



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/13463/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 10 February 2021**

**Decision & Reasons Promulgated
On 10 March 2021**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HGI

aka HB

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

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

For the Respondent: Mr D Williams, David Williams Immigration and Nationality Consultancy

DECISION AND REASONS

**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.

1. This is a remaking of HGI's Article 8 ECHR appeal which was made in the context of deportation proceedings. This remaking follows my error of law decision issued on 12 November 2020 which set aside the decision of the First-tier Tribunal Judge issued on 9 January 2020 which allowed the appeal.
2. HGI (who has used an alias of HB for most of his time in the UK) is a national of Tanzania. He was born in 1981.
3. He came to the UK on 10 November 1997 at the age of 15 to join his mother who had claimed asylum. At that time the appellant and his family were claiming to be nationals of Rwanda. The asylum claim was refused but the family was granted exceptional leave to remain until 28 July 2003. On 30 June 2003, the appellant, together with his mother and siblings, was granted indefinite leave to remain (ILR).
4. Between October 2000 and December 2007 the appellant amassed an extensive criminal history including 12 convictions for 19 offences. The convictions included shoplifting, handling stolen goods, driving whilst disqualified and whilst uninsured, affray and damaging property and having a dog dangerously out of control. None of those convictions led to a custodial sentence. However, on 6 December 2007 he was convicted of possession/control of an article for use in fraud and sentenced to two years' imprisonment.
5. That conviction led the respondent to begin deportation proceedings against the appellant. On 18 March 2008 the appellant was issued with a decision to make a deportation order. He appealed against that decision but his appeal was dismissed on 25 July 2008 and he became appeal rights exhausted on 4 August 2008.
6. Throughout all of this criminal and immigration history, the appellant continued to maintain that he was a Rwandan national. However, following the refusal of his appeal in 2008, when the respondent attempted to get a travel document for him, the Rwandan authorities maintained that he was not known to them. The Rwandan High Commission eventually confirmed that the appellant's Rwandan ID card was a counterfeit. The appellant, however, continued to maintain that he was Rwandan, as did his mother in July 2010, when enquiries were made of her.
7. The respondent made further enquiries and, in 2012, the respondent concluded that the appellant was Tanzanian. However, an application to the Tanzanian authorities for a travel document was refused. Further correspondence with the Tanzanian authorities and litigation with the appellant followed. On 30 October 2018 the Tanzanian High Commission agreed to issue an emergency travel document to the appellant.
8. On 11 January 2019 the deportation order dated 1 September 2008 was withdrawn because it had been issued to the appellant in the false identity of HB. The appellant made further submissions on human rights grounds

as to why he should not be deported but on 30 July 2019 was issued with a notice of a decision to refuse a human rights application.

