



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/20222/2018

**THE IMMIGRATION ACTS**

Heard at the Royal Courts of Justice  
On 27 January 2020

Decision & Reasons Promulgated  
On 04 February 2020

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

K S  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

Anonymity was granted at an earlier stage of the proceedings because the case involves child welfare issues. I find that it is appropriate to continue the order. 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.

**Representation:**

For the appellant: Mr M. West, instructed by J F Batula

For the respondent: Mr P. Singh, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appealed the respondent's decision dated 20 December 2018 to refuse a human rights claim in the context of deportation proceedings.
2. First-tier Tribunal Judge Bird ("the judge") dismissed the appeal in a decision promulgated on 14 November 2019. The judge noted the appellant's immigration history [2-3]. She outlined the appellant's conviction for fraud and the fact that he was sentenced to five years and three months' imprisonment [4]. The conviction led to the respondent's decision to make a deportation order on 10 September 2018 [5-6]. The judge summarised the respondent's reasons for refusing the appellant's subsequent human rights claim [7-20]. She summarised the main points raised in the appellant's grounds of appeal [19].
3. The judge went on to outline the evidence given by the appellant and his partner at the hearing [21-34]. The appellant told the judge about the history of his relationship with his partner [21]. He outlined his education and qualifications [22]. He explained what action he had taken to rehabilitate during his time in prison and told the judge that he had achieved the status of a trusted 'red band' prisoner [23-24]. He took responsibility for his role in the crime and expressed regret for his actions [25]. The judge also noted the appellant's evidence that he suffered a heart attack in 2017. He received treatment and took medication [27]. The appellant last visited his (foster) parents in Nigeria in 2010 [30].
4. The judge summarised the evidence given by the appellant's partner at the hearing [31-34]. She confirmed that she had two children with the appellant and one child from a previous relationship. The oldest child did not know that the appellant was not his father. He was the only father he had ever known. She was asked about what difficulties she might face if they lived in Nigeria. She confirmed that she had visited Nigeria for a month in 2009. There was discrimination. The children did not have any medical issues, but she had type 2 diabetes.
5. The judge directed herself to the relevant legal framework [42-49]. She correctly identified that this was a case where a foreign criminal was sentenced to a period of imprisonment of over four years. The appellant could only succeed if he could show that there were 'very compelling circumstances' to outweigh the public interest in deportation with reference to section 117C(6) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). The judge referred to the Supreme Court decisions in *Hesham Ali v SSHD* [2017] Imm AR 484 and *KO (Nigeria) v SSHD* [2018] 1 WLR 5273 [50][54] thereby demonstrating an understanding of the significant weight that must be given to the public interest in cases involving sentences of over four years' imprisonment. The evidence indicated that the appellant's criminal activity took place over a number of years from 2009 until 2013. The sentencing judge found that the appellant played a "leading role" in the conspiracy. The judge noted that the appellant continued his relationship at a time when he knew he was committing an offence as part of a criminal conspiracy, which may have defrauded the public purse of as much as £13 million [55-58].

6. Having considered the weight to be given to the public interest the judge turned to evaluate the appellant's personal circumstances. She observed that the appellant's partner entered the relationship in the knowledge that he did not have settled status in the UK. The children were born at a time when his status was precarious [59-60].
7. The appellant could only argue the case with reference to the exception contained in section 117C(6) NIAA 2002. However, the judge took the structured approach suggested by the Court of Appeal in *NA (Pakistan) v SSHD* [2017] 1 WLR 207 by considering, as part of the overall assessment, the extent to which any of the other exceptions to deportation might apply. The judge reminded herself that the test of whether deportation would be 'unduly harsh' on the appellant's children was a stringent one that went beyond the usual negative effects of deportation on children [61-62]. She was aware that the appellant was orphaned at a young age because she considered that the appellant could return to live with his foster parents (his uncle) in Nigeria [63]. She considered the fact that the appellant's partner earned around £20-25,000 a year and had visited Nigeria for a month in 2009 [64].
8. The judge found that there was insufficient evidence to show that it would be unduly harsh on his partner or children to accompany him to Nigeria. The appellant was an educated man who had the benefit of family support in Nigeria. He would be able to work and support his family [68]. She acknowledged his partner's concerns about the possibility of discrimination but found that there was nothing in the evidence to show that this would elevate the circumstances to the required level of undue harshness [66]. There was no evidence to suggest that the child from his partner's earlier relationship had any contact with his biological father [69].
9. In the alternative, the judge went on to consider whether it would be unduly harsh for the appellant's partner and children to remain in the UK without him. The judge noted that the appellant had been in prison since 2017. There was no evidence to show that his absence had a negative impact on the children's wellbeing. Their mother continued to care for the children and provided them with emotional support in his absence. The judge concluded that there was no evidence to show that the children would suffer anything beyond the negative effects usually associated with the absence of a parent following deportation [67]. The judge concluded that the evidence which she had "seen and heard" did not show that there were very compelling circumstances that would outweigh the public interest in deportation given that the appellant was sentenced to a period of over four years' imprisonment [71-73].
10. A preliminary issue was raised at the beginning of the hearing regarding the relevant grounds of appeal. The Upper Tribunal records indicated that the appellant's legal representative submitted grounds drafted by counsel on 28 November 2019 as well as a second set of undated grounds drafted by J F Batula. The grounds drafted by the solicitors were poorly pleaded, made general submissions, and failed to identify any arguable errors of law that would have justified granting permission. Neither Mr West nor Mr Singh had a copy of the second set of grounds. It was apparent from the wording of the order that the First-tier Tribunal judge who granted permission did

