



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05717/2017

THE IMMIGRATION ACTS

Heard at Field House
On 27 November 2018

Decision & Reasons Promulgated
On 10 January 2019

Before

THE HONOURABLE MR JUSTICE JONATHAN SWIFT
UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O A

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Tom Wilding, a Senior Home Office Presenting Officer
For the Respondent: Mr David Jones, Counsel instructed by Sutovic & Hartigan solicitors

DECISION AND REASONS

Anonymity

The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the

original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against the Secretary of State's decision to deport him to Nigeria, his country of origin.
2. On 12 March 2014, a reasons for deportation letter and deportation order were served on him and he has been in the United Kingdom unlawfully since then.
3. Between 2014 and 2015, the claimant exercised his right to an in-country right of appeal against the deportation decision. He was appeal rights exhausted in November 2015 on that appeal. The claimant was briefly detained in 2016 pending removal, but released when judicial review proceedings were issued.
4. Following further submissions, a second appealable decision was made on 14 April 2017 and it is the decision by the First-tier Tribunal on that appeal which is the subject of these proceedings.

Background

5. The claimant was brought to the United Kingdom by his step-father in 1987: he was 11 years old. He has not returned to Nigeria since then.
6. The index offence committed by the claimant was possession with intent to supply crack cocaine, heroin and possession of heroin of which the appellant was convicted at Wood Green Crown Court on 9 October 2012 and received three concurrent terms of 3 years' imprisonment. The claimant did not appeal either convictions or sentences and still has not done so.
7. The relationship between the claimant and the mother of some of his children began 2010 and there are 6 children in all, of whom one is a minor whose best interests need to be taken into account:
 - (1) The claimant has four children of his own, three adult children from his former relationship and a child born in March 2015 with his current partner. His eldest son is 24, a married man with a family of his own. His second son is 20 and his elder daughter is 18 years old.
 - (2) The claimant's current partner has two children from a former relationship, an adult son and a daughter who was 17 at the date of decision and is now also an adult: the daughter was pregnant at the date of the First-tier Tribunal hearing and is now herself a mother. Her child is very young and it is not suggested that the best interests of that child are likely to be determinative of this appeal.
 - (3) The claimant also relies on the stillbirth to him and his present partner of a baby son, at 7½ months gestation, caused by pre-eclampsia.

The First-tier Tribunal decision

8. On 7 September 2018, First-tier Judge Davey allowed the appeal. He treated the earlier decision of First-tier Tribunal Judge Russell as the *Devaseelan* starting point. Judge Russell held that the claimant had very little involvement with his children. At [14] in the First-tier Tribunal decision, Judge Davey acknowledged that the 2015 decision:

“... somewhat overtaken by the independent social worker’s report, the events of the birth of the [daughter born in 2015], and the new evidence of the role the [claimant] has more recently been playing in the life of the children and [his pregnant step-daughter], his involvement with her future forthcoming arrangements once the child is born, and steps to be taken thereafter. It seemed to me that as a matter of approach the facts have somewhat moved on and the evidence has become fuller as to the parental role the [claimant] has played and the evidence that he has contact with his children.”

9. At [17] the judge correctly reminded himself that the public interest lies in the deportation of foreign criminals as set out in Section 117C(1) of the 2002 Act as amended.
10. The First-tier Judge accepted that it would be unduly harsh for the claimant’s British citizen partner and the two affected minor children to go to Nigeria with him. The operative portions of Judge Davey’s decision are at [22]-[24]:

“22. Having assessed the evidence as a whole, it seemed to me that the evidence showed that for the British national children and the British national partner it would be unduly harsh for them to live in Nigeria. ... Further in relation to the children and paragraph 399(a)(i)(b), I found on the unchallenged evidence and ISW report that it would be unduly harsh for the child to remain in the UK without the appellant. Similarly the impact upon [the claimant’s partner] showed it was unduly harsh for her to remain in the UK without the Appellant and that it was not argued that she could or should live in Nigeria, given the concession.

23. I reached that view that it would be unduly harsh first, because of the independent social worker’s assessment which I found helpful as to the impact of the Appellant’s removal on the family. Secondly, the family is well settled in the United Kingdom, has no active role in any sense in conduct supporting or concealing the Appellant’s conduct and has not acted unlawfully in any respect. It seemed to me facile to suggest that the family relationships and dynamics can be sufficiently maintained by electronic communication means or by an occasional visit. Quite simply it cannot be sensible to suggest that [the claimant’s partner] leaves behind the children or can afford to carry all the children or some of them to visit the Appellant in Nigeria. In applying my assessment of unduly harsh I take the view that there needs to be a level of seriousness and severity of the harshness in terms of its consequences to come within the terms of the Immigration Rules. Also it seems to me the issue of [the claimant’s step-daughter’s] pregnancy, the fact that she remains living at home and was going to be a burden upon the family, need the help of her mother and

stepfather was another factor which speaks to the impacts of removal of the Appellant on him in terms of wishing to play a part in his “grandchild”. Given the baby is still in utero I find little weight should be given to that at this stage.

24. If I was wrong in my view that there was no need to determine an Article 8 ECHR issue, I would conclude in consideration of that in the context of Sections 117A, 117C and 117D of the NIAA 2002, as amended, that the deportation of foreign criminals is in the public interest and that the more serious the offence the greater the public interest in deportation. I would find that the public interest question is to be fully considered and the public interest should be given significant weight. Clearly the Appellant does not come within Section 117C exception 1 but the Appellant would come within exception 2 on the basis of a genuine and subsisting relation with a qualifying partner ... or a qualifying child [the 2½ year old daughter], a British national and the impact or effect of deportation on the partner or child would, in the light of my findings, be unduly harsh. ... there is no obvious reason, when the Appellant previously worked, when allowed to do so, lawfully and had been employed, why he should be a burden on the taxpayer. He plainly has integrated into society in the United Kingdom, his relationship with his partner is long established and that was done at a time when he was lawfully in the United Kingdom. Similarly his private life has not always been precarious but has become so through later events.”

