Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05575/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 11th June 2019	**On the 08th July 2019**

Before

UPPER TRIBUNAL JUDGE REEDS
UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DO
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T. Lindsay, Senior Presenting Officer
For the Respondent: Mr A. Sesay, Solicitor Advocate

DECISION AND REASONS

1. The Secretary of State appeals, with permission against the decision of the First-tier Tribunal (hereinafter referred to as the "FtTJ") promulgated on the 20th March 2019, in which the Tribunal allowed the appeal of DO against the decision of the Secretary of State to refuse his protection and his human rights claim and in the context of the respondent having made a deportation order against him under Section 32(5) of the UK Borders Act 2007.

2. We make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of minor children. 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 members 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.

3. Although the Secretary of State is the appellant before the Tribunal, we will for ease of reference refer to him as the respondent as he was the respondent in the FtTJ. Similarly, we will refer to DO as the appellant as he was the appellant before the FtTJ.

The Background:

4. The appellant is a citizen of Nigeria. He appealed against the decision of the respondent who, on the 13th April 2018, refused his protection and human rights claim in the context of the respondent having made a deportation order against him under Section 32(5) of the UK Borders Act 2007.

5. The appellant's immigration history and relationship with his partner is set out in the decision of the respondent and summarised in the decision of the FtTJ at paragraph 6 and an earlier decision of the FtT (Judge Greasley) in 2016.

6. The appellant claims to have arrived in the United Kingdom in 2002 however there is no evidence to substantiate that claim. He made an application for an EEA residence card on the 24th November 2009 as the spouse of an EEA national and his application was granted, and he was issued with a residence card valid until 4 December 2014.

7. In 19th January 2015 he was convicted after a trial of three counts of concealing/ removal of criminal property (money laundering).

8. On 23 February 2015 he was sentenced for those offences to a period of 12 months imprisonment on each count to run concurrently and for the authorities to seize £21,962 as representing the proceeds of the crimes committed.

9. The sentencing remarks are set out in the respondent's bundle at B1. The appellant was involved in a criminal enterprise which was intended to obtain large sums of money by sending bogus invoices to companies purporting to come from genuine suppliers. His role was to permit his account used as a conduit for those fraudulently obtained funds and to go to the bank and draw out sums of money as soon as they had arrived in cash. The sentencing judge found the criminal enterprise to be "plainly deliberate, organised and international fraud". Whilst the judge accepted that the appellant was not part of the main organising group, he was satisfied that he had been plainly entrusted with a significant role of taking custody of those credits and passing on the funds. In his sentencing remarks, the judge recorded that the claim made that he had been placed under duress by organised criminals had been rejected by the jury and that he had been convicted of money-laundering of a total sum of around £27,000.

10. Following his conviction at the Crown Court he was served with a notice of liability to deportation on the 22nd April 2015 and was served with his deportation order and decision on the 13th July 2015. He lodged an appeal against the refusal of his residence card on the 24th July 2015 and removal directions were set for the 21st August 2015. His removal was deferred until the 18th September 2015. An application for a stay on removal was refused and removal directions were maintained however on route he made an asylum claim and in his later interview asserted that he was a potential victim of trafficking (VOT).

11. His appeal against the refusal of a residence card was dismissed by the FtTJ on the 25th August 2016 and he became appeal rights exhausted on the 27th January 2017 (we refer to the decision of FtTJ Greasley exhibited in the respondent's bundle).

12. FtTJ Greasley did not accept that the appellant had provided credible and reliable evidence that his former wife, during a five-year period between 2009 and 2014, had exercised EEA treaty rights as both an employed and self-employed worker (see paragraph 23). The judge also concluded that the respondent's decision in relation to Regulation 20(1) was justified, lawful and proportionate (public security grounds). The judge found that the three counts of money-laundering to which the appellant pleaded not guilty, but was convicted of, were very serious matters justifying a custodial sentence. The judge found this to not be an isolated incident and also took into account that the appellant had initially claimed that his identity had been stolen, but they later claimed that he been the subject of duress, but the jury had rejected these claims. At paragraph 28, the judge took into account that the offences were committed for purposes of financial gain, and there was no credible evidence to suggest that the appellant would be likely to secure employment in future in the United Kingdom. The judge also found that he had "tenuous links to the UK", there was no supporting evidence adduced on his behalf referred to by the parties or any general letters of support nor had he demonstrated that he had severed links with Nigeria. His appeal was therefore dismissed under the Immigration EEA Regulations 2016 (the "EEA Regulations").

13. On the 21st April 2017 it was accepted that there were reasonable grounds to suspect he was a VOT, but his claim was subsequently refused within a conclusive decision made on the 29th September 2017.

