



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/18781/2019

THE IMMIGRATION ACTS

Heard at Field House  
On 16 November 2021

Decision & Reasons Promulgated  
On 03 December 2021

Before

THE HONOURABLE MR JUSTICE C G BOURNE  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TE  
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer  
For the Respondent: Mr J Dhanji, Counsel instructed by Irving & Co Solicitors

## 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 an appeal against the decision issued on 8 July 2021 of First-tier Tribunal Judge Colvin which allowed TE's Article 8 ECHR appeal brought in the context of deportation proceedings.
2. For the purposes of this decision, we refer to the Secretary of State for the Home Department as the respondent and to TE as the appellant, reflecting their positions before the First-tier Tribunal.

### Background

3. The appellant is a citizen of Nigeria, born on 12 June 1970. He is now 51 years old.
4. The appellant claims to have entered the UK in 1999 using a false passport.
5. On 19 February 2004 the appellant was convicted of driving a motor vehicle with excess alcohol, using a vehicle whilst uninsured and driving otherwise than in accordance with a licence. He was disqualified from driving for sixteen months, his driving licence was endorsed and he was ordered to pay fines.
6. On 22 February 2007 the appellant was convicted of driving a motor vehicle with excess alcohol, driving otherwise than in accordance with a licence and using a vehicle while uninsured. He was disqualified from driving for thirty-six months, his driving licence was endorsed and he was fined.
7. On 11 May 2007 the appellant was convicted of driving whilst disqualified and using a vehicle whilst uninsured. He received a suspended term of two months' imprisonment, was disqualified from driving for two years, received an order for 120 hours unpaid work, his driving licence was endorsed and he was fined.
8. On 20 December 2007 the appellant was convicted of driving whilst disqualified, using a vehicle while uninsured and taking a motor vehicle without consent. He was sentenced to three months' imprisonment and the suspended term of imprisonment for two months imposed on 22 February 2007 was activated. His driving licence was endorsed and he was fined and ordered to pay costs.
9. In light of these offences, on 29 January 2008 the respondent considered the appellant's situation but decided not to pursue deportation.

10. Meanwhile, on 11 May 2007 the appellant had applied for leave to remain as the unmarried partner of a British national, AW. This application was refused on 3 June 2008. On 6 July 2010 the appellant and AW's daughter, O, a British national, was born.
11. On 23 December 2011 the appellant applied for leave to remain outside the Immigration Rules on compassionate grounds on the basis of his relationships with AW and O. On 28 January 2013 he was granted leave to remain until 28 July 2015 on this basis. On 25 April 2015 the appellant applied to extend this leave. On 27 October 2015 he was granted further leave to remain until 27 April 2018.
12. On 25 April 2018 the appellant applied for further leave to remain on Article 8 ECHR grounds.
13. On 23 November 2018 the appellant was convicted of acquiring, using or possessing criminal property. He was sentenced the same day to twelve months' imprisonment.
14. On 3 January 2019 the appellant was notified of a decision to make a deportation order. On 18 January 2019 the appellant made submissions on an Article 8 ECHR claim.
15. The appellant's human rights claim of 25 April 2018 was refused on 5 November 2019. The appellant appealed against that decision to the First-tier Tribunal on Article 8 ECHR grounds.

#### First-tier Tribunal Decision

16. The appeal came before First-tier Tribunal Judge Colvin on 7 April 2021 and 30 June 2021. In her decision dated 8 July 2021 Judge Colvin found that the appellant met the Exception to deportation set out in Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) as his deportation would be unduly harsh for his daughter, O. She also found that the appellant had shown very compelling circumstances that outweighed the public interest.
17. By the time of the hearing before the First-tier Tribunal, further evidence had been provided on the appellant's family circumstances. Prior to coming to the UK in 1999, the appellant had been in a common law marriage with FE and had a child from that relationship, P, born on 7 August 1998. FE and P came to the UK in either 2006 or 2008. The appellant continued to live with AW and O until approximately 2013 or 2014 when he returned to live with FE. The appellant remained on good terms with AW and played an active role as a father to O. On 24 July 2015 the appellant and FE had twins, C and F.
18. Judge Colvin identified that the key issue in the appeal was whether it would be unduly harsh for O were the appellant to be deported as provided in s.117C(5) of the 2002 Act. She set out the appellant's evidence in paragraphs 4 to 14 of the decision and the evidence of AW in paragraphs 15 to 17. AW told the First-tier Tribunal:

- “15. ... The appellant is a good father to his children. He has always kept in close contact with O and they love each other very much. He is very involved in every aspect of her life and cares deeply for her wellbeing. He has regular contact with her at least three times a week during school term. He attends all parents’ evenings, assemblies, school sports days and church services related to the school. He plays a huge role in her life. They visited together the appellant in prison about five times and these visits were important for her. She goes to stay with the appellant and his family during the school holidays. This is a very happy time for O and she looks forward to it. If the appellant was deported she does not see how he would be able to sustain an amicable relationship with O and she believes that this would be a tragedy for her. She suffers from eczema which can flare up at any time particularly when she is emotionally stressed and has had ongoing visits to a dermatologist. She would not agree to O travelling to Nigeria on her own. She is unsure whether she could handle and afford to travel with her even if it was safe.
16. In oral evidence-in-chief she confirmed that she and the appellant have an amicable relationship and that he is a good father whom O adores. He supports her in everything she does. She initially did not tell O where her father was when he went to prison but she was very upset when she did. They visited him in prison when O was overjoyed to see him. She felt a bit lost during this time that he was in prison being not ‘quite herself’ as she had been used to seeing him three or four times a week. Her eczema became more exacerbated during this time. She thinks it would be devastating for O if her father is deported. She would really like him to be here when she starts her new secondary school. It is highly unlikely that they would visit the appellant in Nigeria: she would consider doing so only if it was the ‘only choice’.
17. In cross-examination she said that she knew the appellant’s criminal case was to do with fraud and money being put into his account which she did not know had been obtained fraudulently. She herself works part-time from home. The appellant pays regular child maintenance of £120 per month. He came to visit them last Sunday and possibly on Thursday before. She is not in a relationship. She had no help whilst the appellant was in prison. O has ongoing appointments for eczema. She herself would be devastated not to have the emotional support of the appellant. She feels that O is quite vulnerable and he supports them both.”.
19. The judge began her assessment of the whether the “unduly harsh” test was met in paragraphs 38 to 39:
- “38. The only qualifying child in this case is [O] born to the appellant and [AW]. She is now just a few days short of her 11<sup>th</sup> birthday. She has always lived with her mother. The appellant says that he lived with this family unit from [O]’s birth in 2010 until 2013 or 2014 and thereafter has made regular visits including sometimes staying over. It has been accepted by the respondent in the past that the appellant has a genuine relationship with this child when two applications for leave to remain were granted in 2013 on the basis of his relationship with the child and the child’s mother, [AW] and in 2015 on the sole basis of his relationship with [O]. It was also accepted by the respondent at a previous adjourned hearing that this continues to be the case. It is therefore reasonable to

say that the appellant's genuine relationship with this daughter has been recognised for the past eleven years since her birth.

39. The evidence before me from the appellant, [AW] and [O] herself refers to the strong attachment between the appellant and this child and the practical arrangements that support to maintain this despite not living in the same household. This evidence is set out above in some detail above. In short, the appellant sees [O] every three to four days at her home with her mother, he attends the parents' evenings at the school and supports her financially. I also accept the evidence that [O] is part of the appellant's family life spending time with his other children, her half-siblings. This was confirmed by the appellant and [AW] and also by [FE] in her email to the Tribunal when she says that [O] is loved by herself and her own children as part of their family. [O]'s own evidence is that she sees her father about three times a week and more in the school holidays. She looks forward to seeing him and also playing with the twins when she visits his home. She was clear that if he was deported she would no longer have a father in her life. It was [AW]'s evidence that it is highly unlikely that [O] would visit the appellant in Nigeria on her own and she was unsure that she herself could 'handle and afford' to travel there even if it was safe to do so."
20. In paragraphs 40 and 41 the First-tier Tribunal set out extracts from the leading cases on the correct approach to an assessment of unduly harsh circumstances for a child, referring to KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, HA (Iraq) v Secretary of State for the Home Department [2020] HRLR 21 and KB (Jamaica) v Secretary of State for the Home Department [2020] EWCA Civ 1385. It is expedient to point out here that in her oral submissions Ms Cunha accepted that the judge referred herself to the correct case law and principles.
21. The judge set out her conclusions in paragraphs 42 and 43 of the decision:
  42. I consider that [O]'s age of 11 is an important factor in this case when assessing the impact on her of the appellant being deported. She has known him as a relatively hands-on father for all her life. She is soon to be moving to secondary school with all that that implies in terms of new challenges and growing up. In her own words she expressed her emotional dependency on her father even if she needed to use the 'vehicle' of her dog as an example. There is no doubt that she enjoys a significant family relationship with her half-siblings and although this might continue even if the appellant was deported that is perhaps less sure than if he remains in the country. I find the likelihood of her visiting her father in Nigeria is low for the reasons given by her mother, [AW], as referred to above.
  43. After careful deliberation I have reached the view that the appellant's deportation is reasonably likely to be particularly difficult and unduly harsh on [O] given her age and her close ties with her father. She would be deprived of the opportunity of growing up during her secondary school and teenage years with a father in her life after he has been actively in her life for the past eleven years. Although there is no expert report before me it is the opinion of [O]'s mother that she is quite a vulnerable child that has suffered significant eczema in the past particularly when stressed requiring treatment from a dermatologist. It is on taking account of all of this evidence that I not only find that it is

unquestionably against [O]’s best interests to have her father removed from her life at this age but I consider that it would be unduly harsh for this to be the case and not just merely harsh. Accordingly I am satisfied that Exception 2 Section 117C(5) of the 2002 Act is satisfied in this case”.

22. The First-tier Tribunal went on in paragraphs 44 to 47 to find that the appellant had shown very compelling circumstances over and above the provisions of s.117C(4) and (5) such that the appeal should also be allowed on this basis.

### Submissions

23. The respondent’s grounds maintained that although the First-tier Tribunal had set out the relevant case law, the correct threshold for a finding of undue harshness had not been applied to the evidence and inadequate reasons had been given for finding that deportation would be unduly harsh for O. The judge had not found that AW had been unable to cope whilst the appellant was in prison, the appellant did not live with O and AW had family who could offer support. AW had accepted that she and O could visit the appellant in Nigeria if this was the only way for O to see the appellant. The error of law in the unduly harsh assessment also infected the finding on very compelling circumstances.
24. The respondent’s skeleton argument dated 18 October 2021 maintained the challenges on the basis of a failure to apply the correct test and inadequate reasoning. The decision did not set out sufficient reasons explaining how the high threshold for a finding of undue hardship was made out on the evidence. The skeleton argument maintained that “Despite identifying the relationship between the respondent and his child and the fact that she would be upset at losing the presence of her father as she grows there is little else in the findings to suggest that this is an unduly harsh situation.” The skeleton argument also referred in paragraph 6 to a rationality challenge.
25. In her oral submissions Ms Cunha clarified that there was no rationality challenge and confirmed that the respondent did not consider that no reasonable decision maker could reach the conclusion that this judge did on the basis of the evidence before her. Her submission was that although the judge had set out the correct legal test she had not applied it correctly as she had not provided reasons capable of showing that the high threshold was met. The description of the elevated test set out in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) had been approved by the higher courts:

“... 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 additional adverb “unduly” raises an already elevated standard still higher.”

The factors relied upon by the judge showed only that there would be undesirable circumstances for O rather than unduly harsh circumstances.

26. Mr Dhanji relied on his Rule 24 response. He submitted that there was no dispute that the judge had directed herself to the correct law and was aware of the elevated threshold for a finding of unduly harsh circumstances. He submitted that she had applied the law correctly and with care to the evidence before her. He accepted that the decision may have been a generous one but Ms Cunha had been clear that there was no rationality challenge. Where those matters were so, it was not open to the Upper Tribunal to find an error, the higher courts having set out consistently that that this would not be appropriate unless there was a clear misdirection in law. He rightly cautioned this Tribunal against allowing an appeal merely because it considers that it might have reached a different conclusion on the facts, short of a finding of perversity.
27. Mr Dhanji also referred us to paragraph 56 of HA (Iraq):
- “56. ... 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”.
28. Mr Dhanji submitted that Judge Colvin’s assessment in paragraphs 38, 39, 42 and 43 of her decision was lawful where the factors she relied upon were amongst those identified by the Court of Appeal in HA Iraq as being potentially relevant to an assessment of undue harshness. The judge had before her the evidence of the appellant and AW that O would be “devastated” if the appellant were not present and that O was “quite vulnerable” and that the appellant “supports them both”. It was open to the judge to place particular weight on the appellant’s age, the degree of her emotional dependency on her father, her vulnerability, her eczema and the diminution of her family life with her siblings in the event of the appellant’s deportation. Judge Colvin was clearly aware of the respondent’s case: see paragraphs 23 and 24 of the decision.

