



**Upper Tribunal  
(Immigration and Asylum Chamber)** Appeal Number: HU/19519/2018 [V]

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 October 2020**

**Decision & Reasons Promulgated  
On 26<sup>th</sup> October 2020**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**T O (NIGERIA)  
[ANONYMITY ORDER MADE]**

Respondent

**Representation:**

**For the appellant: Ms Julie Isherwood, Senior Home Office Presenting Officer**

**For the respondent: Mr Nigel Vaughan, legal representative with NBS Solicitors.**

**DECISION AND REASONS**

**Anonymity order**

*Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of T O who is the subject of these proceedings or publish or*

*reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.*

**Any failure to comply with this direction could give rise to contempt of court proceedings.**

## **Decision and reasons**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 10 September 2018 to refuse the appellant's application for leave to remain on human rights grounds. The claimant is a citizen of Nigeria.

## **Background**

2. The claimant arrived in the United Kingdom in 2004, but has never had leave to enter or remain.
3. On 6 July 2005, she was arrested trying to board a flight to Canada, using a stolen British passport. The claimant pleaded guilty to attempting to obtain services by deception and on 2 September 2005, she was sentenced to 12 months' imprisonment, with a recommendation for deportation. The claimant had claimed asylum when arrested. She benefited from an in-country right of appeal on which she was appeal rights exhausted on 24 April 2006.
4. The claimant began a relationship with her former partner, and in October 2005, while she was in prison, she gave birth to a daughter who is a British citizen and is now 15 years old.
5. The claimant's current partner came to the United Kingdom in 2000 and has lived here for 20 years, including some years before their relationship began. He has been granted a Parental Rights Order in respect of the older daughter.
6. On 28 December 2006, a deportation order was signed. On 27 March 2007, the claimant failed to report and was treated as an absconder.
7. On 8 December 2011, the claimant had another daughter with her current partner, who has permanent residence in the United Kingdom under the Immigration (European Economic Area) Regulations 2016 and is a Nigerian citizen. Their daughter together is 8 years old.
8. On 20 April 2011, the claimant brought herself to the attention of the authorities when she made an application under the asylum legacy programme. She was in a new relationship with her current partner.
9. The claimant next made three applications to revoke the deportation order, in 2011, 2012 and 2013 which were unsuccessful. Following the failure of her last revocation application, the claimant absconded again from 21 November 2014 until 10 September 2015.

10. On 5 September 2016, the claimant's partner achieved permanent residence in the United Kingdom under the EEA Regulations, and by October 2017, the parties had been living together for two years. The claimant applied for an EEA family members' residence card, which was refused on two occasions, in 2016 and 2018. On 14 May 2018, the claimant applied for leave to remain again, but voided that application.
11. The application the subject of the present appeal was made in further submissions, resulting in a refusal letter dated 12 September 2018. The Secretary of State refused to revoke the deportation order or grant leave to remain on human rights grounds.
12. In 2020, the claimant's partner visited Nigeria for a funeral. He does still have connections there, family and friends.

### **Refusal letter**

13. The Secretary of State did not dispute the nationality of the claimant's children, nor that they lived with her and her current partner as part of a family unit. However, she did not consider that it would be unduly harsh for the claimant's partner or children to remain in the United Kingdom without the claimant, or that there were very compelling circumstances outweighing the United Kingdom's right to control immigration.
14. The Secretary of State also considered that as both the claimant and her partner were Nigerian, it was open to them to take the children with them and to return to Nigeria as a family. Alternatively, the claimant's partner could look after the girls in the United Kingdom.
15. The claimant appealed to the First-tier Tribunal.

### **First-tier Tribunal decision**

16. On 18 February 2020, First-tier Judge Bunting began with the *Devaseelan* starting point, a decision by First-tier Judge Mulholland in 2017, on which permission to appeal to the Upper Tribunal was refused. Judge Mulholland noted that the claimant had used multiple identities for herself and her children, and had not attempted to correct this.
17. Judge Mulholland's primary finding was that both girls would be able to reside with the claimant's current partner and that there was no breach of the EEA Regulations as they would not be required to leave the European Union. Judge Mulholland was not satisfied by the claimant's account that her elder daughter was not in touch with her father, following his release from prison in 2014, and made a secondary finding that he would be in a position to assume responsibility for her.
18. Judge Mulholland dismissed the EEA Regulations appeal. There were in addition decisions from First-tier Judges Herlihy and Hanratty. The decision of Judge Herlihy did not add significantly to the factual matrix. That of Judge Hanratty made a negative credibility finding, but the

appellant did not attend and he did not have the opportunity to see her evidence tested in cross-examination.