14. A decision was made to revoke his signed deportation order made under the EEA regulations as his EEA residence card had expired and his application for a residence card had been refused. The deportation order was revoked on the 21st December 2017 and a decision was made to pursue automatic deportation inn accordance with the UK Borders Act 2007.

15. On the 9th March 2018 he was served with a decision to deport notice and was given the opportunity for a response. His legal representatives' submitted representations on the 14th March 2018 asserting breaches of Article 8.

16. On the 13th April 2018 a decision was made to refuse his protection and human rights claim. The basis of his protection claim was based on his fear that if returned to Nigeria he would face mistreatment due to his religion, his fear of traffickers and his

membership of a particular social group, as a bisexual man in Nigeria. Those claims were considered within the decision letter at paragraphs 8 – 57. His claim on medical grounds (Article 3) was considered at paragraphs 63 – 69.

17. As to Article 8, the Secretary of State took into account the nature of his claim that he had established a family life in the UK with two children and a partner and that he had established a private life. In support of the claim, the appellant had submitted two letters and copies of birth certificates and British passports for each of the children. In respect of his family life with the children, aged 8 and 10, it was accepted that children were under 18 years of age and that they were British citizens and that they had never left the UK. However, it was not accepted that the appellant had a genuine and subsisting parental relationship the children in the light of the material that had been provided. It was accepted that it would be unduly harsh for the children to live in Nigeria as the children had obtained British citizenship and were not subject to removal from the UK. The respondent considered that the best interests of children lay in the retention of their current family unit, that is, to remain in the care of their mother in the UK in the event of the appellant's deportation. It was not accepted that the appellant met the requirements of the exception to deportation on the basis of family life with the children.

18. For similar reasons, it was not accepted that he had established family life the UK with a partner. It was accepted that Mr S was a British citizen and was in the UK, but it was not accepted that he had a genuine and subsisting relationship with Mr S.

19. As to private life, it was not accepted that he had been lawfully resident in the UK for most of his life. Whilst he claimed to have entered the UK in 2002 he had not provided evidence to substantiate the claim and his first contact with the authorities in the UK was on 24 November 2008 when he applied for an EEA residence card. Therefore, it was considered that he had entered the UK in 2008 when he was approximately 33 years of age. His residence card expired on 4 December 2014 and therefore his lawful residence in the UK was a total of six years. It was not accepted that he could meet the requirements of the private life exception to deportation.

20. As the exceptions to deportation did not apply in his case, consideration was given to whether there were "very compelling circumstances" such that he should not be deported, the respondent set out that there was a significant public interest in his deportation because he had been convicted of a serious offence which resulted in a custodial sentence of 12 months imprisonment, he had no basis to remain in the UK, and his residence card expired in December 2014 and has since overstayed illegally. In order to outweigh the very significant public interest in deportation, he would need to provide evidence of a very strong Article 8 claim over and above the circumstances described in the exceptions to deportation. The respondent concluded that he had provided no information that would outweigh the significant public interest in his deportation.

21. The Appellant appealed against that decision to the FtTJ. It was asserted in the Grounds of Appeal that he was the father of two children and that it would be unduly harsh on his children for him to be separated from them. It was stated that they were British citizens and were present and settled in the UK and it would be

unduly harsh for them to be deprived of the love and support from the father. The grounds maintained that there was a genuine and subsisting relationship between the appellant and his children.

The Decision of the First-tier Tribunal:

22. The appeal came before the FtTJ on the 15th March 2019.

23. In a decision promulgated on the 20th March of that year, the FtTJ allowed the appeal.

24. At paragraph 3 of the decision, the FtTJ recorded that the appeal was based mainly on the presence of his two British citizen children T aged 11 and TO, aged 9 and that he had a genuine and subsisting parental relationship with them. The appellant did not proceed with his asylum and humanitarian protection claims. The FtTJ set out that "the appeal before me was therefore limited to Article 8 of the ECHR and the issue of the best interest of the children as against the public interest in this matter taking into account the deportation order made against the appellant following his conviction and 12 month sentence for money-laundering in 2015."

25. At paragraph 29 the FtTJ recorded "it was quite clear that the appellant's only thrust in the appeal before me was in reality his relationship with the children. That was what was pursued before me and nothing else."

26. The FtTJ heard oral evidence from the appellant but not from his ex-partner who had provided a witness statement. The judge recorded the contents of that statement at paragraphs 9 – 11. It stated that the appellant was a "good hands-on father" and supported the children. At paragraph 10, it was stated that the appellant regularly took the children to school and collected them and that they would struggle to cope without him if he were to be deported from the UK. It said that the appellant had always been there for the children and was a man of good character and good role model. It was further so that the presence of the appellant in their lives was vital as they reached a critical milestone in their lives and in their development. It said the appellant and the children were extremely close.

