Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/25771/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 November 2018	**On 04 December 2018**

Before

UPPER TRIBUNAL JUDGE KEKIĆ
HER HONOUR JUDGE EADY QC (sitting as a Judge of the Upper Tribunal)

Between

SA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O Ngwuocha of Carl Martin Solicitors
For the Respondent: Mr P Deller, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the resumed hearing of the appeal in this matter. By her Decision promulgated on 10 September 2018, Upper Tribunal Judge Kekić found that there had been a material error of law in the determination of First-tier Tribunal Judge Swaniker (promulgated 23 January 2018) and set aside that decision. Specifically, it was held that the First-tier Tribunal ("the FtT")

had failed to give proper consideration to the factors set out by section 117C **Nationality, Immigration and Asylum Act 2002** ("the 2002 Act") and Judge Kekić directed that this task should be carried out afresh at the resumed hearing of this appeal. In giving her Decision of 10 September 2018, Judge Kekić also made an anonymity order.

2. Pursuant to the case management directions given for the resumed hearing, those acting for the appellant had lodged a further bundle of documents, which included up-dated statements from the appellant and from his wife (AA) and stepson (J). AA and J attended to give evidence at the resumed hearing and confirmed their statements; their evidence was not challenged. In reaching our decision at this hearing, we have had regard to those statements and the additional documentary evidence provided, along with the First-tier Tribunal's decision and all the previous evidence served in this matter. We have also taken into account the submissions made to us today, as summarised below.

The Background

3. The Appellant is a Nigerian national, born on 11 January 1960 (although various other dates of birth have also been recorded at different times). He challenges the decision of the Respondent to refuse to revoke a deportation order made against him on 8 January 2009, under section 32(5) **UK Borders Act 2007** ("the 2007 Act") and the determination of FtT Judge Swaniker, dated 31 January 2018, dismissing his appeal on article 8 **ECHR** grounds.

4. In setting aside the decision of FtT Judge Swankier, UT Judge Kekić noted that no challenge had been made to a number of findings made by the FtT, which were duly preserved, as recorded at para 26 of the Upper Tribunal Judgment; relevantly:

   (i) The appellant has a poor immigration and criminal history. He was first deported from the UK on 25 January 2000, having been convicted of a number of criminal offences in the UK. He re-entered the UK illegally on 12 August 2003, was detained and served with illegal entry papers and removed from the UK on 18 October 2003. On 17 May 2008 he was encountered at Gatwick airport with a false immigration stamp, attempting to re-enter the UK in breach of his deportation order and, on 6 June 2008, he was convicted of "possession of another's false or improperly obtained ID document" and sentenced to a term of 12 months imprisonment. On 7 October 2008, the appellant made representations on an application to revoke a deportation order, having previously applied to be returned to Nigeria under the provisions of the Home Office Facilitated Returns Scheme, which application was rejected. A further deportation order was made against the appellant on 8 January 2009, identifying him as a foreign criminal under section 32(5) of the **2007 Act**; his removal from the UK to Nigeria was then made on 11 September 2009, under

section 32(4) of the **2007 Act**, as conducive to the public good for the purposes of section 3(5)(a) of the **Immigration Act 1971**.

(ii) The appellant married AA in 2010. He has an established family life with AA and her son J (the appellant's stepson; born in 2004) and the appellant and J have a genuine and subsisting relationship, with the appellant having been a presence for J from a young age and having assumed a parental role in his life. Having initially met in the UK, AA and J moved to Nigeria in 2010 to live with the appellant for some five years. Although AA and J returned to the UK in August 2015 (so J could attend secondary school in the UK and because AA needed to support her father who was very ill), that did not break J's relationship with the appellant; the family have continued to remain in close contact.

(iii) AA and J are British citizens and, as such, J is entitled to a life in the UK, with the opportunity to enjoy all the rights, opportunities and privileges which attach to his British citizenship. He has a parent in the UK who is able to take care of him so he is not required to return to Nigeria. There is also an extended family network in the UK that can provide both J and AA with additional support. Although there was evidence that J had developed several anxieties, these were not to "clinical levels" (see the January 2016 report of Dr Shenoy, Chartered Clinical Psychologist). Similarly, whilst the evidence supported the contention that J missed the appellant and was affected by the separation, his anxieties were also caused by other factors and there had been some exaggeration of the impact of the separation on J. In any event, J was settling down at school and his level of anxiety had decreased. J's best interests are served by staying with his mother and extended family in the UK.