so based on the grounds drafted by counsel. It was agreed that the relevant grounds for the purpose of this appeal were the ones drafted by counsel.

11. The appellant appealed the First-tier Tribunal decision on the ground that the judge failed to consider relevant evidence submitted in support of the appeal. She failed to give adequate reasons for her decision. It is submitted that she failed to consider the following factors, which cumulatively, could outweigh the public interest in deportation:
  - (i) The appellant had a difficult upbringing having been orphaned at a young age;
  - (ii) The appellant's partner is of Indian descent, their children are of mixed heritage and would face difficulties in Nigeria as a result;
  - (iii) The background evidence relating to the treatment of women and girls in Nigeria;
  - (iv) The significant role that the appellant plays in the life on his step-son, who has only ever known the appellant as his father;
  - (v) The respondent's delay in considering the appellant's application for leave to remain as a Tier 1 Migrant, which was only voided on 30 July 2017 (6 years later);
  - (vi) The fact that the appellant was convicted of a single offence and there was significant evidence of rehabilitation. The OASys report assessed him to be at low risk of serious harm; and
  - (vii) The appellant's good prison record, including a letter from the Governor of HMP The Mount dated 26 July 2019 and the letter from the Shannon Trust dated 22 July 2019.

### **Decision and reasons**

12. It is apparent from the summary of the judge's findings outlined above that she directed herself to the correct legal framework and was aware of the significant weight that must be given to the public interest in deportation in cases involving sentences of imprisonment of over four years. The judge took a structured approach to the assessment of whether there were 'very compelling circumstances' to outweigh the public interest in deportation by considering the extent to which any of the other exceptions to deportation might apply within the context of the overall balancing exercise conducted under section 117C(6) NIAA 2002.
13. The sole legal point raised in the grounds is that the judge failed to make findings regarding relevant considerations. I accept that there is some force to this argument in relation to certain aspects of the decision. It is incumbent on a judge to give adequate reasons for her decision so that the parties can understand how and why the Tribunal concluded as it did. It is not necessary for a judge to deal with every piece of evidence, but where evidence is relevant to the assessment, it should be assessed, and adequate reasons should be given to explain what weight is placed on

it. It is a basic rule of decision writing to ensure that the case of the losing party, in particular, has been adequately addressed.

14. In assessing whether there were very compelling circumstances to outweigh the public interest in deportation, the judge was correct to begin by analysing the nature of the offence and to consider what weight should be given to the public interest. It was open to her to place significant weight on the public interest considerations given the length of the sentence and the sentencing remarks, which suggested that the appellant played a leading role in a large-scale fraud. She then turned to consider the individual circumstances of the appellant and his family in order to assess whether they were sufficiently compelling to outweigh the public interest considerations.
15. The appellant fell far short of the private life exception contained in section 117C(4) NIAA 2002. He had not lived in the UK lawfully for most of his life. It was apparent that he continued to have familial and cultural connections to Nigeria and would not face very significant obstacles to integration there.
16. The judge accepted that the appellant had genuine and subsisting relationships with his British partner and their children. She addressed the two elements of the 'unduly harsh' test contained in section 117C(5) NIAA 2002. I accept that the judge's analysis of whether it would be unduly harsh for the appellant's partner and children to live with him in Nigeria was inadequate. The most basic element of such an assessment is to begin by making findings relating to the best interests of the children: see *ZH (Tanzania) v SSHD* [2011] 1 FLR 2170. No assessment was carried out in this case. No consideration was given to whether it was in the best interests of the children to be removed from the advantages of life in the UK to less advantaged conditions in Nigeria. No holistic consideration was given to whether a combination of factors, including (i) the weight to be given to British nationality; (ii) the fact that the children are of mixed heritage and may face discrimination; (iii) the use of corporal punishment in schools in Nigeria; and (iv) discrimination against women and girls generally, was a sufficiently compelling set of circumstances that might meet the stringent test.
17. Although I accept that findings as to whether it would be unduly harsh for the appellant's partner and children to live with him in Nigeria was inadequately reasoned, it only formed one part of the overall assessment under section 117C(5) NIAA 2002. The second element was to consider whether it would be unduly harsh for the appellant's partner and children to remain in the UK without him if he is deported. In such circumstances the judge's failure to conduct a proper assessment of the best interests of the children had less impact because it is widely recognised that it would not be in the best interests of children to be separated from a loving and supportive parent. It is usually in the best interests of children to be brought up by both parents.