27. In addition, the FtTJ made reference to a letter from a teacher written about the eldest child T and a letter in relation to the youngest child TO. There was also a further letter confirming that the appellant had been bringing both children to Saturday lessons from 1 September 2018 until 8 December 2018 (see paragraphs 13 – 15).

28. The FtTJ's analysis of the evidence is set out at paragraphs 35 – 51. It can be summarised as follows: -

    (i) the appellant had a close relationship with his two children based on the witness statement of his former partner, and the three letters from the teachers. He described this as "compelling evidence on school headed notepaper signed by them" (at [35]).

    (ii) He found that the appellant took part in their activities and attended parent's meetings, brought the children to school and that their teachers stated how important he is in their life at home (see [36]).

(iii) The FtTJ observed that the respondent had not made further enquiries as to the relationship between the appellant and the children before a decision was made and that in his view the respondent should have taken further measures to ascertain the relationship between the appellant and the children before making a decision (see [39]).

(iv) In any event, at the date of the hearing, the appellant had a genuine and subsisting parental relationship with his children. He took an active presence in their lives as explained by the appellant's former partner and by the evidence from the teachers. Whilst he did not reside with the children, he saw them daily and enjoyed an affectionate and subsisting relationship with the children (see [42]).

(v) It would be unduly harsh for the children to live in Nigeria because they are British, live in the UK and live with their mother, are doing well at school and attend school. Such a move would be hugely disruptive the children (see [43] and [50]).

(vi) It would be unduly harsh for the children to remain in the UK without their father as he had "a huge positive presence in their lives". The FtTJ found that the best interests of the children lay in their retaining a good relationship with both their parents which they could not do if their father was deported (see [44] and [46]).

(vii) In respect of the previous decision of Judge Greasley, the FtTJ considered that there were sufficient reasons to depart from his analysis of the appellant's criminality. Those reasons were as follows:

(a) he had taken "an elevated approach to the appellant's convictions".

(b) the appellant had not reoffended.

(c) the sentencing judge was bound by statute and could not impose a suspended sentence in any event. (see [48]).

(viii) In summary, it would be unduly harsh for the children to remain in the UK without their father because

(a) he had a genuine and subsisting relationship with them,

(b) he was actively involved in their lives,

(c) he is a participative father,

(d) the children's mother is supportive of him as a good father,

(e) the school letters speak volumes as to the good relationship has the children,

(f) the children struggle without him - see [48]).

The Appeal before the Upper Tribunal:

29. The Secretary of State sought permission to appeal that decision and permission was granted on the 10th April 2019 by First-tier Tribunal Judge Robertson for the following reasons: -

> "It is arguable, as submitted in the grounds of application, that the judge has found that it would be unduly harsh for the children to remain the UK without their father on the basis that it is in their best interests for him to remain in the UK. There did not appear to be any evidence before the judge to establish that the children had suffered whilst he had been in prison and had not managed without him, or that there had been any behavioural/developmental issues as a result of his absence to tip the findings into being unduly harsh to remain in the UK without him.
>
> Permission to appeal is granted."

30. The appellant was represented before the Upper Tribunal by Mr Sesay, Solicitor Advocate. The Secretary of State was represented by Mr Lindsay.

31. We therefore heard submissions from both parties which are set out in the Record of Proceedings. The points raised in the grounds and relied upon by the Secretary of State relate to the FtTJ's consideration of the issue of undue harshness.

32. Mr Lindsay, on behalf of the respondent relied upon the grounds. He submitted that the evidence referred to in the decision failed to reach the high threshold of unduly harsh consequences as confirmed in the decision of KO (Nigeria) (appellant)v Secretary of State for the Home Department (respondent) [2018] UK 53, relying on paragraph 23. "Unduly harsh" does not mean uncomfortable or inconveniently or merely difficult and thus a more elevated threshold was necessary in order to meet that test. He submitted that the central problem with the decision was that there was no evidence capable of taking the circumstances above the normal effects of deportation and that there was no evidence capable of supporting the conclusion that the circumstances would be unduly harsh for these children and as the FtTJ made no clear finding on the elevated threshold, he misdirected himself in law.

33. In addition, he submitted that the FtTJ did not make any self-direction to the elevated threshold set out in the decision of KO (as cited) nor to the other core principles of law that something more than the usual effects of deportation would be required. In this context, he made reference to the decision of AJ (Zimbabwe) [2016] EWCA Civ 1012 and that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals and that something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. He submitted that the decisions stated that such an event was "commonplace and not a compelling circumstance". Thus, he submitted, there was nothing in the evidence before the FtTJ which would take the relationship "out of the ordinary" and none of the findings of fact made were capable of establishing this.

34. He directed the Tribunal to paragraph 39 and submitted that the FtTJ had made a significant error of fact. This was said to be material because it was not clear if the judge had added weight to the appellant's case on the basis of a misunderstanding of the chronology of the decisions made by the respondent and the evidence upon which those decisions was based.

35. Mr Lindsay submitted that when a careful analysis was undertaken of the core reasons given by the FtTJ at paragraphs 42 – 44, it was based on no more than the appellant had played an active role, is a positive presence and saw the children daily.

36. He further submitted that the FtTJ had conflated the children's best interests test with the unduly harsh test. At paragraph [44] the FtTJ made a finding as to the children's best interests and that they were to retain a good relationship with both their parents which they could not do if their father was deported but that finding followed the compendium finding based on undue harshness at paragraphs 42-43.

37. In summary he submitted, the judge failed to apply the correct approach when considering the issue of undue harshness and that this was a material error of law. He submitted on the evidence, the appeal should have been dismissed.

38. Mr Sesay provided a Rule 24 response and a skeleton argument and in addition made oral submissions. He submitted that the reliance placed on paragraph 23 of KO (Nigeria) was misplaced for two reasons; firstly, there was nothing in KO which was inconsistent with paragraph 46 of Hesham Ali v SSHD [2016] UKSC 60 on the Tribunal's task of conducting independently a proportionality assessment in deportation cases, and secondly, where children are involved, in conducting the proportionality assessment, the Supreme Court preferred the narrow approach which focuses on the child. Therefore, he submitted that the FtTJ directed himself as required by the Supreme Court regarding the hypothetical question at paragraph 18 which is "where are the parents are expected to be?". The FtTJ implicitly concluded that the parents are both to be in the UK, particularly with the appellant's active and positive involvement with the children. It was not simply as argued by the respondent that it concerned separation instead. It was about the impact of the deportation of the appellant on his children.

39. He further submitted that the FtTJ correctly directed himself in law on the application of the "unduly harsh" test at paragraph 45. The judge made reference to section 117C and identified a balancing act, and at paragraph 47 applied the principles in KO (Nigeria). Thus, the FtTJ carried out a judicial assessment focusing on the children. He submitted that it was not necessary for the FtTJ to make reference to every paragraph in the decision of KO (Nigeria) and that he had properly directed himself to paragraph 47 and the evaluative exercise that should be undertaken.

40. Mr Sesay submitted that the respondent was not entitled to limit the scope of judicial discretion and that the decision reached by the FtTJ was an evaluative judgement that he was entitled to take.

41. He referred us to the decision of MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT at paragraph 42 (v) which made reference to the children in that decision as being at a critical stage of their development, the appellant being a father figure in the life of his daughter and that the appellant's role had been present since her birth and that "children do not have the resilience, maturity or fortitude of adults." Thus, he submitted this was the case here.

42. Mr Sesay submitted that the judge was entitled to take into account the evidence before him and the letters from the school. At paragraph 33 he set out the nature of

the appellant's Article 8 claim that he had established a family life in the UK with his two children, at paragraph 35 he made reference to the appellant's evidence and the witness statement from his estranged partner and reached the conclusion that the evidence was "compelling". He submitted that it was not an error of law to come to the conclusion that he did, and it was not irrational. The judge had more evidence than had been put before the Secretary of State and at paragraph 36 acknowledged this as independent evidence and the judge focused on the children.

43. He submitted that the respondent's reliance upon the decision in AJ (Zimbabwe) was misplaced and that the test of undue harshness whilst an elevated threshold did not have to be "compelling". Mr Sesay submitted there was no error of law in the decision of the FtTJ.

Discussion:

44. We remind ourselves that we can only interfere with the decision of a judge if it has been demonstrated that there was an error of law in reaching that decision.

45. The effect of the provisions relating to the deportation of foreign criminals is that by Section 32(4) Parliament had decided that the deportation of foreign criminals is conducive to the public good. By Section 32(5), the Secretary of State is obliged to make a deportation order subject to Section 33. Section 33 identifies a number of exceptions, which if applicable, have the consequences that sub-Section 32(4) and (5) will not apply.

46. Whilst the appellant had raised protection claims based on his sexual orientation, and as a victim of trafficking, as the judge recorded at [3] he did not seek to rely on or advance those grounds. On the present facts, the only exception relevant is whether removal would breach his rights and those of his family members under the ECHR.

47. The Immigration Rules reflect the statutory obligation to deport foreign criminals whilst recognising that there may be cases where the making of a deportation order would be incompatible with Article 8 (see Rules 398, 399 or 399A).

48. The correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider whether the appellant is a foreign criminal as defined by Section 117D(2)(a), (b) or (c). If so, does he fall within paragraphs 399 or 399A of the Immigration Rules and if not, are there compelling circumstances over and beyond those falling within paragraphs 399 or 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors in Section 117 and C.