(iv) That said, J had spent some five years living with the appellant and AA in Nigeria and there was no credible evidence of unrest and fighting in the appellant's home area in Nigeria, so no safety issues rose. In the circumstances, it would not be unreasonable for J to leave the UK and move to Nigeria.

(v) As for AA, notwithstanding her family ties in the UK, it would not be unduly harsh for her to live with the appellant in Nigeria.

The Resumed Hearing

5. At the resumed hearing in this appeal, we received up-dated witness evidence from the appellant, AA and J. There was no objection taken to us taking any of this evidence into account. Moreover, both AA and J were in attendance before us to give oral evidence and both confirmed the content of their witness statements. Neither was cross-examined.

6. AA up-dated the position in terms of her family, explaining that her father died in September 2017 after suffering from oesophageal cancer for two years. She has explained the effect of her continuing separation from her husband and her concerns for his safety in the light of present unrest in the area of Nigeria where he is living. She acknowledges that J's best

interests are served by his remaining in the UK, not least as he has recently badly fractured the bones in his left forearm, requiring surgical intervention – something that would not have been provided for free in Nigeria. AA has told us that she currently supports the appellant financially from her work in the UK – the economic situation in Nigeria being such that there is little investment in building projects which would use the water tank business in which the appellant works. She has explained that the appellant's age (nearly 60) means that he cannot compete against young unemployed graduates and she has said that she would herself now find it very difficult to get work in Nigeria that would enable her to provide for the family as she currently does. As for J, AA says it is not an option for him to return to live in Nigeria, observing that, although only 14, he is now six feet tall and would be treated as an adult if any emergency situation arose. As we have already recorded, AA's evidence was not challenged and we accept what she has told us as her honest testimony.

7. Turning to the evidence of J himself, we also accept his unchallenged testimony. J has told us that he misses the appellant ("Dad") badly. The appellant is the father-figure in J's life (all the more so since the death of his maternal grandfather) and as he gets older he wants to able to talk to the appellant in private about things that he would find difficult to discuss with AA or his grandmother. Referring to more recent events, he has explained that it was particularly difficult when he had to have his arm in plaster for eight weeks this summer as his mother had to assist him in his personal care. He has further explained missing the appellant's presence in his life as missing "the African side of my personality". In this context we note that AA is white British and J's natural father was black Ghanaian, albeit that (as Dr Shenoy reports) during his childhood, growing up with the appellant, J saw himself as Nigerian.

8. To corroborate the continuing family ties between AA and J and the appellant, we have also been provided with copies of AA's telephone bills showing calls on a daily basis to Nigeria.

The Issue

9. The appellant is subject to a deportation order as a foreign criminal. In challenging the Respondent's decision to refuse to revoke that order the appellant relies on article 8 **ECHR**. In such a case, regard must be hard to the considerations listed in section 117C of the **2002 Act** (see section 117A (2)(b)). Section 117B of the **2002 Act** sets out the public interest considerations applicable in all cases; relevantly, it is provided that, where there is a genuine and subsisting parental relationship with a qualifying child *and* it would not be reasonable to expect the child to leave the UK, the public interest does not require removal (section 117B(6)). In determining this question, as the FtT Judge observed, the best interests of a child must be a primary consideration but are not always the only primary consideration and do not of themselves have the status of the paramount consideration (and see **MA (Pakistan) and ors** [2016] EWCA

Civ 705 and **Kaur (children's best interests/public interest interface)** [2017] UKUT 00014 (IAC)).

10. Section 117C of the **2002 Act** then sets out *additional* considerations in cases involving the deportation of foreign criminals, providing as follows:

> (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.

11. The starting point is thus that deportation is in the public interest, and the more serious the offence, the greater the interest in deportation. For sentences of 4 years' imprisonment or less (as here), there are, however, two exceptions to deportation. We are concerned in this case with the second of those exceptions, which applies (relevantly) where the applicant has a genuine or subsisting relationship with a qualifying child and the effect of deportation on the child would be unduly harsh.

12. It is not disputed that J is a British citizen and that he is, therefore, a qualifying child under section 117D(a). The question that the FtT failed to address, and which therefore falls to us to determine, is whether, having

regard to the considerations set out at section 117C, the effect of the appellant's deportation on J is unduly harsh?