18. However, the Court of Appeal in *NA (Pakistan)* made clear that the fact that it is not in the best interests of children to be separated from a parent is not usually a sufficiently compelling factor to outweigh the public interest in deportation.
- “33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.
34. 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; [2013] 1 AC 338 at [145]. Nevertheless, 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.”
19. The evidence before the judge showed that the appellant and his partner have three children. Their evidence indicated that the oldest child (A) was unaware of the fact that the appellant was not his biological father. A letter from A outlined the activities that he enjoyed doing with his dad. He said that his father had “been gone for quite a long time now” and that he would be the “happiest boy on earth” when he comes home. He said that his sister also misses him and they pray for him to come back. The letter showed the usual level of attachment one might expect between a father and child and the child’s understandable desire for his dad to come home.
20. The appellant’s partner said that it was more difficult to care for the children in his absence and asserted that it was not in their best interests to be separated from their father. Of course, the appellant is responsible for the current separation and the threat of future separation. The threat of deportation arises from his actions. I note that the appellant’s cousin made a statement saying that her mother had to come from Nigeria on “a number of occasions” to help the appellant’s partner because she was struggling to look after the children and was taking anti-depressants. However, his partner mentioned none of this in her statement and it seems that there was no evidence to support these assertions. Other than that, there was no evidence to show that any of the children suffered from serious health problems or which disclosed any other compelling or compassionate circumstances.
21. The appellant included evidence to show that he suffered a heart attack in 2017. He asserted that he continued to receive treatment in the UK but there was no evidence to suggest that he could not receive similar treatment in Nigeria. His partner said that she suffered from type 2 diabetes, but again, there was no evidence of current treatment or to show that she would not be able to receive adequate treatment in Nigeria. Those health issues were not identified as factors that needed to be considered in more detail in the grounds of appeal.

22. The judge outlined the evidence given by the appellant and his partner at the hearing. She clearly had regard to her evidence that it had been more difficult to look after the children while he was in prison [32-33]. It was open to the judge to take into account the evidence showing that the appellant's partner was still able to work to support the children [64]. Nothing in the evidence disclosed any compelling or compassionate circumstances that went over and above the usual difficulties one might expect in such circumstances. Having considered the evidence that was before the judge relating to the impact that separation would have on the appellant's partner and children, I find that it was open to the judge to conclude, without the need for further explanation, that there was no evidence to show that the effect of deportation would be unduly harsh if the appellant's partner and children remained in the UK without him [67]. If her finding in relation to the second element of the assessment under section 117C(5) is adequately reasoned, her failure to give adequate reasons in relation to the first element does not make any material difference to the outcome.
23. Turning to consider the points listed in the grounds. It is difficult to see how point (i) could have been given any weight in the assessment. It seems obvious that the loss of the appellant's parents at such a young age was likely to have an impact on him, but it is difficult to see how it amounts to a compassionate factor that was relevant to the balancing exercise. The appellant was brought up by other family members, was able to obtain an education, and to obtain work to support his family. There was no evidence before the judge to suggest that he suffered any particular vulnerability as a result of his early loss or that it was a factor that would prevent him from being able to re-establish himself in Nigeria. At best, it was a neutral factor.
24. In relation to points (ii) and (iii) I accept that the judge failed to make adequate findings relating to the conditions the family might face if they lived in Nigeria. However, those points only went to the first element of the exception contained in section 117C(5). The judge's findings relating to the second element were sustainable. Clearly it would not be in the best interests of the children to be separated from their father but the evidence before the judge did not, as a matter of fact, disclose any compelling or compassionate circumstances that went beyond the usual negative effects of deportation on children. In so far as it formed part of the overall assessment under section 117C(6) it was open to the judge to find that deportation would not be unduly harsh on the appellant's partner or children.
25. In relation to point (iv), Mr West struggled to find any real reason why the appellant's relationship with A was any more compelling than his relationship with his biological children. I accept that there may be circumstances where a child's history includes previous separation from a parent. The prospect of separation from another person with whom they have bonded might begin to raise a case above the usual negative effects of deportation. Whether the circumstances of a child rise above the relevant threshold is fact sensitive. In this case, the evidence given by his partner was that A is unaware of the fact that the appellant is not his biological father. He has no contact with his biological father. In the circumstances, it is difficult to see how deportation would affect him any differently to the other children. On the evidence

before the First-tier Tribunal, the fact that A is not the appellant's biological child was unlikely to make any material difference to the balancing exercise.