49. On the facts of the case there is no dispute that the appellant was a foreign criminal; he was not a British citizen and by reason of his offending history was properly characterised as someone who had been convicted of an offence of at least 12 months imprisonment that and therefore in accordance with paragraph 398 of the Immigration Rules, the public interest required his deportation unless an exception to deportation applies. Thus, the issue before the FtTJ was whether he could fall within paragraphs 399 or 399A. Paragraphs 399 and 399A of the Immigration Rules are reflected within section 117C(5) of the 2002 Act, which provides as follows: -

> "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."

50. The question in s. 117C (5) as to whether "the effect" of C's deportation would be "unduly harsh" is broken down into two parts in paragraph 399, so that it applies where:

> "(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported."

51. It was common ground before the FtTJ that he could not meet the requirements of paragraph 399A (relating to private life) or Exception 1. It was also common ground that the Secretary of State conceded that in the light of the children's residence with their mother, it would be unduly harsh for the children to live in Nigeria. Thus, the issue turned on paragraph 399(a) and Exception 2. That section reads as follows: -

52. Thus, the issue turned on paragraph 399(a) and Exception 2. That section reads as follows: -

> "(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."

53. The decision letter set out the material that had been sent to the respondent to demonstrate that he had an established family life with his two children and his partner (see paragraph 77) which consisted of 2 letters and copies of birth certificates and passports for the children with whom he claimed to have a family life with. At paragraphs 79-88 of the decision letter, the issue of family life was considered on the material provided and whilst it was accepted that he was the father of two British Citizen children, it was not accepted that he had demonstrated that he had a genuine and subsisting parental relationship given the limited material he had provided (see paragraphs 84-88).

54. Mr Lindsay on behalf of the respondent made reference to paragraph 39 of the decision where the FtTJ made reference to the children's best interests and made an observation that the respondent had made no further enquiries as to the relationship between the appellant and the children before a decision was made and that the respondent should have taken further measures to ascertain the relationship before making a decision. In this context, Mr Lindsay submitted that the FtTJ had misunderstood the decision letter and had made a material error of fact. He went further to suggest that it could be seen as having influenced the FtTJ's later assessment of whether it would be unduly harsh for the children to be separated from their father.

55. We have considered that submission in the light of the material and in the context of the appellant's history. The chronology sets out that he was notified of the decision to make a deportation order and on 14 March 2018 provided his response. He claimed to have established family life with his partner and family life with his children. Paragraph 77 of the decision letter sets out the evidence sent in support of the family life with his children. In our judgement, the evidence was extremely limited and consisted of copies of passports and birth certificates relating to the two children, and letters from his partner Mr S and his former partner. The decision letter therefore proceeded on an analysis based on the evidence he had provided at paragraphs 81 onwards. As he did not live with children and despite the claim made as to the existence of family life, he had not provided any evidence beyond that of a biological relationship and did not demonstrate that there was a genuine and subsisting parental relationship. In our judgement that was an entirely legitimate criticism in the light of the limited evidence provided. Whilst the FtTJ was critical of the respondent, stating that the Home Office had not made any further enquiries and that that should have taken place, we are satisfied that the respondent undertook an entirely legitimate assessment of the appellant's family life in the light of the limited evidence had been provided. The burden lay on the appellant as to the evidence he wished to advance in respect of his family life.

56. We also note that the FtTJ stated at [49] that whilst the respondent conceded that it would be unduly harsh for the appellant's children to live in Nigeria, the respondent ignored that "the appellant's father is a very significant parent in their lives." This is unarguably wrong as the appellant at that time of the decision had not demonstrated that by way of any evidence.

57. Whilst we considered the FtTJ had made some criticism of the respondent which was not objectively well-founded, we are not satisfied that this had any effect on his reasoning as Mr Lindsay submits. At [42] the FtTJ made it plain that he had to consider the position as at the date of the hearing and on the evidence before him.

58. In the decision reached, the Secretary of State conceded that in the light of the children's residence with their mother, it would be unduly harsh for the children to live in Nigeria, as it was not accepted that the relationship was genuine and subsisting, the respondent considered that the children's best interests lay in the retention of the current family unit, that is, to remain with their mother.

59. At the hearing before the FtTJ, a greater amount of evidence was provided on behalf of the appellant to evidence his relationship with his two children. It consisted of a witness statement from the appellant, a witness statement from the appellant's ex-partner, three letters from the children's respective schools and photographs of the appellant and the children together.

60. Therefore, the judge was required to consider what was meant by "unduly harsh" in the context of the law and in the context of specific factual circumstances of the Appellant and the relevant children.

61. We have carefully considered the parties submissions in the light of the decision of the FtTJ. In our judgment, the FtTJ did not properly apply the relevant legal

principles when determining the issues in this appeal relating to whether or not it would be unduly harsh for the children to remain in the United Kingdom without the Appellant.

