



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20913/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House
On 20 May 2021
(remote hearing)

Decision & Reasons Promulgated
On 2 June 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUWAFEMI EBENEZER JNR OLAPADE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

For the Appellant: Mr Clarke, Senior Home Office Presenting Officer

For the Respondent: Mr Byrne, Counsel instructed by Visa Inn Immigration
Specialists

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

1. I will refer to the parties as they were designated in the First-tier Tribunal.

Background

2. The appellant is a citizen of Nigeria born on 18 June 1976. He entered the UK in 2013 as a visitor, with leave until 18 January 2015. He did not leave when his visa expired.
3. On 2 March 2016 he applied for leave to remain in the UK on the basis of his family life with a British partner and his son ("JO"), who is a British national born on 5 May 2015. He was granted leave until 22 January 2019.
4. On 24 April 2017 the appellant was convicted of a serious driving offence.
5. On 21 January 2019 the appellant applied for further leave to remain on the basis of his family life with his partner and JO.
6. On 24 July 2019 he was convicted of affray and, on 3 September 2019, sentenced to 12 months imprisonment.
7. On 13 September 2019 the appellant was served with a decision to make a deportation order against him under section 32(5) of the UK Borders Act 2007. The appellant, in representations made on 1 October 2019, argued that his deportation would violate article 8 ECHR. On 11 December 2019 the respondent served a deportation order on the appellant along with an appealable decision refusing his human rights claim. The respondent's decision also stated that it was not accepted that the appellant had a derivative right to reside in the UK under EU law as the primary carer of JO.
8. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Swaney ("the judge"). The judge's decision, which was promulgated on 30 one July 2020, is now being appealed by both parties.

Decision of the First-tier Tribunal

9. The judge found that the appellant, since his release from immigration detention on 10 March 2020, has been living with JO, his former partner (who is JO's mother) and his former partner's daughter from a previous relationship ("AC"). AC was 14 at the time of the hearing.
10. The judge described the relationship between the appellant and his former partner as being "an on again and off again relationship".
11. The judge found that the appellant is actively involved in caring for both JO and AC. With respect to the relationship between the appellant and AC, the judge found that the appellant is an important figure in AC's life and that AC

regards him as being as important in her life as her biological father (who lives in Zimbabwe).

12. The appellant relied on an independent social worker report by Ms Austin, that was prepared whilst the appellant was in prison (with the appellant participating by telephone). The judge identified inconsistencies in Ms Austin's report, and found that she overstated the likely impact of the appellant's deportation on the ability of the appellant's former partner to provide for her children. The judge stated that she could place "some weight" on the report.
13. The judge addressed two distinct legal questions: firstly, whether the appellant has a derivative right to reside in the UK under regulation 16(5) of the Immigration (EEA) Regulations 2016 ("the 2016 Regulations"); and secondly, whether his removal would violate article 8 ECHR.
14. With respect to the 2016 Regulations, the appellant argued that he has a derivative right to reside in the UK pursuant to regulation 16(5) because he and his former partner are the joint primary carers of JO and JO would be unable to reside in the UK if they both left for an indefinite period.
15. The judge rejected this interpretation of regulation 16(5). Relying, *inter alia*, on *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09), *Chavez-Vilchez v Raad van bestuur van de Sociale verzekeringsbank* (Case C-133/15) and *Patel v Secretary of State for the Home Department* [2019] UKSC 59, the judge found that the relevant question under regulation 16(5) was not whether JO would need to leave the UK if, hypothetically, both his parents were to do so, but rather whether he would in practice be compelled to leave the UK as a consequence of the appellant being removed. The judge found that JO has a stronger bond with his mother than with the appellant and that in the event of the appellant leaving the UK JO would remain with his mother in the UK. He therefore would not be compelled to leave the UK.
16. With respect to article 8 ECHR, the judge directed herself to apply the framework in section 117C of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act").
17. Applying section 117C(5), the judge found that both JO and AC are qualifying children and that the appellant had a genuine and subsisting relationship with them.
18. In paragraph 59 the judge directed herself that the test under section 117C(5), where a person subject to deportation has a genuine and subsisting relationship with a qualifying child, is whether the effect of deportation on that child is "unduly harsh". In paragraphs 61 and 62 the judge again referred to the test of undue harshness, citing the relevant Supreme Court authority

KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53. In paragraph 71 the judge concluded that the effect on AC would be unduly harsh.