19. The present decision is based on oral evidence, with cross-examination. The judge found that both children were at school and in education and had a private life outside the home. The section 55 best interests of both children were to stay with their mother, whether she was in the United Kingdom or in Nigeria. In addition, it was in their best interests to remain in the United Kingdom and grow up as British citizens.
20. The First-tier Judge found that it would be unduly harsh for the children to live in the United Kingdom without their mother, with reference to paragraph 399(a) and 399(b) of the Immigration Rules HC 395 (as amended). The claimant was the primary carer, since her partner had employment but she did not. The bond between mother and daughter was strengthened by this. There was a letter from the older child (albeit unsigned) emphasising that she wanted her mother to remain. The younger child was said to be clingy and 'too heavily reliant' on the claimant.
21. The judge applied *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 and concluded that the bond between the claimant and her children was sufficiently different from that of most families to make her removal unduly harsh. The elder daughter was just choosing her GCSEs, which she would study from September 2020. Moving her now would be significantly detrimental to her education. She had a circle of friends and interests, within and outside school. The younger girl did not speak or understand Yoruba, although she would learn eventually, but it was the circumstances of the older girl which were determinative on Article 8 ECHR grounds because of her age and educational circumstances.
22. The judge took account of the claimant's unlawful status in the United Kingdom. He then gave separate consideration to section 117C and section 117B(6) which he correctly found to be inapplicable, as this is a case where a deportation order has been made. The 12-month sentence placed the claimant at the lower end of 'medium' offending, although passport offences were always serious.
23. The judge noted the public interest in deportation, but the present claimant had committed only one offence, 13 years ago, and was 'long past the point of being rehabilitated'. Delay was a factor, but given the long periods of absconding, not one which carried much, if any, weight in this appeal.
24. In the event that the claimant did not meet the terms of the exceptions, Judge Bunting considered that this was a 'near miss' and that in her peculiar circumstances, the appeal should be allowed.
25. The Secretary of State appealed to the Upper Tribunal.

## Permission to appeal

26. There were two grounds of appeal: first, that the First-tier Tribunal decision failed to provide adequate reasons on a material matter, the question of undue harshness; and second a material misdirection, again with reference to undue harshness, with reference to *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213 at [39]. With respect, both grounds appear to be the same.
27. Permission to appeal was granted by Upper Tribunal Judge Martin on the basis that:

“It is arguable, as asserted in the grounds, that the judge erred in finding the [claimant’s] deportation unduly harsh on her eldest child, when the children both live in a stable environment with their father/step-father, particularly if, as the grounds suggest, the [claimant’s] partner has a court order giving parental rights in relation to his step-daughter. It is arguable the judge erred in finding as he did, on the basis only that the child was not the biological daughter of the partner.”

## Rule 24 Reply

28. There was no Rule 24 reply on behalf of the claimant.
29. The appeal was listed for 4 September 2020 by video link but the claimant did not attend and there was no representation from her. After the hearing, email correspondence was received from Mr Vaughan, who had been unable to connect with the hearing and had not thought to telephone the Tribunal and let us know.
30. The appeal was relisted for a further video link hearing before a different Upper Tribunal Judge.
31. That is the basis on which this appeal came before the Upper Tribunal today.

## Submissions

32. For the Secretary of State, Ms Isherwood had sent the Tribunal an email (unfortunately not linked till after the hearing) in which she said she would rely on the following authorities:
- *PN (Uganda) v Secretary of State for the Home Department* [2020] EWCA Civ 1213
  - *Imran (Section 117C(5); children, unduly harsh : Pakistan)* [2020] UKUT 83 (IAC)
  - *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213
  - *Secretary of State for the Home Department v KF (Nigeria)* [2019] EWCA Civ 2051

33. In addition, at the hearing she relied on *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 at [102]-[103], handed down on 9 October 2020.
34. Ms Isherwood argued that the judge had failed adequately to reason why it would be unduly harsh for the claimant's two daughters to remain in the United Kingdom with her partner.
35. For the claimant, Mr Vaughan also relied on *PG (Jamaica)*. The claimant's elder daughter had lived with just her mother from her birth in 2005 until her mother met her present partner in 2011. The younger child had known no other parents but the claimant and her partner, the younger child's biological father. The maternal input was irreplaceable.
36. The nature of the claimant's offence and the delay should both be given weight. The judge had elevated the parent-child bond at [105], [112] and [114], weighing all relevant factors fairly. His decision was neither perverse nor irrational. It had been open to the First-tier Judge to find that it would be unduly harsh to separate these children from their mother.
37. I reserved my decision, which I now give.