62. Whilst Mr Sesay submitted that the FtTJ lawfully applied the decision of KO (Nigeria) at paragraph 47 when reaching his decision, we do not accept that is the case. At [47] the judge set out his self-direction on the law as follows:

> "47. Reference is also made to section 33 of the Borders Act 2007 and the exceptions. Exception one is where removal of a foreign criminal in pursuance of a deportation order would breach a person's inter-alia, Convention rights (Article 8 of the ECHR for example). In the case of Hisham Ali v SSHD [2006] UKSCE 60 the Supreme Court held paragraph 46 that whilst the respondent's view is relevant it is for the Tribunal to assess the proportionality of deportation. In KO Nigeria v SSHD [2018] UKSCE 53, at page 32, the Supreme Court held that in assessing the undue harshness scope of reasonableness, in deportation decisions affecting children, the focus is on the impact on the child and their best interests as opposed to the conduct of their parent (s). In a matter of the Supreme Court in ZH Tanzanian the SSHD the primary focus is on the best interests of children particularly when the children, as in the case before me are British citizens."

63. We would accept that the FtTJ correctly identified that the focus should be on the impact upon the relevant children. However, it is clear from the self-direction set out above that the judge appeared to conflate the issue of undue harshness with that of reasonableness and thus applied the wrong test. This misdirection in law is applied again at paragraph 48 where the judge stated:

> "48. … In respect of the *reasonableness and undue harshness* (our emphasis) of the appellant's deportation on the children the following factors are relevant, that the appellant has a genuine and subsisting relationship with the children, he is actively involved in the children's lives and enjoys an active familial and social relationship with his children. He is a participative father and the children's mother is supportive of him as a good father for their children. The school letters also speak volumes as to the good relationship has with the children. His children will struggle having regard to the totality of the evidence listed and, in the round, without him. The Upper Tribunal has held in the case of JG [2019) UK UTC to 2, that it is simple not enough that young children may readily adapt to life in another country or as in the case before me, stay in the UK without their father."

64. We are further satisfied that having conflated the two distinct and separate tests; the judge failed to apply the necessary threshold.

65. The decision of KO considered what was the correct approach relating to what is meant by "unduly harsh" within the context of the legislation. It gave particular consideration to paragraphs from the judgment of Laws LJ, with whom Vos and Hamblen LJ agreed, in MM (Uganda) v SSHD [2016] EWCA Civ 450 and the Upper Tribunal decision in MAB (USA) v SSHD [2015] UKUT 435.

66. The decision of the Supreme Court which reaffirmed the definition of "unduly harsh" from the earlier decisions of **MK** and **MAB** at paragraph [33], stated as follows: -

> "Whether the consequences of deportation will be 'unduly harsh' for an individual involves more than 'uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging' consequences and imposes a considerably more elevated or higher threshold.
>
> The consequences for an individual will be 'harsh' if they are 'severe' or 'bleak' and they will be 'unduly' so if they are 'inordinately' or 'excessively' harsh taking into account all of the circumstances of the individual." Although I would add, of course, that 'all of the circumstances' include the criminal history of the person facing deportation."

67. As the Supreme Court stated at paragraph 23, the expression "unduly harsh" is 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.

68. The Supreme Court further stated at paragraph 23 as follows: -

> "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 (and subject to the discussion of the cases in the next section) 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."

69. As set out in the decision of The Secretary of State v RA (S117C "unduly harsh", offence; seriousness) Iraq [2019] UKUT 123 (IAC) the President of the Upper Tribunal, Lane J (sitting in a panel with UTJs Gill and Coker) considered the correct approach to s. 117C(5) with the benefit of the guidance provided in KO (Nigeria) v SSHD [2018] UKSC 53 and NA (Pakistan). At paragraph 17, the following was stated:

> "17. As can be seen from paragraph 27 of KO (Nigeria), the test of "unduly harsh" has a dual aspect. It is not enough of the outcome to be "severe" or "bleak". Proper effect must be given to the adverb "unduly". The position is, therefore, significantly far removed from the test of "reasonableness", as found in section 117B (6) (b)."

70. We are satisfied from a careful reading of the decision that the FtTJ made no reference to the elevated threshold within the decision. Importantly, it is also missing from the analysis of the evidence that was before the FtTJ.

71. The analysis undertaken by the FtTJ concerning the nature of the family life between the appellant and the two children is principally set out at paragraphs 35 and 36 and paragraphs 42-44 of his decision. At paragraph 35, the judge made reference to the evidence before the Tribunal which consisted of the oral evidence of the appellant, the written evidence from his former partner, who had not attended the hearing, and three letters from the children's schools.

72. The FtTJ described the content of the letters at paragraph 35 in the following terms:

> "I have seen how close the appellant is to his children even from the form teachers who provided compelling evidence on school headed notepaper signed by them. This is independent evidence."

