



IAC-AH-KRL-V3

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

Appeal Number: HU/17000/2018 (P)

THE IMMIGRATION ACTS

**Decision under Rule 34
On 20 May 2020**

**Decision & Reasons Promulgated
On 22 May 2020**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**TEMIDAYO ISHOLA OJO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria. His date of birth is 22 April 1990. The Appellant appealed against the decision of the Secretary of State to refuse an application on human rights grounds dated 6 August 2018. His appeal against that decision was dismissed by Judge of the First-tier Tribunal (“the FtT”) in a decision of 23 December 2019 following a hearing at Taylor House on 10 October and 22 November 2019.
2. The Appellant came to the UK as a dependant on 29 July 2007. He was granted indefinite leave to remain as a dependent relative on 2 September 2009. On 11 April 2018 he was sentenced to 21 months’ imprisonment as a result of the commission of

offences of dishonesty. Following the Appellant's criminality, the Secretary of State made an order to deport the Appellant on 20 July 2018.¹

3. The Appellant pleaded guilty before Woolwich Crown Court of one count of converting criminal property. The judge sentencing the Appellant described it as a "relatively sophisticated operation" and described the Appellant's criminality as essentially an identity fraud. The Appellant set up a bank account in the name of another person which enabled him to take control of that person's account. He made transfers from the victim's account into his own and other's bank accounts. The benefit of the offence to the Appellant was £1,800. The judge described the Appellant as playing a significant role and the overall loss to the victim was £69,000, that that reflected the sum that went into the Appellant's account. The purpose behind the offence was to launder money. The sentencing judge had regard to the Appellant's age and gave him credit for his guilty plea. He considered his personal circumstances, including that he had a 3 year-old daughter and a stepson.
4. The matter was listed on 24 March 2020 for an oral hearing in order for the Upper Tribunal to determine whether the FtT made an error of law, permission having been granted to the Appellant by Judge of the FtT Tribunal Osborne on 16 January 2020. In the light of the COVID-19 pandemic that date was vacated and the President of the UTIAC, His Honourable Judge Lane made directions.
5. Judge Lane's directions were issued on 8 April 2020. In response to those directions the Secretary of State served a Rule 24 response. Despite the Appellant having been permitted to serve further submissions in support of the error of law none have been received by the Tribunal. An e-mail was sent from those instructed by the Appellant to the Tribunal on 21 April 2020 attaching the Appellant's skeleton argument. This is dated 16 March 2020 and it is said by the solicitors that it was sent to the court "before on 16 March 2020 along with the supplementary bundle referred to in the skeleton argument". The document includes a response to the Respondent's Rule 24. Thus the date shown on it cannot be accurate. The Secretary of State on 27 April 2020 e-mailed further submissions in response to the submissions made by the Appellant.

Rule 34

6. There are no representations from either party about whether the matter should be determined on the papers. Having had full regard to the Pilot Practice Direction: Contingency Arrangements in the First -Tier Tribunal and Upper Tribunal, the Presidential Guidance Note No 1 2020 and all documents submitted by the parties, I conclude that this appeal decision should be made without a hearing. The appeal can be fairly and justly determined without the need for a hearing. The parties have been given the opportunity to participate in the proceedings.

¹ Automatic deportation of a "foreign criminal": s32 UKBA 2007; s117D NIAA 2002

The findings of the FtT

7. The Appellant's appeal was advanced on the basis that the Appellant, a medium offender, met Exception 2 of the of the Nationality, Immigration and Asylum Act 2002 on the basis that he has a genuine and subsisting relationship with his partner and children and that his removal would be unduly harsh.
8. The judge heard evidence from the Appellant and his partner [LA]. They have a child together, a daughter, "D" who was born on 1 December 2014. Ms [A] has an older child, "L" from an earlier relationship. L's date of birth is 30 September 2011. D's date of birth is 1 December 2014.
9. The judge heard evidence from the Appellant and his partner. She set this out at paragraphs 15 to 24. The judge set out the law at paragraphs 27 to 34. There is no challenge to the judge's self-direction.
10. The judge made the following findings:-
 - "35. I have had very little evidence of family life enjoyed by the Appellant and his partner. Although both say that they have been in a relationship since 2012, there is little evidence of their life together. There are no supporting statements from either family or friends. There are no bill payments in joint names. The only information that was produced at the hearing was a letter from [~] School in Peckham which shows that the Appellant is named as the father of the younger child and the stepfather of the older child and that he occasionally brings the children to school and collects them after school.
 36. There is a medical report for Miss [A] dated 18 January 2018. This points to a strong relationship between the Appellant and the children and shows that he supports the children financially. I have seen no further reports to show that the Appellant's partner and the children will not manage without him.
 37. I bear in mind that the higher courts have all stated that the deportation of a parent will be hard and disruptive for the children/partners involved. In KO [2018] UKSC 53 the Supreme Court in paragraph 27 approved the finding of the Upper Tribunal in MK (Sierra Leone) [2015] where the Upper Tribunal (UT) held:

'By way of self-direction, we are mindful that unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context denotes something severe or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher'.
 38. The information that I have before me does not show that the Appellant's removal will have an unduly harsh impact on the children. The children live with their mother. There is no information to show that apart from the usual difficulties faced by families who are separated by deportation, the impact will be unduly harsh. It will not be convenient or comfortable for Miss [A] to be left with the two children. There's nothing to show me that

whilst the Appellant was in prison she did not manage. There is nothing to show the more elevated threshold described in MK where the UT said that harsh denoted something be severe or bleak and unduly raised this to something even higher.

39. The Appellant is returning to Nigeria. The evidence shows that his father was removed to Nigeria at some point. The Respondent's bundle contains the immigration history of the Appellant. It is noted that on 2 September 2009 the Appellant was granted indefinite leave to remain as a dependent relative of a settled person (his father). His father's British citizenship was subsequently nullified in 2012, as he was found to have obtained this using false details. It appears that the Appellant's father left in July 2015. Certainly, I heard no evidence from the Appellant's father, his stepmother, or any siblings.
40. The Appellant in his statement at paragraph 2 states that he had lived in the United Kingdom between 2001 and 2007 and then he was taken back to Nigeria by his parent in order to regularise his stay in the United Kingdom. Any stay the Appellant that the Appellant (sic) had in 2001-2007 was without authority. The Appellant's father's immigration history throws into question the legality of the Appellant's own status.
41. As the Appellant has his father in Nigeria and he was there himself until 2007, he will be able to reintegrate into life there. Whilst I accept that it will be unduly harsh to expect the two children and Miss [A] to accompany him to Nigeria, I do not find that it would be unduly harsh for the children to remain in the United Kingdom with Miss [A]. As I have said above there is no evidence to show that she was unable to cope whilst the Appellant was in prison".

The Grounds of Appeal

11. The grounds seeking permission are narrow. It is asserted that the judge failed to make a finding in respect of the children's best interests pursuant to Section 55 of the Border, Citizenship and Immigration Act 2009 ("the 2009 Act") and did not take into account the Appellant's family life.
12. The grant of permission concludes that it is arguable that the judge failed to assess and make a finding as to what is in the child's best interests and it is arguable that such a finding should have been made before the issue of unduly harsh was considered. All grounds were found to be arguable.
13. The Appellant chose not to submit further submissions in response to Judge Lane's directions. The Secretary of State's Rule 24 response maintains that there is no error of law. It is asserted that the judge had regard to the available evidence. It is observed that the grounds seeking permission do not set out or seek to argue that the judge failed to consider material evidence. It is argued that the judge had the correct test in mind when considering "unduly harsh" and applied the guidance in KO (Nigeria) v the Secretary of State for the Home Department [2018] UKSC 53. It is argued that the judge referred to the principle of best interests, at paragraph 7, in

respect of the decision of the Secretary of State. The judge had regard to all relevant factors relating to the children's best interests.

Conclusions

14. In the Appellant skeleton argument before me, it is asserted the FtT failed to consider the Appellant's supplementary bundle which contained further evidence of his family life with his children and partner. This is a matter not raised in the grounds of appeal. The Appellant seeks to rely on a ground of appeal which he does not have permission to argue. There is no application to amend the grounds.
15. The directions did not permit the Secretary of State to further respond; however, in the light of the additional ground of appeal now raised by the Appellant, I consider, the Secretary of State's response to this. The Secretary of State contends that the allegation is wholly without merit and that the appeal hearing was part heard to enable the Appellant to produce further evidence. The judge referred to the medical report relating to the Appellant's partner (in the supplementary bundle) at paragraphs 14, 23, 24 and 36 of the decision. Furthermore, the judge asked clarification questions (see paragraph 23 of the decision) in relation to the contents of the document.
16. The best interests of children is a primary factor when assessing proportionality generally, but it is not paramount (see ZH (Tanzania) v SSHD [2011] UKSC 4). It is incumbent on a judge to determine the relative strength of the factors which make it in their best interests. In the context of removal, if it is overwhelmingly in the child's best interests to remain, the need to maintain immigration control could well not tip the balance. This is an appeal concerning deportation. The best interests of children certainly carry great weight, as identified by Lord Kerr in HH v Deputy Prosecutor of the Italian Republic [2012] UKSC 25 AT [145]; however, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in SSHD v CT (Vietnam) [2016 EWCA Civ 488 at [38]:

"Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation."
17. There is no merit in the suggestion that the judge did not consider the evidence before her when assessing proportionality. Had the Appellant permission to argue this as a ground of appeal, which he does not, it has no substance. It is evident from the decision of the judge that for the reasons identified by the Respondent that she had before her a supplementary bundle. She specifically engaged with the letter from Sarah Ryan, Adult Mental Health Practitioner in Southwark Parental Health Team, dated 18 January 2018 at [36] of the decision. The Appellant's solicitors fail to

identify any evidence within that bundle that the judge does not specifically refer to that would make any difference to the outcome.

18. The Appellant's grounds of appeal do not make any discrete or sustainable challenge the assessment of whether separation of the family would be unduly harsh. There is no properly identified material evidence that the judge did not consider. The Respondent's case was that the relationship between the Appellant and his partner and the children was not genuine and subsisting. There was before the Respondent an absence of evidence supporting the relationships. The judge however, disagreed with the Respondent to an extent. She said at [35] that there was very little evidence before her of family life between the Appellant and his partner. She then said at [36] that the letter from Sarah Ryan pointed to a strong relationship between the Appellant and the children, however that there was no evidence to show that their mother and the children will not manage without the Appellant. A proper reading of the decision discloses that the judge accepted that there was a genuine and subsisting relationship between the Appellant and his children and that there was a relationship of sorts between the Appellant and his partner.
19. The judge went onto consider unduly harsh in the context of the Appellant staying here with their mother. She accepted that it would be unduly harsh for partner and the children to relocate to Nigeria. When assessing unduly harsh she did not identify the best interests of the children. However, she set out at [7] that the Respondent had properly concluded that the best interests of the children is a primary factor. She understood the relevance of s55 of the 2009 Act. There was no countervailing evidence which would justify an unusual finding that it would not be in the children's best interests to be with their father and mother here in the United Kingdom particularly in the light of the judge having accepted the relationships. She understood the law and proceeded to assess unduly harsh on the basis that it is in the children's best interests to remain here in the United Kingdom with the Appellant. While she could have made this clearer, this was the only rational conclusion to have reached on the evidence and considering the findings she made. Had she not proceeded on the basis that it is in their best interests to remain in the United Kingdom with their father, it is difficult to see why she would have gone onto to consider unduly harsh.
20. Before the judge there was no evidence that separation would lead to degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. As we know from KO (Nigeria) v the Secretary of State for the Home Department [2018] UKSC 53, it is an elevated threshold denoting something severe or bleak to be evaluated exclusively from the effect on the child. This has been further explained by the Court of Appeal in SSHID v PG (Jamaica) [2019] EWCA Civ 1213, where it was said that the 'commonplace' distress caused by separation from a parent or partner insufficient to meet the test. There was no evidence before the judge capable of reaching the elevated test. The grounds of appeal before me do not seek to identify any such evidence. There is no application under Rule 15 (2A) to adduce further evidence that was not before the FtT.

21. I accept that had the judge proceeded to consider unduly harsh and proportionality without having in mind the children's best interests, it could undermine the overall assessment. However, in this case, I do not understand from reading her decision that this is what she did. There is no challenge to the overall unduly harsh assessment. The judge did not fail to consider material evidence. She properly directed herself in respect of KO (Nigeria) v the Secretary of State for the Home Department [2018] UKSC 53 and applied the correct test. Moreover on the basis that it is in the children's best interests for them to remain here with both parents, on the scant evidence before the judge relating to the quality of the relationship and the impact of separation, properly applying the law, there is only one conclusion that the judge could reach in respect of Article 8. The evidence was insufficient to establish that separation would be unduly harsh.
22. The FtT did not make a material error of law. The decision to dismiss the Appellant's appeal under Article 8 is maintained.

No anonymity direction is made.

Signed *Joanna McWilliam*
Upper Tribunal Judge McWilliam

Date 20 May 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.