### **Legal provisions**

38. The claimant is a foreign criminal. As such, section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) is applicable. Her children are qualifying children as defined in section 117D, because they are both British citizens. So far as relevant, section 117C provides as follows:
  - "117D (1) The deportation of foreign criminals is in the public interest.
  - (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
  - (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies. ...
  - (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.
  - (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

Section 117D(4) (Exception 1) does not apply because it requires a person to show that they have been lawfully resident in the United Kingdom for most of their life. The claimant in these proceedings has never been

lawfully resident here. Similar provisions are in the Immigration Rules HC 395 (as amended) at 398(b), 399 and 399A.

## The authorities

39. The Supreme Court gave guidance on the meaning of ‘unduly harsh’ in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53. At [23] in the judgment of Lord Carnwath JSC, he said this:

“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.”

40. The cases relied upon by Ms Isherwood in 2019 and 2020 seek to apply the *KO (Nigeria)* principles. In *PG (Jamaica)*, the Court of Appeal dealt with a case where there was a significant delay in seeking to deport the appellant, the last offence being committed in 2008, and the first deportation order made in January 2011. Following its revocation, there was a period of discretionary leave, followed by another application for leave to remain (in time) and a delay of almost three years in making a decision on that application.
41. The Court of Appeal applied *KO (Nigeria)*. Lord Justice Holroyde, with whom Lord Justices Floyd and Hickinbottom agreed, said this:

“38. The decision in *KO (Nigeria)* requires this court to adopt an approach which differs from that taken by Judge Griffith and Judge Finch. In the circumstances of this appeal, I do not think it necessary to refer to decisions predating *KO (Nigeria)*, because it is no longer appropriate, when considering section 117C(5) of the 2002 Act, to balance the severity of the consequences for SAT and the children of PG’s deportation against the seriousness of his offending. The issue is whether there was evidence on which it was properly open to Judge Griffith to find that deportation of PG would result for SAT and/or the children in a degree of harshness going beyond what would necessarily

be involved for any partner or child of a foreign criminal facing deportation.

39. Formulating the issue in that way, there is in my view only one answer to the question. I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or children in this country. ... Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another, and have to face one or more of their children going through "a difficult period" for one reason or another, and the fact that a parent who is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children. Nor can the difficulties which SAT will inevitably face, increased as they are by her laudable ongoing efforts to further her education and so to improve her earning capacity, elevate the case above the commonplace so far as the effects of PG's deportation on her are concerned. In this regard, I think it significant that Judge Griffith at paragraph 67 of her judgment referred to the "emotional and behavioural fallout" with which SAT would have to deal: a phrase which, to my mind, accurately summarises the effect on SAT of PG's deportation, but at the same time reflects its commonplace nature.

40. So far as PG's offending history is concerned, I accept Mr Lewis's submission that neither the nature of the offences committed after PG had served his prison sentence, nor the overall passage of time, can assist SAT or the children now that KO (Nigeria) has made it clear that the seriousness of the offending is not a relevant consideration when determining pursuant to section 117C(5) of the 2002 Act whether undue harshness would be suffered."

42. In a short concurring judgment, Hickinbottom LJ said this:

"46. When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with their other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are "unduly harsh" will deportation be constrained. That is entirely consistent with article 8 of the ECHR. It is important that decision-makers and, when their decisions are challenged, tribunals and courts honour that expression of Parliamentary will. In this case, in agreement with Holroyde LJ, I consider the evidence only admitted one conclusion: that, unfortunate as PG's deportation will be for his children, for none of them will it result in undue harshness."

43. In *KF (Nigeria)*, Lord Justice Baker, with whom Lord Justice Ryder, then the Senior President of Tribunals, agreed, applied both *KO (Nigeria)* and the observations above of Hickinbottom LJ in *PG's* case. At [30], Baker LJ said this:



“30. ... The First-tier Tribunal judge found that the respondent's son would be deprived of his father at a crucial time in his life. His view that "there is no substitute for the emotional and developmental benefits for a three-year-old child that are associated with being brought up by both parents during its formative years" is indisputable. But those benefits are enjoyed by all three-year-old children in the care of both parents. The judge observed that it was a "fact that being deprived of a parent is something a child is likely to find traumatic and that will potentially have long-lasting adverse consequences for that child" and that he was entitled to take judicial notice of that fact. But the "fact" of which he was taking "judicial notice" is likely to arise in every case where a child is deprived of a parent. All children should, where possible, be brought up with a close relationship with both parents. All children deprived of a parent's company during their formative years will be at risk of suffering harm. Given the changes to the law introduced by the amendments to 2002 Act, as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances.”