73. At paragraph [36] the FtTJ again referred to the letters as evidence "confirming the fact that he takes part in activities and attends parents meetings, brings the children to school and take them from school, and the children speak about him to their teachers and state how important he is in their life both at home and as regards to the education their stability."

74. At paragraphs 42 – 43, the FtTJ set out his findings of fact. He found the appellant to have a genuine and subsisting parental relationship with the children and that "he took an active presence in the children's lives". Whilst he did not reside with the children, he saw them daily and enjoyed "an affectionate subsisting relationship with them". At paragraph 43, he gave reasons as to why it would be unduly harsh for the children to live in Nigeria. It had been accepted on behalf of the respondent that it would not be in the children's best interests to leave the UK and that they could remain with their mother in Nigeria.

75. This led to his conclusion at paragraph 44 that it would be unduly harsh for the children to remain in the UK without their father. The judge stated "their father has a huge positive presence in their lives. The best interests of the children rest in my view with them retaining a good relationship with both their parents. They cannot do so if the father was deported." The reasons were then summarised again at paragraph 48 where the judge made reference to the genuine and subsisting relationship, that he was actively involved the children's lives, the children's mother was supportive of him as a good father and that the "school letters also speak volumes as to the good relationship has with the children. His children will struggle having regard to the totality of the evidence holistically, and in the round, without him."

76. When looking at those findings in the context of the evidence, we would accept that the evidence from the school was independent of the appellant but whether it could be described as "compelling" is less clear. The evidence from the schools consisted of three short letters. The letter exhibited at page 15 relating to the eldest child, T, confirmed that the appellant attended school functions, including parents' evenings, and collected him from school. It stated that T regularly spoke about his father indicating that he was a regular and significant part of his home and school life. A similar letter was exhibited at page 16 relating to TO which was equally short, again stating that the appellant was involved in school life and was "supportive towards his son". It referred to the collection from school and attending parents' evenings and "working in partnership" with the teaching staff. The letter at page 17 referred to the appellant bringing both children to school on a Saturday between September and December 2018.

77. We accept the submission made by Mr Lindsay that none of that evidence provided any detail or examples given of the support beyond that of a normal parent/child relationship. Nor were any examples given as to his involvement in school beyond that of attending parent's evenings and collecting the children from school.

78. The appellant's partner's evidence was similarly lacking in detail. It stated that the appellant provided support for the children which was identified as taking the children to school; no other type of support was identified. Whilst the FtTJ appeared to place weight and reliance on a witness statement in his conclusions at paragraph 48, where he refers the children struggling to cope without the appellant, no details were given in the witness statements in support of this assertion.

79. Mr Sesay submitted that on the facts of this particular appeal, the focus was on the nature of the appellant's relationship with the children and the consequences for them as they lack resilience, maturity or fortitude of adults as set out at paragraph 47 MK and that was consistent with the FtTJ's decision.

80. However, whilst we accept that the FtTJ was required to undertake an evaluative exercise of what was "unduly harsh", this would have to take place in the context of the test should be applied (see paragraphs 13-17 of The Secretary of State v RA (as cited)).

81. As Mr Lindsay submitted, there was no objective evidence or independent evidence that the appellant's presence was required to safeguard the children's welfare.

82. We have been referred to the decision in AJ (Zimbabwe) by Mr Lindsay. In that decision the Court of Appeal had made reference to the case law relevant to the best interests of children and at paragraph 17 stated that "these cases show that it would be rare for the best interest of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests."

83. We take into account the submission made by Mr Sesay in his skeleton argument that the decision of AJ (Zimbabwe) was made before the decision in KO in the Supreme Court. However, we do not accept that what was said by the Court in AJ to be inconsistent with the decision in KO and unarguably supports the elevated threshold of the test set out at paragraph 33.

84. There is no dispute between the parties that the appellant has a genuine and subsisting parental relationship with the children. However, even taking the evidence at its highest, it demonstrates that the appellant has been taking an active role in the children's lives, that he sees them daily, has been involved in the school activities and has a close and significant relationship with them.

85. In our judgment the analysis of the evidence before the FtTJ did not identify anything other than that which normally would be the position of children who would be separated from a father with whom they had a close relationship. This is underlined by the fact that the phrase "unduly harsh" anticipates an evaluation being undertaken as it is not just the nature and quality of the relationship because paragraph 339(a) requires there to be a genuine and subsisting relationship before considering whether it would be "unduly harsh".

86. We do not accept the submission made by Mr Sesay that even if the judge applied a generous approach, it was not an error of law. We remind ourselves that we should be cautious in reaching a contrary decision to that of a judge who had the benefit of

hearing oral evidence (see SSHD v AH (Sudan) and others [2007] UKHL 49). However, for the reasons we have set out above, the judge made a material misdirection in law by conflating the issues of undue harshness and reasonableness and by failing to apply the necessary threshold test set out in KO (Nigeria) in his analysis of the evidence.