13. In answering that question, it is common ground that we are bound to apply the guidance provided by the Supreme Court in **KO (Nigeria) and ors v SSHD** [2018] UKSC 53 (LordCarwath providing the lead Judgment, with which the other Justices of the Supreme Court agreed), as follows:

> "22. … Like exception 1, and like the test of "reasonableness" under section 117B, exception 2 appears self-contained.
>
> 23. On the other hand, the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. 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. What it does not require in my view … is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor … can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.

14. At the heart of the Appellants' argument in **KO** was the submission that, in determining whether the effect of deportation of the parent on the child would be "unduly harsh", the tribunal is concerned only with the position of the child, not with the immigration history and conduct of the parents, or any wider public interest factors in favour of removal. The position of the Secretary of State was that, on the contrary, this provision requires a balancing exercise, weighing any adverse impact on the child against the public interest in proceeding with deportation of the parent.

15. In determining that question, the Supreme Court made clear (see para 15) that it proceeded on the presumption that the provision in issue was intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" (**Zoumbas v SSHD** [2013] UKSC 74, para 10 per Lord Hodge). It did not, however, accept that the provision was only concerned with the position of the child; that had to be considered in the context of the public interest identified in the deportation of foreign criminals.

16. Applying the approach thus set out at paragraph 23 (see above), the Supreme Court considered that the Upper Tribunal Judge in **KO** had been wrong to have regard to the particular criminal history of the father but

upheld the decision reached as that had, in fact, not taken account of that history. The test that had actually been applied by the Upper Tribunal in **KO** had been to assess whether the effect on the children had been unduly harsh "*when balanced against the powerful public interest considerations in play*" (see as recorded at para 33 of the Supreme Court's Judgment); an approach that Lord Carnwath considered entirely consistent with the view it had taken of this provision (see para 36). The Supreme Court adopted the same approach to the test in the joined case of **IT** – which also involved a refusal to revoke a deportation order – albeit finding in that case that the matter needed to be remitted given the inconsistent reasoning of the FtT on the facts.

Submissions

The Respondent's Position

17. For the Respondent, we noted that Mr Deller adopted a very balanced – almost neutral - position in this case. It was noted that the only matter to be determined at this stage was that provided under section 117C of the **2002 Act**. Assistance in carrying out that task was provided by the Supreme Court's Judgment in **KO**, which explained what was meant by this provision in deportation cases (specifically, see its consideration of the case of **IT**).

18. In the present case, the Respondent had relied on the atrocious immigration history of the appellant; in particular, on his previous breaches of deportation orders. He had been removed from the UK as a result of a new deportation order in 2009 and it was the refusal to revoke that order that was now under challenge. Nearly ten years had passed since then and it was acknowledged that the **Immigration Rules** did point to ten years as being a natural break but, in any event, since the introduction of the **Human Rights Act 1998**, a deportation order could be challenged if it could be shown that article 8 **ECHR** would be breached by that order remaining in place.

19. Turning then to the article 8 considerations in this case. The Tribunal had to proceed on the basis that the appellant had an established family life and a parental relationship with J. Parliament had, however, provided that there was a need to then balance the public interest with those private interests, as codified (relevantly) by section 117C. That required a balancing exercise (see **KO**). This was not a case involving criminal offences attracting the highest levels of sanctions and thus, by virtue of section 117C (3) and (5), exception 2 came into play. Since 2009, it was accepted that the appellant had grown a protected family life. He was now older and had not attempted to breach the deportation order since

2009. The crux of the issue for the Tribunal was the impact on J: would the continuing effect of the deportation order be unduly harsh on him?

The Appellant's Position

20. For the appellant it was observed that this was the first time in this appeal process that the question of undue harshness had been considered in relation to J. Section 117A did not suggest that the public interest remained fixed for the entire period of the deportation order and, in its earlier decision in this matter, the Upper Tribunal had previously accepted that the weight to be given to the public interest diminishes with the passage of time. The starting point was, therefore, to identify the weight to be given today to the public interest in the continuation of the deportation order.

21. The relevant conviction in this case dated back to 2008, which was now spent and thus, in the eyes of the law, the appellant was a rehabilitated offender. In this context, the public interest was very weak.

22. Turning then to the other side of the balance and the interests of J; it was apparent that J was a child who had a clear insight into all that had happened. He was present at the appellant's arrest and had visited the appellant when he was in detention. He had then visited the appellant in Nigeria and he and his mother, AA, had lived with the appellant in Nigeria for five years until they came back to UK so he could complete his education and spend time with his maternal grandfather, who was terminally ill, and also because of the increasing violence in Nigeria. J thus had insight into these issues and it was his continued suffering that was now the main issue in the case.