44. And at [33]:

“33. In my judgment, there is no need to remit this case. Like the Court of Appeal in *PG (Jamaica)*, I have reached the conclusion that there is really only one possible outcome. There simply was not the evidence on which a tribunal, properly directed as to the law, could conclude that the deportation of KF would lead to his partner and child suffering a degree of harshness beyond what would necessarily be involved for any part of child of a foreign criminal facing deportation. As in that case, the evidence does not provide a basis upon which KF could establish Exception 2 under s.117C(5) of the 2002 Act and paragraph 399 of the Immigration Rules, and accordingly under s.117C(3) the public interest requires that he be deported.”

45. In February 2020, in *Imran*, the Upper Tribunal gave guidance on the proper application of section 117C(5), with the judicial headnote as follows:

*“1. To bring a case within Exception 2 in s.117C(5) of the Nationality, Immigration and Asylum Act 2002, the 'unduly harsh' test will not be satisfied, in a case where a child has two parents, by either or both of the following, without more: (i) evidence of the particular importance of one parent in the lives of the children; and (ii) evidence of the emotional dependence of the children on that parent and of the emotional harm that would be likely to flow from separation.*

*2. Consideration as to what constitutes 'without more' is a fact sensitive assessment.”*

46. I was not taken to *PN (Uganda)* during the hearing. The judgment cited by the Secretary of State relates to unlawful detention and as such has no direct relevance to the facts of this appeal.

47. Finally, in *AA (Nigeria)* Lord Justice Popplewell, with whom Lord Justice Moylan and Baker agreed, were considering the case of an appellant brought to the United Kingdom in 1999 by a parent when he was 11 years old, who arrived perhaps on a visit visa, but had no leave to remain from at least 2000. His mother abandoned him, and he went to live with an aunt. He was physically abused by his uncle, and sexually abused by his football coach, which had a huge impact on him.
48. In 2006, AA's then British citizen partner gave birth to the appellant's child. He was just 18 years old. The marriage broke down in 2011 and he had no contact with his former partner after that: the appellant began committing crimes, including drug running, and went to prison for over 4 years in November 2013. By then he had an EEA citizen partner, who was pregnant with his child, which was born while the appellant was in prison.
49. On his release in August 2015, the appellant lived with his new partner and their son, but his older child by the previous relationship spent time with them and the half siblings bonded. He was served with a deportation order in April 2017 and made a human rights claim.
50. The First-tier Judge found that the appellant had been in the United Kingdom since the age of 11, for 19 years, and had a private and family life here, despite his unlawful presence. The First-tier Judge considered it most unlikely that the appellant would re-offend, having regard to his vulnerability at the time of his offending, his current stable family circumstances, and also to his conduct in prison and following release, which demonstrated a desire to address his offending behaviour and obtain skills he could use in the community to reduce the risk of reoffending.
51. The appeal was allowed in the First-tier Tribunal but set aside and remade negatively in the Upper Tribunal. The Court of Appeal set aside the decision of the Upper Tribunal and restored the decision of the First-tier Tribunal. The Court of Appeal considered that the Upper Tribunal had unlawfully restricted the range of reasonable views which might be reached by First-tier Tribunal judges, and substituted its own view as to what the outcome should be, for that of First-tier Judges who had heard and seen the parties give evidence.
52. At [41], Popplewell LJ said this:

“41. ... This appears to me to be a case in which the Upper Tribunal has interfered merely on the grounds that its members would themselves have reached a different conclusion. That is impermissible. I appreciate that under the tribunal system, established by the Tribunals Courts and Enforcement Act 2007 Act, the Upper Tribunal is itself a specialist tribunal, with the function of ensuring that First-tier Tribunals adopt a consistent approach to the determination of questions of principle which arise under the particular statutory scheme in question by giving guidance on those questions of principle: see per Lord Carnwath JSC in the tax context in *HMRC v Pendragon Ltd* [2015] UKSC 37 at [48] and Baroness Hale PSC in the immigration

context in *MM (Lebanon) v Secretary of State for the Home Department* [2017] 1 WLR 771 at [69] to [74]. However it is no part of such function to seek to restrict the range of reasonable views which may be reached by FTT Judges in the value judgments applied to the many different private and family life circumstances which make almost all cases in this area different from each other. It is emphatically not part of their function to seek conformity by substituting their own views as to what the outcome should be for those of first instance judges hearing the evidence. ...”