9. The appellant appealed against that decision and his appeal came before the First-tier Tribunal on 20 November 2019. As before, the First-tier Tribunal allowed the appeal in a decision dated 9 January 2020.
10. The respondent appealed against the decision of the First-tier Tribunal and, after a hearing on 19 October 2020, as before, on 12 November 2020 I found an error of law in the decision of the First-tier Tribunal and set it aside to be remade.
11. I was assisted in this matter by the skeleton arguments provided by both representatives and their agreement that the issue to be decided was narrow, concerning the exception set out in Section 117C(5) of the Nationality and Immigration Act 2002, that is, whether the appellant's deportation would result in unduly harsh circumstances for his son.
12. There was agreement about the basic facts of the appellant's relationship with his son, A. It was not disputed that they have a genuine and subsisting relationship and that the appellant has a parental role in his son's life. The child was born in 2015 when the appellant was in a relationship with his mother, H. The mother worked to support the family as the appellant was not permitted to do so. The appellant was the primary carer for the child until approximately March 2019 when the appellant and the child's mother separated. Since then, the child has lived with his mother during the week with the appellant seeing him at weekends and continuing to play an important role in his life.
13. Both parties referred to the recent case law from the Court of Appeal on the question of how to approach correctly an assessment of whether a child will face unduly harsh circumstances. The parties placed particular importance on the guidance of the Court of Appeal in HA(Iraq) v SSHD [2020] EWCA Civ 1176. In that case the Court of Appeal considered the correct approach referring to the guidance of the Supreme Court in the case of KO (Nigeria) v SSHD [2018] UKSC 53. There was a consensus that the learning of Lord Justice Underhill in paragraphs 51 to 57 was of particular importance:
 - "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.
54. The Appellants of course accept that Lord Carnwath said what he said in the passages to which I have referred. But they contend that it is not a complete statement of the relevant law and/or that it is capable of being misunderstood. In their joint skeleton argument they refer to the statement in para. 23 of Lord Carnwath's judgment that "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" and continue:
- "This statement, taken in isolation, creates the opportunity for a court or tribunal to reach a conclusion on undue harshness without due regard to the section 55 duty or the best interests of the child and without careful analysis of all relevant factors specific to the child in any particular case. Instead, such considerations risk being 'swept up' under the general conclusion that the emotional and psychological impact on the child would not be anything other than that which is ordinarily expected by the deportation of a parent ... that cannot have been the intention of the Supreme Court in *KO (Nigeria)*, which would otherwise create an unreasonably high threshold."
- Mr de Mello and Mr Bazini developed that submission in their oral arguments. In fact it comprises two distinct, though possibly related, points. I take them in turn.
55. The first is that what Lord Carnwath says in the relevant parts of his judgment in *KO* makes no reference to the requirements of section 55 of the 2009 Act and is likely to lead tribunals to fail to treat the best interests of any affected child as a primary consideration. As to that, it is plainly not the case that Lord Carnwath was unaware of the

relevance of section 55: see para. 15 of his judgment, quoted at para. 41 above. The reason why it was unnecessary for him to refer explicitly to section 55 specifically in the context of his discussion of Exception 2 is that the very purpose of the Exception, to the extent that it is concerned with the effect of deportation on a child, is to ensure that the best interests of that child are treated as a primary consideration. It does so by providing that those interests should, in the case of a medium offender, prevail over the public interest in deportation where the effect on the child would be unduly harsh. In other words, consideration of the best interests of the child is built into the statutory test. It was not necessary for Lord Carnwath to spell out that in the application of Exception 2 in any particular case there will need to be "a careful analysis of all relevant factors specific to the child"; but I am happy to confirm that that is so, as Lord Hodge makes clear in his sixth proposition in *Zoumbas*.

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.”

14. I also took into account the guidance from Lord Justice Jackson in paragraphs 151 to 163 of **HA (Iraq)** on the need to focus on the individual child and caution in “treating physical harm as intrinsically more significant than emotional harm”; see paragraph 156.
15. Both parties also focussed their submissions on the social work report dated 5 November 2019 of Ms Jane Bartlett. There was no dispute that Ms Bartlett is a qualified and experienced social worker and that she had the expertise to prepare such a report. The report sets out that Ms Bartlett was properly instructed. I noted that in paragraph 4.1 of the report Ms Bartlett set out the correct approach to the best interests of the child in these proceedings, those best interests being a primary and not a paramount consideration. That belies the suggestion in the respondent’s skeleton argument that she did not appreciate the correct role of the child’s best interests in the assessment that has to be conducted here as compared to the Family Courts.
16. The respondent’s view was the social work report was not capable of showing unduly harsh circumstances for the appellant’s child. Ms Bartlett set out in paragraph 3.5:

“He [the appellant] said that contact with his son happens now by arrangement. HB collects him each weekend so A can spend time with his family, especially J and I. A is now at pre-school on a Monday, Tuesday, Wednesday, in Oxford where C resides. H said A loves the train journey.”