### Discussion

29. When making our decision on error of law we were assisted by the guidance of the Court of Appeal in Lowe v Secretary of State for the Home Department [2021] EWCA Civ 62. Lowe also concerned the deportation of a foreign national criminal. As here, the appeal was allowed by the First-tier Tribunal and appealed by the respondent to

the Upper Tribunal. In paragraphs 28 to 31, McCombe LJ set out the correct approach to an appeal against a first instance decision:

- “28. Importantly, as *Kamara* shows, decisions of the present character made by the fact finding tribunal are ‘broad evaluative decisions’. In his skeleton argument, Mr Pilgerstorfer submitted (in para. 24) that the appellate Court is in as good a position as the first instance judge to appraise whether the facts found and relied upon meet the legal standard. In my judgment, that submission was contrary to authority, and, with respect to Mr Pilgerstorfer, when confronted by the court with the possibility that the submission was incorrect, he qualified the submission in a manner to which I will return. Yet again, the well-known judgment of Lewison LJ in *Fage UK Ltd. v Chobani UK Ltd.* [2014] EWCA Civ 5 at [114] is relevant.
29. At [114] – [115], Lewison LJ explained the caution to be exercised by appellate courts in interfering with evaluative decisions of first instance judges. Para. [114] is particularly well known, but para. [115] is also of relevance to the present case. The Lord Justice said this:
- ‘114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva Plc* [1997] RPC 1 ; *Piglowska v Piglowski* [1999] 1 WLR 1360 ; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325 ; *Re B (A Child) (Care Proceedings)* [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:
- i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
  - ii. The trial is not a dress rehearsal. It is the first and last night of the show.
  - iii. Duplication of the trial judge’s role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
  - iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.



- v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
- vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] 2 WLR 210; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135'.

- 30. In this case, the FTT had determined the issues that were before it, being those which were regarded as being central to the question of whether the Appellant had demonstrated the relevant 'very significant obstacles'. It was not necessary for the FTT to deal with a case that was not being made by the Respondent. The appeal to the FTT was 'the first and last night of the show', not a 'dress rehearsal'.
- 31. Equally, it is to be recalled that judgments at first instance are necessarily an incomplete impression made upon the judge by the primary evidence. This FTT judge reached the conclusion that he did on the issues raised and he expressed himself succinctly on them. This is what Lord Hoffmann said on the point in the well-known passage of his speech in the House of Lords in *Biogen Inc. v Medeva plc* [1997] RPC 1 at 45:

'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation...''.

- 30. With this guidance in mind, we concluded that the decision of the First-tier Tribunal that the appellant succeeded as s.117C(5) was met was generous but not wrong in

law. We appreciate the difficulty for the parties in cases such as this, given the evolving case law on the correct approach to an unduly harsh circumstances assessment and the absence of “a baseline of ‘ordinariness’” to assist in deciding whether the requisite threshold is met. However, the respondent has conceded that the First-tier Tribunal judge directed herself correctly to the legal test to be applied. The penultimate sentence of paragraph 43 indicates that the judge had the elevated threshold directly in mind as she reached her conclusion on undue harshness. The First-tier Tribunal heard the evidence of the witnesses, including that of AW that she and O would be “devastated” if the appellant was deported. There was no serious credibility challenge to the witnesses. The judge placed weight on legitimate factors, in particular the child’s age and the closeness of her relationship with her father. It is well-understood that weight is a matter for the judge. The reasoning in paragraphs 42 and 43 is clear and shows why the appeal was allowed. The respondent accepts that the decision was not irrational.

31. We therefore concluded that the finding of undue harshness was lawful and that the appeal was allowed correctly on that basis. That being so, it was unnecessary to address the challenge to the findings under s.117C(6).

### **Notice of Decision**

32. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed: *S Pitt*  
Upper Tribunal Judge Pitt

Date: 24 November 2021