19. However, in paragraph 60 the judge stated that she needed to consider whether it was unreasonable to expect JO and AC to remain in the UK without the appellant, and in paragraph 66 a test of reasonableness was again referred to.
20. The judge found that the effect of the appellant's deportation would not be unduly harsh for JO but would be for AC. The main reason the judge gave for finding that the unduly harsh threshold would be met in respect of AC was that she would suffer emotional harm from the cumulative effect of being separated from her biological father (who lives in Zimbabwe) and the appellant.

Grounds of Appeal

21. The respondent sought, and was granted, permission to appeal. The appellant was subsequently also granted permission to appeal.
22. The respondent's grounds of appeal argue that the judge's finding that the effect of the appellant's deportation on AC would be unduly harsh was inadequately reasoned and did not come close to demonstrating the severe or bleak outcomes envisaged in established case law. Reliance was placed on *LE (St Vincent And the Grenadines) v The Secretary of State for the Home Department* [2020] EWCA Civ 505 and *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213, as well as *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), where it was said at paragraph 46:

"By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

23. It is also argued by the respondent that the judge failed to take into consideration the ability of AC's mother to successfully look after her children on her own as she has done for the majority of their lives.
24. The appellant's grounds argue that:
 - a. The judge, when evaluating undue harshness with respect to JO, failed to consider the difficulties JO's mother would have in affording to visit the appellant in Nigeria, given that she would still need to travel to

Zimbabwe to visit AC's father; and failed to consider the impact on JO's education.

- b. The judge misapplied regulation 16 of the 2016 Regulations by failing to recognise that their meaning is clear: a person is entitled to a derivative right of residence where he is one of two parents sharing responsibility for a child and the effect of both those parents leaving the UK would be that the child would be unable to reside in the UK. The grounds contend that the CJEU case law relied upon by the judge is irrelevant as it represents the minimum level of protection required by article 20 TFEU and there is nothing preventing the 2016 Regulations from providing a more permissive and generous framework.

Regulation 16(5) of the 2016 Regulations

25. Prior to the hearing, Mr Clarke applied for permission to cite an unreported Upper Tribunal decision which was promulgated on 2 February 2021: *SSHD v Velaj* HU/12362/2017. *Velaj* is a decision by an Upper Tribunal panel which addressed the same arguments made by the appellant in respect of regulation 16(5). It sets out cogent reasons (with which I agree) as to why regulation 16(5) should be given a purposive interpretation consistent with CJEU jurisprudence. However, I do not need to consider Mr Clarke's application, or the appellant's ground of appeal in respect of regulation 16(5), because Mr Byrne stated that in the light of the panel's analysis in *Velaj* he was no longer pursuing this ground.

The effect of the appellant's deportation on AC

26. The issue for the judge to determine was whether the effect of the appellant's deportation on AC would be unduly harsh under section 117C(5) of the 2002 Act.
27. Mr Clarke submitted that it is not possible to be satisfied that the judge applied the test of undue harshness under section 117C(5) because although reference is made in the decision to undue harshness, at paragraphs 60 and 66 the judge referred to reasonableness, which indicates that she may have had in mind section 117B(6) of the 2002 Act, which is applicable only where a person is not liable to deportation, rather than section 117C(5), which applies in cases such as this involving foreign criminals. Mr Clarke also argued that the judge's failure to refer to *MK (Sierra Leone)* - or to harshness denoting something severe or bleak - reinforces that the judge did not apply the correct threshold.
28. Mr Clarke also submitted that the reasons given by the judge were insufficient and did not support the conclusion that the effect on AC of the

appellant's deportation would be unduly harsh. He argued that the judge failed to take into account that the appellant had resided with AC for only a brief period of time and did not make any findings on how AC's education (or life) would be negatively impacted. He argued that the judge needed to take into account, when considering the effect on AC, her finding that the appellant's former partner would be able to manage without him, as she had done for most of the children's life. He also highlighted the criticisms in the decision of the independent social worker, whose report, he argued, could not properly be relied upon because of fundamental mistakes about when the appellant and his former partner lived together.

