The grounds go on to quote from a series of cases. The only part the grounds where a legal point about the First-tier Tribunal decision appears to be pleaded is at [10], which states:

> '10. It is submitted that the FTTJ's reasoning that the appellant's deportation would result in undue harshness for his daughter simply does not establish that the high threshold as set out in the established case law cited above, is made out. The FTTJ cites the local authority report which describes the appellant's relationship with [C], as a 'positive, strong attachment' [163], however it is submitted that this in no way reaches the unduly harsh threshold. The consequences for the appellant's other children were no (sic) found to be unduly harsh in the 'stay' scenario. It is submitted that the public interest in the appellant's deportation is not outweighed by his Article 8 rights, particularly in light of his conviction for assault on his step-daughter and the fact that the appellant is not considered to be a suitable carer and does not live with any of his daughters.'

8. On behalf of the Secretary of State, Mr Melvin sought to argue two broad points:

   (i) That the judge failed to make findings in relation to the 'stay' scenario in connection with the first two children (A and B).

   (ii) That the judge failed to give adequate reasons to explain why the situation of the third child (C) met the high threshold to show that deportation would be unduly harsh.

9. In response, Mr Wood accepted that the judge did not make findings relating to the 'stay' scenario for the first two children. He argued that this was immaterial to the outcome of the appeal because the judge directed himself to the correct legal test relating to the threshold and had made sustainable and rational findings relating to the effect of deportation on the third child.

Decision and reasons

10. The appellant had remained in the UK for many years unlawfully and would have been liable to removal even if he had not committed a criminal offence. Following his conviction for a serious assault on his teenage step-daughter, the appellant was sentenced to 33 months' imprisonment. The Secretary of State made a deportation order. In response, the appellant made a protection and human rights claim. The First-tier Tribunal dismissed the appeal in relation to most of the grounds raised by the appellant, but allowed the appeal with reference to the exception to deportation contained in section 117C(5) NIAA 2002 in relation to three of

his children. At the date of the First-tier Tribunal hearing on 15 February 2022 the appellant did not live with any of the children but had contact with them every week or two weeks. The third child (C) is the subject of a care order. The appellant is not deemed to be a suitable person to provide for her care although there was evidence before the judge to show that the local authority is seeking to encourage contact between father and child.

11. The first point made by Mr Melvin was not pleaded in the grounds. There was no application to amend the grounds or to seek permission to argue the point. He referred to paragraph 2 of the grounds, but this came under the heading of 'Background' and made a general statement about the respondent's view of the case. It did not particularise any argument with reference to the First-tier Tribunal decision.

12. Nevertheless, Mr Wood made a fair concession that the judge had failed to consider the 'stay' scenario in the case of the first two children. We also accept that this is the case. However, we will only set aside a decision if an error would have made a material difference to the outcome of the appeal. The Secretary of State's case relies on her success in the only ground of appeal that was actually pleaded, which related to the judge's findings regarding the effect of deportation on the third child.

13. The only part of the grounds of appeal that even attempted to make a legal point about the decision was paragraph 10 (as set out above). In our assessment this amounted to a general submission setting out the Secretary of State's view of the case and was nothing more than a disagreement with the outcome. At the hearing, Mr Melvin stopped short of arguing that the decision was irrational, which in any event was not pleaded in the grounds. Instead, he argued that the judge failed to give adequate reasons to explain why the high threshold was met to show that deportation would be unduly harsh on the third child.

14. The judge set out the details of each child and considered their situations in turn. The first and second children live with their respective mothers. The judge concluded that it would be unduly harsh to expect the children to continue their family life with their father in Nigeria, but failed to make any findings as to whether it would be unduly harsh for them to remain in the UK without him.

15. The findings relating to the 'go' scenario were open to the judge to make and have not been challenged. Nothing in the judge's summary of the evidence suggests that there were any compelling or compassionate circumstances relating to the first two children over and above the difficulties that would arise from not having physical contact with their father in the 'stay' scenario.

16. However, the situation for the third child was markedly different. At the date of the First-tier Tribunal hearing she was only five years old. He noted that she was the subject of a care order and quoted a letter dated 24

August 2021 from a social worker who worked for the relevant local authority.

17. The social worker confirmed that the child was in foster care. The appellant had regular contact with the child. The contact reports were positive and there was reported to be a 'healthy attachment in their relationship and good interactions observed by the supervisor'. The local authority was reviewing the contact arrangements with a view to increasing contact because the appellant 'seems to be an interested father and we intend to strengthen the relationship in the best interest of [C]'. The judge went on to cite an updated letter dated 11 January 2022, which appeared to be in similar terms.

18. The judge took into account the fact that the child was the subject of a care order. He noted that the local authority should be aware of the appellant's conviction for assaulting his step-daughter. Despite this, they were satisfied that supervised contact with the appellant was in the best interests of the child. The judge went on to note that there was a contact report for 29 May 2021, which was 'extremely positive in every area that was assessed by the social worker.' The judge went on to make the following findings:

> '162. Given the existence of a Care Order, I finder that [C] has experienced a certain amount of trauma in her life due to deficiencies in the parenting that she has been afforded by her biological parents to the extent that the Family Court has sought (sic) it necessary to grant a Care Order to the Local Authority. Neither the Appellant nor [C]'s biological mother are suitable carers for [C] and in my view it would be unduly harsh to require [C] to live in Nigeria with the Appellant. I also rely on the fact that [C} appears to be a British citizen and I rely on the fact that if she were uprooted to Nigeria, she would be taken away from school, family and friends and all the rights and privileges of being brought up in the United Kingdom.
>
> 163. Equally, I find that it would be unduly harsh for [C] to remain in the United Kingdom without the Appellant. It is clear from Social Services that her contact with the Appellant is a positive and there is a strong attachment and it is clearly in [C]'s best interests for this contact to continue. I attach significant weight to the fact that social services clearly believe that the continuation and development of such (sic)'

19. At [145]-[148] the judge directed himself to the correct legal principles relating to the test of 'unduly harsh' as set out by the Supreme Court in *KO (Nigeria) v SSHD* [2018] UKSC 53. The quote from [23] of that decision made clear that he understood that the test of 'unduly harsh' was a stringent one that went beyond the level of harshness one might expect that deportation would have on any child facing separation from a parent. At [153] the judge also reminded himself that 'the threshold of "unduly harsh" is an elevated one.'

20. The judge's citation of the case of *RA (s.117C; "unduly harsh"; offence; seriousness)* [2019] UKUT 123 was out of date because the case was the subject to an appeal to the Court of Appeal. The judge did not refer to the modification in approach set out by the Court of Appeal in the later case of *HA (Iraq) v SSHD* [2020] EWCA Civ 1176, which was linked to *RA (Iraq)*. That decision has since been upheld by the Supreme Court (*HA (Iraq) & Ors v SSHD* [2022] UKSC 22).

21. Given that the main thrust of the only ground of appeal is that the judge failed to give adequate reasons to explain why the stringent test was met, we find that the omission of any reference to *HA (Iraq)* is immaterial in circumstances where the case outlined a more flexible and child centred interpretation of the test outlined in *KO (Nigeria)*.

22. The appellant was remaining in the UK unlawfully at the date of the index offence. The offence involved an assault on his step-daughter. In the circumstances few would have sympathy for the appellant if he were deported, but the courts encourage a child-centred approach to the assessment under section 117C(5) NIAA 2002.

23. We have considered the evidence relating to the third child contained in the appellant's bundles. In light of that evidence we are satisfied that the judge gave adequate reasons to explain his findings. He set out the evidence in some detail. It was reasonable for him to infer that the fact that the child was the subject of a care order indicated that she had experienced a difficult start in life although the evidence did not explain the full background to the care proceedings. It was open to him to take into account the fact that the local authority considered that it was in the child's best interests to continue to have contact with her father and that it was a positive relationship.

24. The impact of removing a person who has a positive influence in the child's life, at a time when the local authority was tentatively encouraging increased contact, was obvious. Further disruption to a child who has already been found to need the protection of a care order could only have a profoundly negative impact on the child.

25. Although the judge's final paragraph is incomplete and appears to tail off, we are satisfied that he was fully aware of the stringent nature of the test and that he gave adequate reasons to explain why it was met with reference to the evidence. His findings were within a range of reasonable responses to that evidence.

26. The fact that the judge failed to make complete findings relating to the 'stay' scenario in relation to the other two children would not have made any material difference to the outcome of the appeal if his findings were sustainable in relation to the third child.

27. For the reasons given above, we conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The decision shall stand.

Signed M. Canavan Date 26 September 2022
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email