



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

Appeal Number: HU/26513/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 15 February 2019**

**Decision & Reasons Promulgated
On 06 March 2019**

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**SUNNY [O]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Furner, Solicitor, Birnberg Peirce & Partners

For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. In a decision posted on 6 September 2018 Judge Row of the First-tier Tribunal dismissed the appeal of the appellant, a citizen of Nigeria, against the decision made by the respondent on 16 November 2016 to make a deportation order. This decision had been made because between 12 August 2003 and 15 October 2015 the appellant had accumulated eleven convictions for 38 offences. The appellant is a foreign criminal.
2. I need not set out my decision in detail because both representatives were in agreement with me that the judge's decision is vitiated by legal error.

The principal issue the judge had to decide was whether the appellant could show he met the requirements of paragraph 399(a) of the Immigration Rules and s.117C(b) of the NIAA 2002 that it would be “not be unduly harsh for the child to remain in the UK”, namely SJ, a British citizen child born 23 October 2008. SJ is 13 years old. SJ’s mother is [OC]. It was the appellant’s evidence before the judge that there would be undue hardship because the appellant was the only one in a position to care for SJ; SJ’s mother, [OC], lived in Gambia; SJ’s adult sister [S] attends university and did not wish to be involved; and the appellant’s wife, Mrs K, had serious mental health problems.

3. The judge did not accept that SJ’s circumstances were as claimed by the appellant, particularly in light of inconsistencies in the evidence of the witnesses at the hearing.
4. Unfortunately, when elaborating why he did not believe the appellant’s account of SJ’s circumstances, the judge stated at paragraph 31 that it was “beyond belief” that the local authority social services would not have been involved with the three children when the appellant was in prison in October 2015 (see also paragraph 37). This was unfortunate because the issue of social service involvement over this period had not previously been an issue and, before rejecting the appellant’s claim as “beyond belief”, the judge should have afforded him the opportunity of substantiating it. Had the judge done so, it would have come to light that none of the three agencies involved with the family (Dudley Children’s Service; Birmingham Children’s Trust and Sandwell Children’s Trust) had records of involvement during this period. It was not immediately obvious on the evidence what other local authority social services could have been involved. This error clearly had a material impact on the judge’s assessment of the appellant’s evidence relating to the care of SJ.
5. There are also significant shortcomings in the judge’s proportionality assessment, particularly in relation to the appellant’s history of offending. What the judge stated at paragraphs 41 to 42 appears to attach no weight to the fact that the appellant had not re-offended since 2013 or been in prison since and to have not weighed at all in the balance that the Probation Officer had stated in December 2017 that the appellant posed a “very low risk” of further offending. The judge’s proportionality assessment also makes no reference to the impact of the appellant’s removal on Mrs K, to whom he acts as a carer. These and other shortcomings in the judge’s decision lead me to conclude that it should be set aside.
6. The case will need to be remitted to the FtT because in the nature of the errors identified, none of the judge’s findings of fact can be preserved.
7. Whilst the legal issue is a narrow one – the issue of whether the effect of the appellant’s deportation on SJ would be unduly harsh, the issues of fact are potentially wide-ranging. It is the appellant’s case that he is the only person in a position to care for SJ if he is deported. The respondent’s

position is that SJ could be cared for by his mother or otherwise by his older sister [S]. I do not understand the respondent's position to be that another option that would avoid undue hardship would be for SJ to be taken into care.

8. As regards SJ's mother, [OC], there is conflicting evidence as to whether she lives in the UK or Gambia or whether (given the allegation that her partner abused SJ in 2014/2015) even if she lives in the UK, she would be a suitable carer. As regards [S], the respondent's position is somewhat unclear as to whether she could be an available carer. Clearly her evidence is that she is not willing to and if she is in college education it is difficult to see that she would be in a suitable position to take on that role, but nevertheless the respondent's position as stated in paragraph 18 is that SJ would "either live with his mother or with whomever he lived with when the appellant was in prison between October 2015 and May 2017".
9. In an attempt to assist the next judge who will have the task of resolving the relevant factual issues I direct:
 - 1) That the appellant's representatives use best endeavours to obtain a witness statement from Mrs [C] specifying where she has been living since mid-2017 and what are her current intentions as regards caring for SJ were the appellant to be deported. (The more she can document as regards her living situation and travels in and out of the UK the better).
 - 2) That the respondent produce a short statement clarifying who precisely they consider would be responsible for the care of SJ if the appellant is deported and why it is considered that the care of such person(s) would not have an effect that was unduly harsh on SJ.
10. To summarise:

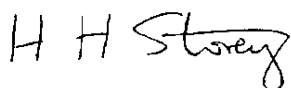
The decision of the FtT judge is set aside for material error of law.

The case is remitted to the FtT (not before Judge Row).

No anonymity direction is made.

Signed

Date: 28 February 2019



Dr H H Storey
Judge of the Upper Tribunal