The respondent maintained that the fact that the appellant no longer lives full-time with the child and his mother indicated that the appellant’s deportation was less likely to have an unduly harsh impact on A. The social work report showed harshness but could not show that the elevated threshold of undue harshness was met here. Where the evidence did not show undue harshness for the child, and where the public interest came back into the balance in the very compelling circumstances assessment, the appellant could not show that he could defeat the public interest in deportation.

17. For the appellant, Mr Williams maintained that the social work report did provide evidence capable of showing that the appellant’s child would face unduly harsh circumstances in the event that the appellant was to be deported. There was no dispute that the appellant had been the child’s primary carer until the age of 4. He had therefore formed particularly close bonds with his father, their strong relationship continuing now even though the appellant was no longer living full-time with his son. The strength of their relationship indicated that the appellant’s deportation was likely to be unduly harsh for his son.
18. Mr Williams submitted that the social work report supported the statements from the appellant, his ex-partner and her family as to the

appellant being a very good father to his son and being a very important figure in his life. The partner stated, for example, recorded in paragraph 3.8 of the social work report, that the appellant “has a brilliant relationship with A”. There was no dispute that the appellant had continued to play a strong role in his child’s life after the couple had separated.

19. Ms Bartlett’s view, after interviewing the adults who knew A best and also spending time with A, was that the child would experience “fear, distress and separation from the familiarity of his routines” if the appellant were deported; see paragraph 4.5. Ms Bartlett went on to indicate in paragraph 4.6:

“Should HB have to leave the UK and relocate to another country, the emotional security of his son will be disrupted, because he would lose their relationship as he knows it, including any direct contact.”

In paragraph 4.7 and 4.8 Ms Bartlett stated:

“He is observed to be securely attached to his father who has been his joint primary carer; A will know that he is safe when he senses his father’s touch, when he looks for him and hears his voice. Should his father suddenly disappear from his life he will suffer symptoms of physical and emotional loss, leading to confusion and anguish. He will not understand these emotions but will suffer the loss physiologically and emotionally.”

20. Ms Bartlett also identified that the appellant’s ex-partner had “invested many years in their relationship, trusting him with the full-time care of her son” and that her mental state would deteriorate in the event of the appellant’s deportation, she would “experience a significant increase in levels of anxiety and stress as a result” and that this could have an additional negative impact on the child.

21. Throughout the report, Ms Bartlett stressed the importance of the fact that the appellant was the primary carer for the child during the formative years between birth and 4 years old. In paragraph 4.9 of the report she indicated that she considered it “crucial” that the child retained the security of his father’s presence. Ms Bartlett concluded in paragraph 5.3 of the report:

“A needs stability in his world and continuity of care by his primary carers to whom he is securely attached, to protect him from the consequent psychological harm he would likely experience should his father be made to return”.

22. The parties disagree as to whether Ms Bartlett’s report shows that the appellant’s deportation would lead to unduly harsh circumstances for the appellant’s child. I must make that assessment now. Ms Bartlett considered it of particular importance that the appellant was A’s primary carer for the first four years of the child’s life. Her view was that this meant that the appellant was a particularly strong presence in A’s life. This appeared to me to be significant factor. The evidence was that the appellant continues to have a significant relationship with the child even though he is not living with him full-time. The child is still young and highly

vulnerable to the effects of separation from his father. There is no question but that his best interests are served by his father remaining in the UK in order to continue the strong relationship that they have established. I also placed weight on the comments of Ms Bartlett on the difficulties the appellant's ex-partner will experience if the appellant were to be deported and how this would add to the child's difficulties. Ms Bartlett found the appellant's presence to be "crucial" to his son because of these factors. It is therefore my conclusion that for this particular child, because of the nature of his relationship with his father and the additional negative impact arising from the difficulties of his mother in the event of the appellant's deportation, the threshold of undue hardship is met. Where the appellant has shown that he comes within the provisions of Section 117C(5) of the 2002 Act the appeal under Article 8 ECHR must be allowed.

Notice of Decision

23. The appeal is allowed under Article 8 ECHR.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 3 March 2021