87. We have therefore reached the conclusion that the decision of the FtTJ does involve the making of an error on a point of law for those reasons and therefore the decision is set aside.

The re-making of the decision:

88. As to the re-making of the decision, Mr Sesay stated that there was no evidence that there had been a material change of circumstances since the hearing in March 2019 in relation to the children's circumstances or that of the appellant. No further evidence had been filed and served in accordance with the directions. As Mr Lindsay submitted, there had been no challenge to the factual circumstances of the appellant or the children and in those circumstances, we invited the parties to make any further submissions that they wished to rely on.

89. Mr Lindsay on behalf of the respondent submitted that the appellant had only pursued his appeal on the basis of his relationship with the children as set out in the decision of the FtTJ at paragraph 29 and therefore his submissions addressed that issue.

90. Whilst there was no dispute on the evidence that the appellant has a genuine and subsisting parental relationship with the children, the evidence fell far short of establishing effects that could be described as "unduly harsh" in the context of the test set out in KO (Nigeria) and that something more than the normal effects of deportation on the children was required. The evidence before the FtTJ demonstrated that he did not live with the children and even taking it its highest it would be difficult to see how he could succeed on the basis of the evidence because if he did it would effectively mean that all fathers who have an ongoing, close relationship with their children would never be deported. He submitted that the appeal should be dismissed.

91. Mr Sesay submitted that we should consider the impact on the children in accordance with paragraph 47 of MK (Sierra Leone) and that Judge Robertson when granting permission, had made reference to the children not suffering from any difficulties but that the issue was about the quality and the impact on the children. In the light of the evidence before the FtTJ which was corroborated by the evidence from the schoolteachers, it could properly be said that any separation from their father would be unduly harsh upon the children.

92. Mr Sesay did not seek to rely upon s.117C(6) which, even in the case of a foreign criminal who has been sentenced to less than four years' imprisonment but more than twelve months, that, even where Exception 2 does not apply an individual may resist deportation where there are "very compelling circumstances, over and above those described" in Exception 2 (see NA (Pakistan) and another v SSHD [2016] EWCA Civ 662 and RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019]

UKUT 123 (IAC)). Mr Sesay confirmed to us in his submissions that the appellant 's case was put solely on the basis of Exception 2 and the issue of undue harshness.

93. We have carefully considered the competing submissions made by each of the advocates, but we do so in the light of our earlier evaluation of the evidence and the relevant legal principles.

94. The issue remains whether the separation of the children from the appellant is "unduly harsh".

95. We accept, as did the FtTJ that it would plainly be in the best interests of the children for their current stable environment, in which both parents are presently playing their respective parts, to continue. We take their best interests into account as a primary consideration. We have no doubt that it would be in the children's best interests to have both parents in the UK. However, we do not accept that the evidence demonstrates that for both children to remain in the UK without the appellant is unduly harsh. Even taking the evidence at its highest, it demonstrates that the appellant has been taking an active role in the children's lives, that he sees them daily, has been involved in the school activities and has a close and significant relationship with them.

96. Whilst the appellant's partner has set out in her written evidence that his presence is vital for them to meet their critical milestones, there is no evidence in support of this and stands as bare assertion. Their health and wellbeing are being catered for by the presence and care of his ex-partner. Neither the FtT nor the Upper Tribunal have any cogent evidence that the children's separation from their father will have any significant impact on their wellbeing. We would accept the references made in the evidence that the appellant has a very close relationship with the children and that he has been involved in school activities such as attending parents' evenings and is regularly involved in the collection of the children from school. Nevertheless, the evidence simply does not demonstrate that the circumstances of the children in the UK without the appellant are "severe" or "bleak" such as to be "harsh" let alone "unduly harsh". Looking at all the circumstances, we are not satisfied that the effect of the deportation order against the appellant has an "unduly harsh" impact upon either of the children.

97. For these reasons, we are not satisfied that Exception 2 in s.117C(5) of the NIA Act 2002 applies.

98. As we have set out Mr Sesay did not rely upon s.117C(6), namely that, even though Exception 2 did not apply, there were nevertheless "very compelling circumstances, *over and above* those described in "Exception 2" (our emphasis). That test could not be met in this appeal since all the relevant circumstances have already been taken into account in reaching our decision that Exception 2 does not apply.

99. In summary, as we have concluded that the impact of the the deportation order against the appellant is not unduly harsh upon either child, the public interest requires the deportation of the appellant. Therefore, his appeal based upon Art 8 of the ECHR does not succeed and his appeal is dismissed.

Notice of Decision

100. The decision of the First-tier Tribunal involved the making of an error on a point of law and is therefore set aside. We re-make the appeal as follows; the appeal is dismissed.

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 3/7/2019

Upper Tribunal Judge Reeds