29. Mr Byrne acknowledged that the judge mistakenly referred to reasonableness but argued that this was no more than a slip. He noted that undue harshness was mentioned in paragraphs 59, 61, 62 and 71. He submitted that paragraph 71 demonstrates that the test of undue harshness was applied as it is explicitly stated in that paragraph that the judge was satisfied that the effect on AC of the appellant's deportation "would be unduly harsh". Mr Byrne argued that the judge did not need to refer to *MK (Sierra Leone)* or use the words "severe" or "bleak" as it was sufficient that she referred to *KO (Nigeria)*.
30. He also argued that the reasoning in the decision was adequate as the judge identified the basis for her findings, and explained the particular circumstances of AC that gave rise to undue harshness, which was the cumulative effect of separation from the appellant after already having been separated from her biological father.
31. I am satisfied that the judge did not fall into any of the errors raised by the respondent, for the following reasons:
 - a. First, although the judge referred in paragraphs 60 and 66 to reasonableness, it is plain, when considering paragraphs 59 - 71 as a whole, that the judge was aware that the applicable test was undue harshness and that she applied this test. Paragraph 71, in particular, leaves no doubt that the judge considered, in respect of AC, whether the effect on her would be unduly harsh. I do not accept, therefore, that the judge applied the wrong test.
 - b. Second, I do not accept that the judge failed to appreciate that undue harshness is a high threshold or erred by not referring to *MK* (or the references therein to harsh being severe or bleak). Having cited *KO*, which is a 2018 Supreme Court authority, there was no need for the judge to quote from a 2015 Upper Tribunal decision. The judge at paragraph 61 stated that it was held in *KO* that "the unduly harsh test is whether the consequences for the child will be inordinately or excessively harsh taking into account all of the circumstances". This

clearly indicates that the judge was aware that there is a high threshold.

- c. Third, the judge gave adequate reasons to explain why she concluded that the undue harshness threshold was met in the case of AC. The judge considered the length of time AC has known the appellant, the nature of their relationship, the stage of AC's life, and – most significantly – the effect on her of effectively losing a second father figure. The judge stated at paragraph 71 that it was the likely impact of losing a second father figure that (just) persuaded her that the effect would be unduly harsh. The judge also distinguished between AC and JO. In respect of JO, she focused on the ability of the appellant's former partner to cope without the appellant and meet his needs. This was entirely appropriate given his young age. In contrast, in respect of AC, the judge focused on the emotional impact. This indicates that the judge undertook a case specific approach looking at the reality of the situation for AC. In so doing, the judge was approaching the case consistently with recent Court of Appeal authorities. As explained in paragraph 22 of *TD (Albania) v Secretary of State for the Home Department* [2021] EWCA Civ 619:

“The decision in *HA (Iraq)* does no more than explain that what is required is a case-specific approach in which the decision-maker addresses the reality of the child's situation and fairly balances the justification for deportation and its consequences.”

The effect of the appellant's deportation on JO

32. As I have upheld the judge's decision in respect of AC it is not necessary to determine whether she erred in respect of JO. That said, I am satisfied that the judge did not err. She gave clear reasons to explain why she found that the appellant's former partner would be able to successfully meet JO's needs and facilitate the maintenance of his relationship with the appellant. She was entitled, for these reasons, to conclude that the effect on JO of the appellant's deportation would not meet the unduly harsh threshold.

Conclusion

33. The judge, when assessing the effect on AC and JO of the appellant's deportation, applied the correct legal test, took into account all of the material evidence and made findings, specific to each of them, that were supported by reasons. Caution must be exercised before interfering with evaluative decisions of first instance judges (see, for example, *Lowe v The Secretary of State for the Home Department* [2021] EWCA Civ 62) and, although I am in no doubt that many judge's would have reached a different conclusion about whether

the unduly harsh threshold was met in respect of AC, I am not satisfied that there is a basis to disturb the evaluative decision of the judge in this case.

Decision

34. The decision of the First-tier Tribunal did not involve the making of an error of law and stands.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan

Dated: 21 May 2021