23. As for the guidance of the Supreme Court in **KO**, it was to be noted that it had not determined the case of **IT** but had remitted the question in that case to the Upper Tribunal. It was also relevant that section 117C(7) made clear that the focus was on the particular offence that had led to the deportation rather than the immigration history.

24. In the present case, the appellant had shown remorse; he was now nearly 60 and had not re-offended and was unlikely to do so. He had remained in Nigeria since his deportation and had made no application to return until 2016. There was a family life with AA and J that was genuine, established and very close. J had given evidence, expressing his anxieties arising from the continuing separation from the appellant. Given the particular circumstances of the case, the appeal should be allowed.

Findings and Conclusions

25. The starting point for our deliberations is provided by the findings of the FtT we have referenced above. To up-date the position by reference to the evidence before us, we further find as follows:

(i) J's relationship with the appellant goes back to when J was very young; AA and the appellant having started a relationship by the time J was two. Equally, from a very early time in J's life, the appellant had taken on the role of a parent, changing J's nappies, encouraging him to speak and assisting in exercises suggested by a speech therapist; generally taking on the role of his father and being seen as such by J.

(ii) Since his deportation in 2009, the appellant and his family have respected UK immigration laws. There has been no further attempt by the appellant to re-enter the UK, notwithstanding periods of separation from his family. Instead, AA and J went to live with the appellant in Nigeria for a number of years, during which J's relationship with the appellant further developed and he built up close connections with the appellant's family.

(iii) Although AA and J returned to the UK, we are satisfied that their close family bonds with the appellant have continued. That was the finding of the FtT and it is apparent that this continues to be the position, as demonstrated by the testimony of AA and J, corroborated by the telephone records we have seen.

(iv) As time has gone by, we find that the relationship with the appellant has become increasingly important for J. To some extent that is the entirely predictable desire that an adolescent boy might have to have a father in his life. More than that, however, we accept J's testimony that he misses the "African side of his personality" – a sense of his racial origin and his self-identity that we accept is genuine and important to him.

(v) The appellant is now in his late 50s and there is no suggestion that he is likely to re-offend. The offence to which his current deportation order relates was the use of a false or improperly obtained ID document. The appellant has, however, demonstrated nothing but respect for UK immigration laws since 2009. While we do not ignore or condone his previous breaches of those laws, we acknowledge the change in behaviour that he has demonstrated over what is nearly ten years. We infer that this is in large part due to the appellant's relationship with AA and J, and to the family life that he wishes to continue.

(vi) Although we have accepted the finding of the FtT that it would not be unduly harsh for AA to return to live with the appellant in Nigeria, we also accept her evidence before us that, if she were to do so, it would be very unlikely that she could find work that would enable her to support the family as she is currently able to do in the UK. That would inevitably impact on J and it is a matter that we are entitled to take into account when considering J's options and the question of undue harshness in his case.

26. We turn then to the balancing exercise we are required to undertake under section 117C. We note that the question for us is not simply whether the continuing effect of the deportation would be harsh for J; we

have to determine whether it would be *unduly* harsh – a test that requires us to consider harshness for J as balanced against the public interest in continuing the appellant's deportation as a foreign criminal.

27. On the particular facts of this case, we consider the balance falls in favour of granting the appellant's appeal. The public interest in continuing the appellant's deportation has diminished over the years. His conviction is now spent and he has demonstrated respect for UK immigration laws over a period of nearly ten years. The particular facts of this case have a number of unusual features in our experience, not least the long history of the relationship between the appellant and J, which has included a significant period of J's life being spent with the appellant in Nigeria. This is a case where, as we think Mr Deller fairly acknowledged, the public interest side of the balance is now much diminished. While, therefore, there is *a* public interest in the continuation of the deportation order in general terms and because of the appellant's pre-2009 history, we consider that has far less weight than would normally be the case. Balancing that interest against J's particular circumstances – in particular, his sense of separation from his "dad", the loss of a father-figure at this time of his life, the absence from his life of an important part of his racial identity and the almost certain poverty that J would live in if he was to return to live in Nigeria, we find that this is a case where the continuation of the deportation order would have an unduly harsh effect on J as a qualifying child.

Decision

28. For the reasons we have provided, we allow this appeal and make a finding that the appellant's application for the deportation order to be revoked should be allowed.

Notice of Decision

The appeal is allowed on human right grounds.

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 his 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.

Signed Date: 3 December 2018

HHJ Eady QC (sitting as a Judge of the Upper Tribunal)