11. At [25] in the decision, the First-tier Judge noted that the Home Office Presenting Officer had accepted that ‘it is not reasonable to expect the qualifying child to leave the United Kingdom and accordingly section 117B(6) would be engaged. In those circumstances similarly it would not be proportionate or in the public interest to require his removal’.
12. The First-tier Tribunal allowed the appeal on Article 8 ECHR grounds and under the Immigration Rules HC 395 (as amended).
13. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

14. Permission to appeal was granted by First-tier Tribunal Judge O’Brien as follows:
- “2. The grounds assert that the Judge erred in the following ways. The Judge failed to give adequate reasons why the Appellant’s deportation would cause unduly harsh consequences for the qualifying children in particular in light of the previous findings in the First-tier Tribunal and Upper Tribunal.
3. The Judge’s reasons for concluding that it would be unduly harsh for the children to remain in the United Kingdom without the Appellant are undoubtedly sparse and arguably inadequate. Moreover, the Judge arguably failed to take into account all relevant circumstances when making that assessment including the seriousness of the Appellant’s

offending. The Judge expressly considered s117B(6), when that section does not apply to deportation cases. All grounds are arguable.”

Rule 24 Reply

15. Permission to seek judicial review was granted on 3 October 2018 but no Rule 24 Reply was filed within 1 month of that date, as Rule 24(2)(b) requires.
16. The claimant’s representatives sought to admit a response filed out of time on 13 November 2018. We do not admit that document as a Rule 24 Reply, but we have had regard when preparing this appeal to the indication that it gave of the arguments which Mr Jones proposed to run on behalf of the claimant.

Submissions

17. We heard submissions from both Counsel. For the Secretary of State, Mr Wilding reminded the Tribunal that the question was whether separating the claimant from his partner and their 2½ year old daughter (now the only minor) would be unduly harsh. Section 117B(6) of the 2002 Act did not apply in the case of a deportation case and it was an error of law for the Judge to have considered that subsection at all. The claimant had been born in Nigeria and lived there for the first 11 years of his life and there were no insurmountable obstacles to his reintegrating there now.
18. Exception 2 in section 117D had not been properly applied at [24] in the First-tier Tribunal decision, having regard to the factual matrix at the date of hearing. Mr Wilding reminded the Upper Tribunal that the First-tier Judge did not have the benefit of guidance on the application of the unduly harsh test given by the Supreme Court in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 on 24 October 2018.
19. For the claimant, Mr Jones said that it was important to read the First-tier Tribunal decision as a whole. The independent social worker’s report set out the variety of experiences of loss and volatility in the life of this family, which were drawn together for the consideration of family life and the effect of removing the claimant to Nigeria on the whole family. Details from the report were considered at [6], [7] and [19] in the First-tier Tribunal decision and the Judge had taken extensive oral evidence.
20. Mr Jones relied on the contents of the report as a whole, and certain passages therein which might have informed the First-tier Tribunal’s thinking but which were not set out in the decision.

Analysis

21. Judge Davey’s application of section 117B(6) was a plain error of law. That subsection is not applicable in deportation cases.
22. The correct section of the 2002 Act is section 117C:

“117C Article 8: additional considerations in cases involving foreign criminals

- (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. ...”

In this case, the claimant’s prison sentence of 3 years means that it is not necessary to go on to consider subsection 117C(6) and ‘very compelling circumstances’.

23. The claimant does not rely on Exception 1 in subsection 117C(4). This appeal was advanced under subsection 117C(5). It is not in dispute that the claimant has a genuine and subsisting relationship with his 2½ year old daughter, or with his current partner. The question is whether his deportation would be ‘unduly harsh’ in relation to either the daughter or the partner.
24. In *KO (Nigeria)*, Lord Carnwath JSC, with whom Lord Kerr JSC, Lord Wilson JSC, Lord Reed JSC and Lord Briggs JSC agreed, encapsulated the correct approach to undue harshness at [23]:

“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. ...”
25. We are unable to discern from the decision of the First-tier Tribunal why the Judge considered that the removal of this claimant would create a degree of harshness for

his partner and child 'going beyond what would necessarily be involved for any child [or partner] faced with the deportation of a parent [or spouse]'. Whilst it may be that there is material in the independent social worker's report on which this decision could have been justified, it is unclear to us what material the Judge regarded as determinative of the appeal. The Judge's reasoning is inadequate and the Secretary of State's appeal succeeds for that reason, and also because the Judge applied section 117B(6) inappropriately.

26. We note the further developments in the extended family situation, in particular that this claimant's step-daughter from his partner's first relationship is now an adult and herself a mother. It is open to the claimant, if so advised, to make further submissions on the basis of the factual matrix as it has developed.
27. The decision of the First-tier Tribunal allowing the appeal cannot stand. Given the passage of time, it is not appropriate to remake this decision today in the Upper Tribunal. The appeal will be reheard afresh, and the decision remade in the First-tier Tribunal, with no findings of fact or credibility preserved.

DECISION

28. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

We set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal on a date to be fixed.

Date: 7 January 2019

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson