



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

Appeal Number: PA/12902/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 19 November 2019**

**Decision & Reasons Promulgated
On 4 December 2019**

Before

**THE HONOURABLE LORD MATTHEWS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE McWILLIAM**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**OA
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Mr H Cheng, Solicitor, Duncan Lewis

**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.

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against a decision of FtT Judge S Iqbal promulgated on 27 June 2019 allowing the respondent's appeal against a deportation order. For the sake of continuity we shall henceforth call the respondent in this appeal the appellant and the Secretary of State the respondent. Having regard to the Upper Tribunal and Asylum Chamber Guidance Note 2013 No 1: Anonymity Orders, we anonymise the appellant to protect the identity of her son who is a minor.
2. The appellant is a Nigerian national born on 19 August 1986. She was arrested on 20 April 2006 attempting to board a flight to Lagos using a Nigerian passport containing a counterfeit biodata page. On 7 July 2006 she was convicted at Lewes Crown Court, sentenced to twelve months' imprisonment and recommended for deportation. She was served with a deportation order on 18 October 2006. She appealed against that and became appeal rights exhausted on 30 July 2007. She failed to adhere to reporting conditions and was listed as an absconder on 27 July 2007. She had a son born 2 May 2008 and on 11 February 2011 she made an application for a residence card as the spouse of an EEA national. However, she was encountered living as a family with her partner, KA and their son, DA (born on 2 May 2008) and not her claimed partner, who was a French national. The EEA application was refused and she sought to appeal that but it was dismissed with appeal rights exhausted.
3. On 18 November 2011 the Home Office served on the appellant a status questionnaire which was completed and received by the respondent on 25 November 2011. The information received concerning her child and partner was treated as further submissions and on 6 June 2013 they were refused under paragraph 353 of the Immigration Rules. She lodged an appeal against this decision but it was dismissed by the First-tier Tribunal on 23 October 2013 and she became appeal rights exhausted on 19 January 2015. The deportation order was then signed on 17 February 2017. She was detained and the order was served on 13 March 2017. Further submissions were made but rejected and on 28 March 2017 she submitted an implied claim for asylum, which was refused, and which was certified under Section 96 of the Nationality, Immigration and Asylum Act offering no right of appeal.
4. She was served with a removal notice on 15 May 2017 and applied for a stay of removal, which was granted on 23 May 2017 on the basis that there were implications for DA arising out of the deportation of his mother which might not have been considered. The matter was settled by consent with the decisions of 15 May and 23 May 2017 withdrawn and further representations made by the appellant were considered. On 24 October 2017 a decision was made to refuse the protection and human rights claim which was then the subject of the appeal to the FtT. Her appeal was allowed by Judge Iqbal. The Secretary of State was granted permission to appeal.

The findings of the FtT

5. At paragraphs 14 and 15 of the determination the judge notes the following:

- “14. There is also a previous determination as indicated in relation to her appeal against the deportation order of 3 June 2013 by First-tier Tribunal Judge Thanki, promulgated on 23 October 2013 and upheld by the Upper Tribunal in a determination promulgated on 23 December 2013.
15. Whilst I am bound by the findings made in the previous determination taking into account the guidance as set out in Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka [2002] UKIAT 00702 I go on to consider that there have been several developments in the circumstances of the appellant and her family, on the basis of which I may depart from previous findings made.”

6. Paragraph 16 goes on as follows:

“There is also a determination promulgated on 18 July 2017, in relation to her partner, [KA] and their son [DA] (DOB 2 May 2008), where the FtT Judge Hembrough acknowledged at [66] that he was not considering their appeal in isolation of the family unit, which included the appellant: *‘The reality is that whether he is allowed to remain in the UK turns on my finding in relation to [DA’s] status.’* The appeal was dismissed with reference to Section 117B(6) and at [86], the judge noted *‘[DA] is not a British citizen’*. I have therefore considered the findings made by the judge to the extent that they are relevant in line with the guidance of AA (Somalia) and AH (Iran) v SSHD [2007] EWCA Civ 1040, where the Court of Appeal concluded:

‘In cases where the parties are different, the second Tribunal should have regard to the factual conclusions of the first Tribunal but must evaluate the evidence and submissions as it would in any other case. If, having considered the factual conclusions of the first Tribunal, the second Tribunal rationally reaches different factual conclusions, then it is those conclusions which it must apply and not those of the first Tribunal. In my view Ocampo and LD do not stand in the way of this simple approach. Both cases make it clear the first decision is not binding and that it is the fundamental obligation of the judge independently to decide the second case on its own individual merits.’”

7. At paragraph 17 the FtT says the following:

“At the outset the parties highlighted before me that there had been a change of circumstances since the dismissal of [KA’s] decision, particularly that on 18 September 2018, [DA] had been naturalised and received his British passport on 15 October 2018, as a result of an application being made by [KA] in December 2017. It was highlighted to me that at page 35 of the application his Home Office reference was the same as that of the appellant, and therefore they ought to have been considered as part of one family unit.”

Paragraph 18 goes on:

“In addition at 9.5, [KA] had highlighted the name of his partner (that is the appellant) and that she shared primary care for their child. As a result of that application on 25 January 2019 [KA] was granted leave to remain under GEN3.2 of Appendix FM that there were exceptional circumstances in his case which would render a refusal a breach of Article 8 and that it would be unjustifiably harsh to remove him from the United Kingdom.”

8. The argument before the FtT was not based on a protection claim but on a breach of her Article 8 rights.
9. Having considered the relevant legislation and authorities, the FtT found that it would be unduly harsh for DA, who suffers from autistic spectrum disorder (ASD) to be required to live in Nigeria and also that it would be unduly harsh for him to live in the UK without his mother.
10. At paragraph 38 she said the following:

“I am therefore satisfied given the appellant has demonstrated on balance that she falls to be considered under the exception to deportation, as paragraph 399(a) of the Rules applies, which as set out earlier is largely reflected by Exception 2 in Section 117C(5), where the appellant has a genuine and subsisting relationship with a qualifying child and the effect of her deportation would be unduly harsh on her child.”

The Law

11. In respect of unduly harsh and the test to be applied the Supreme Court in KO [2018] UKSC 53 said as follows:-

“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 (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. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department*[2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) 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.”

12. In KO at paragraph 22 Lord Carnwath (with whom the other Judges agreed) said that on the face of it, Exception 2 in section 117C of the 2002 Act raises a factual issue seen from the point of view of the partner or child and he said the above at paragraph 23. It is now clear that a Tribunal or court considering section 117C(5) of the 2002 Act must focus not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation but rather on whether the effects of deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. The Tribunal must consider whether it would be unduly harsh for the child and/or partner to live in the country to where the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him.
13. At para 17 of RA (S.117C: “unduly harsh”): offence: seriousness) Iraq [2019] UKUT 00123 the UT said:
- “As can be seen from paragraph 27 of KO (Nigeria), the test of unduly harsh has a dual aspect. It is not enough for 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).”

The grounds of appeal

14. It is important to look at the grounds on which the appeal is based. Grounds 1 to 4 are as follows:

“Material Misdirection in Law

1. The Judge of the First-tier Judge Iqbal (‘the judge’) has allowed the appellant’s appeal based on finding that it would be unduly harsh for the appellant to return to Nigeria without her son, as well as the finding that it would also be unduly harsh for the family to return to Nigeria together. In doing so, it is submitted the judge has erred in law.
2. At [31] the judge finds that [DA] has no connections to Nigeria and it would be unduly harsh for him to relocate there with his family given that he is now a British citizen. No alternate reason is given aside from his citizenship which, in itself is not sufficient to make this finding.
3. The judge goes on to find at [25] that the appellant is a low risk of reoffending is (sic) inadequately unreasoned (sic) when it is noted she engaged in deception when entering into a sham marriage some time after the index offence.
4. Likewise, this change in circumstances does not allow the judge to depart from the findings of the previous judge that suitable schools for ASD children are available in Lagos and Abuja. [DA’s] father having been granted leave is a separate issue to that of his mother, a foreign national offender whose removal is in the public interest.”

15. Ground 5 is to the effect that there is nothing exceptional about the circumstances and reference is made to AJ (Zimbabwe) [2016] EWCA Civ 1012.
16. Ground 6 is to the effect that in allowing the appellant's appeal, the judge overlooked the public interest in deportation of foreign national offenders. Reference is made to paragraph 15 of OH (Serbia) [2008] EWCA Civ 694 and paragraph 20 of Danso [2015] EWCA Civ 596.
17. It is also said that the appellant is still a foreign national offender and the public interest still requires her removal.
18. The Secretary of State had submitted a skeleton argument. Mr Cheng had not had sight of this until shortly before the hearing. At the outset Mr Cheng submitted that in large measure it went beyond the grounds. The grounds themselves only referred to the question of citizenship as the change in circumstances which allowed the judge to depart from the previous findings. That was what the appeal was about, and it did not allow the Secretary of State to embark on a more wide-ranging attack on the determination. The grounds challenge the unduly harsh decision in the context of relocation to Nigeria. However, the Secretary of State raised for the first time in his skeleton argument challenges to the decision in the context of separation of the family.
19. In replying, Mr Melvin sought to argue that the grounds were such as to allow the more wide-ranging attack and referred also to the grant of permission where it was said, in relation to ground 1, that:

"It is arguable that the judge placed undue weight on the citizenship aspect when there are a plethora of other factors one ought to have possibly considered, alongside such evidence. In arguably failing to address other factors which indicated it was not unduly harsh the judge has arguably erred."
20. In our opinion, it is not legitimate to look at the grant of permission in this way. The permission cannot expand the grounds and in our view, they are very restricted. In essence, it seemed to us that the grounds were merely saying that the child's citizenship was the only new factor since the previous Tribunal decision and that it was insufficient to allow the FtT to come to different conclusions to the judge considering the appeal in 2013. It was essentially a *Devaseelan* challenge and a reasons challenge to the unduly harsh decision in respect of relocation to Nigeria.
21. We indicated to Mr Melvin that we were not prepared to allow the argument to proceed on the basis of the skeleton and he sought to amend the grounds to bring them into line with the skeleton. We considered that this came very late in the day, would cause prejudice to the appellant and would undoubtedly result in a requirement for an adjournment, as Mr Cheng indicated that he would be seeking further time to consider the issues raised in the skeleton if the respondent was permitted to rely on it. We refused Mr Melvin's motion.

Submissions

22. In opening the appeal, Mr Melvin submitted that the judge should have considered issues of citizenship and nationality but also the care given to the child when the respondent was detained and the situation of a child with ASD in Nigeria. The main thrust of the determination was that she treated citizenship as a trump card and did not fully consider the issue of family separation or the fact that her father could return to Nigeria.
23. There were inadequate reasons for finding that it was unduly harsh for the child to go to Nigeria or for the family to be separated.
24. He referred us to the case of SSHD v PG (Jamaica) [2019] EWCA Civ 1213, highlighting the very high threshold in cases where undue harshness was alleged. There is really nothing controversial about this as far as the principles are concerned. Reference was made in particular to paragraph 38 of the judgment. Mr Melvin submitted that the judge should have looked at the matter more globally rather than making a finding based on the question of citizenship. He was asked about the references to a new social work report prepared for the purposes of the appeal and which was dealt with particularly in paragraphs 33 and 34. He submitted that this dealt with how the father coped when the child was in his care. It was well-known that deportation caused families to be split. The father had had some training or counselling to improve matters in case the appellant should be deported but none of that was looked at in paragraphs 34 or 35. He submitted that it was difficult to see how that report could elevate the circumstances to undue harshness.
25. In reply, Mr Cheng turned to the grounds themselves. He submitted, as he had before, that the appellant was only arguing that no reasons were given for departing from the previous decision other than the question of citizenship. That was simply not the case. Mr Cheng submitted that it was clear from the decision that the judge found that it was unduly harsh both for the mother to be removed and for DA to stay in this country without her. Having found that Exception 2 applied, the public interest did not require deportation. In these circumstances, any argument about the public interest fell away.

Conclusions

26. The judge properly identified the applicable Rules and statutory framework. There is no challenge to the judge's self-direction.
27. Mr Melvin did not, as we understood it, make any oral submissions in relation to ground 3 which attacked the judge's finding that the appellant was a low risk of reoffending. However, on this issue we conclude that she did not ignore the deceptive behaviour since her conviction, as the grounds of appeal complain. This behaviour included entering into a sham marriage in order to secure leave. This is noted at paragraph 26 and the judge tells us that she had considered it in the round with the other

evidence before her. She was entitled to be satisfied that the appellant had demonstrated she was a low risk of reoffending and in any event, even if this was an error it does not strike us as having any materiality. That finding is at paragraph 25. However, the judge correctly did not consider the appellant's criminality when assessing unduly harsh.

28. The judge had analysed the family's situation and at paragraph 30, in dealing with KA's appeal in 2017, she said:

"The situation as it stands today is that another two years have passed since the determination of [KA's] appeal in 2017, [DA] is now a British citizen and [KA] has additionally been granted leave as a result of [DA's] circumstances. I find that these matters, together with the new evidence presented in this appeal, do cause me to depart from the findings of the previous judges in the appeals of the appellant and [KA], for the reasons set out below."

29. The judge considered unduly harsh in the context of DA having to relocate to Nigeria at [31]. She said that she was satisfied on the totality of the evidence that it would be unduly harsh for the child to relocate to Nigeria. A proper reading of [31] discloses that there were reasons over and above DA's nationality and that leave had been granted to his father for the judge's conclusion. DA has ASD. The point made by the judge was that his condition had been managed from his early years through to his schooling in the UK. The judge did not proceed on the basis that there are no schools available in Lagos or Abuja as asserted in the grounds. She found that he has no connection with Nigeria. There is no suggestion that he has ever lived there. The social worker's report that was not before the FtT in 2017 spoke of DA having a private life outside of the family home and of being fully integrated. At [33] the judge made findings about this report indicating that it was of good evidential value. There is no challenge to this. At [41] the judge assessed DA's best interests stating that they were to stay in the UK with his family. Similarly, this finding is not challenged. It was incumbent on the judge to consider unduly harsh based on the evidence before her. The grounds focus on the decision at [31] to support the Secretary of State's case, but the decision must be read as a whole to properly understand the reasoning behind it. It is unarguable that the judge considered the grant of leave to the appellant's partner by the Secretary of State on the basis that removal would be "unjustifiably harsh" as determinative of the issue of unduly harsh. This matter was not raised in oral submissions. It was one piece of evidence. The weight to attach to it was a matter for the judge.
30. Despite our decision to refuse the application by Mr Melvin to amend the grounds, in oral submissions he strayed beyond them. In any event, we conclude that the decision of the judge in respect of separation of the family is lawful and the challenges in the skeleton argument are without substance. In paragraph 32 the judge considered the question of whether it would be unduly harsh for DA to remain without his mother in the United Kingdom. The judge at [35] said that she had heard evidence about the difficulties faced by KA when the appellant was detained in March 2017

which had led him to call a support worker who had arranged respite care. The judge took into account the evidence from the social worker about the impact of the Appellant's detention on DA with reference to school logs which disclosed a change in behaviour when his mother was detained and that he was "unsettled and tearful." The evidence of the social worker was supported by the evidence of the support worker. The judge considered at [34] the substance of the evidence of the social worker including the observation about DA's behaviour when his mother was in immigration detention. Against the background of all the evidence, including new material not limited to the citizenship question, she was satisfied that the appellant's deportation would have an impact which was unduly harsh both on her partner and her child.

31. There was no requirement for the judge to make additional findings about matters identified in the skeleton argument. It is not necessary to make a finding about whether the Appellant's husband would never be able to adequately care for the child in the absence of the Appellant. The judge had to assess the evidence before her. There was no evidence to support the assertion that problems would be short term or easily overcome. It was not for the judge to engage in speculation.
32. There is no basis for the suggestion that the judge considered immaterial matters when assessing unduly harsh. This argument is wholly lacking in substance. The reference to "findings I make on other issues that arise in the Appellant's appeal" at [36] does not support the Secretary of State's position. The judge properly directed herself on the law and there is nothing to support that she did not properly apply it. This was not a matter pursued by Mr Melvin in oral submissions.
33. Whilst we construed the challenge to be that the judge misdirected herself, at para 27, the judge directed herself that the unduly harsh assessment was self-contained, and the test was harsher than the test of reasonableness. There is nothing wrong with this self-direction.
34. Mr Melvin relied on PG (Jamaica) essentially to support what was a challenge on rationality grounds. There was in our view evidence on which it was properly open to Judge Iqbal to find that deportation of the appellant would result for DA a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation. We take account of the evidence of the social worker and the diagnosis of ASD. In this case, there was no lengthy prison sentence which had taken the appellant away from DA for a significant period. DA had always known life with his mother save for a brief period when she was in immigration detention. Considered collectively all factors were capable of taking the situation beyond the commonplace.
35. In our opinion, the unfocused grounds of appeal are not made out. As we have indicated, they are predicated upon the relevant change in circumstances being the child's citizenship. That, however, is not the case. There was other evidence upon which the FtT was entitled to and

did rely. In our opinion, it cannot be said that the judge's decision was irrational. It may be that another judge might not have made it but it was one which was open to her on the facts which she found established. The judge properly directed herself and applied the law including *Devaseelan*. If the Secretary of State had wished to embark on a more wide-ranging attack on the determination, that could have been done but it came far too late, in our opinion, for it to be done now. However, this is not material because for the reasons we have given, there is no substance in the wider challenges. Even if we had allowed the appeal to proceed on the basis of the arguments in the respondent's skeleton, we would have reached the same conclusions.

36. The judge was entitled to allow the appeal on the grounds that the appellant met the requirements of Exception 2 (S117c (5)) in the context of the DA. There is no need to engage with the grounds in so far as they challenge the decision under s117C (6) and proportionality.
37. There is no properly identified error of law in the decision of the judge to allow the appellant's appeal.

Decision

The appeal of the Secretary of State is refused.

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LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)

Date: 28 November 2019