53. Popplewell LJ relied on the guidance given by Lord Justice Carnwath in *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045 at [40], and cited with approval by Baroness Hale PSC in *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 at [106]-[107]:

“106. ... The considerations listed above provide ample support for the conclusion reached by the First-tier Tribunal, and for the view of the Upper Tribunal that any legal errors were not material.

107. It is no doubt desirable that there should be a consistent approach to issues of this kind at tribunal level, but as we have explained there are means to achieve this within the tribunal system. As was said in *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045, para 40 (per Carnwath LJ):

“... It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case ... The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law ... Nor does it create any precedent, so as to limit the Secretary of State’s right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist Tribunal should be respected. ”

54. In effect, it seems that the Court of Appeal treated the finding that removal of a parent would be unduly harsh as a finding of fact, with which the Upper Tribunal should not interfere, save in the very limited circumstances set out by Lord Justice Brooke in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90], in subparagraphs (3) and (4):

“90. It may now be convenient to draw together the main threads of this long judgment in this way. During the period before its demise, when the IAT’s powers were restricted to appeals on points of law: ...

2. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.

3. A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way

that the IAT was unable to understand why he reached that decision.”

55. That is the legal matrix within which this appeal falls to be considered.

## Analysis

56. The core finding in the First-tier Judge’s decision, on which all else turns, is at [114]:

“114. In this case, I conclude that the family dynamics, the fact that [the elder daughter] is not the biological daughter of the [claimant’s] partner, and the bond between [the younger daughter] and the [claimant], combine to compel a conclusion that the family situation is sufficiently different from most families as to mean that the consequences for the children in losing their mother would be not only harsh, but unduly so. ”

57. The real question therefore is whether on the limited evidence before the judge, he was entitled to find that it would be unduly harsh to expect the children to remain in the United Kingdom with their father (in the case of the younger daughter) or step-father (in the case of the elder daughter).
58. The Secretary of State’s complaint is that it was not open to the First-tier Judge to find that removing the claimant to Nigeria would be unduly harsh, on the evidence before him. I note that at [123], the First-tier Judge acknowledged that the resumption of life in Nigeria was the price the claimant had to pay for her conviction, but held that it would be more traumatic for the children to readjust to life there.
59. Much of the decision is devoted to considering the difficulty for the children in going to Nigeria, but that is not material. Both children are now British citizens: as the First-tier Judge acknowledged, they cannot be compelled to leave the United Kingdom and the expectation is that they are entitled to grow up as British citizens here, with the full benefit of their citizenship.
60. The basis of the decision which the judge made seems to have been simply that the step-daughter has no biological relationship with her step-father. At [107] the judge noted that there was an effective family unit where the claimant’s father played an active part in the life of both children but that the claimant ‘is the person who has more contact with the children than her partner, or that she is the primary source of personal and emotional support’. The judge accepted the oral evidence of the claimant that the younger child ‘is somewhat reserved and ... too heavily reliant on the [claimant]’. The judge accepted the claimant’s evidence that separating the younger child from her mother ‘would go beyond the difficulties that would inevitably occur in separating an 8-year old girl from her mother’.
61. Before the decision in *AA (Nigeria)*, I would have had no hesitation in finding that the evidence before the First-tier Judge was not sufficient to

support a finding that, objectively, it was unduly harsh for the children to remain in the United Kingdom with her partner, who is parent to one, and has a Parental Rights Order for the other. However, as the law currently stands, I consider that the decision of the First-tier Judge was (jus) open to him, given his acceptance of the oral evidence of the claimant.

62. The finding of fact that it would be unduly harsh for the claimant's daughters to remain in the United Kingdom without her is neither irrational nor *Wednesbury* unreasonable and the judge did identify and record the matters that were critical to his decision on material issues. That being so, the Upper Tribunal has no power to interfere with it.
63. The decision of the First-tier Judge is sustainable and I uphold it.

## **DECISION**

64. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed [Judith AJC Gleeson](#)  
2020

Date: 20 October

Upper Tribunal Judge Gleeson