26. Point (v) is particularly weak. The principles outlined in *EB (Kosovo) v SSHD* [2008] UKHL 41 only go to the extent to which delay in decision making may have strengthened the appellant's ties to the UK. The appellant fell far short of the private life exception to deportation and relied largely on his relationship with his partner and children, which were considered under a different exception. Even if the application had been considered promptly and he was granted Indefinite Leave to Remain (ILR) the effect of the deportation decision would have been to revoke such leave. In any event, it is reasonable to infer that there may have been a good reason for the delay given that the appellant says that he was arrested in 2012 and was under investigation for some time before being charged. It is unsurprising that it might have taken time to investigate such a large-scale fraud.
27. The last two points relate to the appellant's criminal history, rehabilitation and the risk of reoffending. These matters might have some relevance to the overall assessment but were unlikely to be given any meaningful weight on the facts of this case.
28. The fact that the appellant was convicted of a single offence is immaterial when it was a sufficiently serious offence to attract a sentence of five years and three months' imprisonment. It was a particularly long sentence for an offence of this kind. The sentencing remarks made clear that the appellant played a leading role in the conspiracy and that the fraud was of sufficient scale to impact on the public interest. The sentencing judge said that the monies lost to the fraud could and should have been used to benefit the public. At least £2,500,000 was lost from the public purse. The scale of the fraud could have been up to £13,367,000. If the appellant was convicted of theft and sentenced to a short period of imprisonment, then the fact that he only had a single conviction is a factor that might reduce the public interest in deportation to some extent. However, it is not arguable that it would have made any material difference to the assessment in this case when the appellant was convicted of such a serious offence, which by its nature and scale added further weight to the public interest considerations.
29. There was evidence before the First-tier Tribunal to show that the appellant had a good prison record and had worked hard to access opportunities for rehabilitation. This is a credit to the appellant but is a matter that would be given little or no weight in the assessment given that all prisoners are expected to behave well in custody and should work towards rehabilitation. At best it was a neutral factor that did not reduce the weight to be given to the public interest in deportation.
30. Similarly, the OASys report indicated that the appellant posed a low risk of serious harm but this is a neutral factor in the absence of any other compelling or compassionate circumstances that might begin to show that there were very compelling circumstances that could outweigh the public interest in deportation. If an assessment showed a risk of reoffending it would lend further weight to the




public interest in deportation. The fact that the appellant is unlikely to reoffend is a neutral factor given that everyone is expected to abide by the law. It does not add any weight to the appellant's side of the scale.

31. I accept that the judge did not engage with the factors identified in the grounds in detail, but the level of reasoning required will depend on the circumstances of each case. She noted and was aware of the relevant facts on the appellant's side of the scales even if she failed to make specific findings when she came to weigh up the circumstances. For the reasons given above, it is difficult to see how any of the factors identified by the appellant, either individually or taken together, could have come close to showing that there were very compelling circumstances to outweigh the significant weight that must be placed on the public interest in deportation given the serious nature of the offence. If it was at least arguable that the evidence was capable of outweighing the public interest my decision might be different, but the evidence before the First-tier Tribunal fell far short of showing that there were very compelling circumstances of the kind that might outweigh the public interest considerations in this case.
32. The evidence showed that the appellant had a typical family life with his partner and children. Undoubtedly, his deportation would not be in the best interests of the children and would cause real difficulties for his partner who would be left to raise them without his day-to-day support. It would be open to them to continue their life together in Nigeria, but if they chose not to do so, the judge gave sustainable reasons to explain why it would not be unduly harsh for them to remain in the UK without him. Nothing in the evidence disclosed any other particularly compelling or compassionate circumstances that went beyond the usual negative effects of deportation. Although I acknowledge that there was some lack of reasoning, any error arising from a lack of detail in the judge's findings would have made no material difference to the outcome of the appeal. Any properly directed First-tier Tribunal judge would be bound to come to the same conclusion on the evidence.
33. I conclude that the First-tier Tribunal decision did not involve the making of an error of law that would have made any material difference to the outcome of the appeal.

## DECISION

The First-tier Tribunal decision did not involve the making of a material error of law

Signed   
Upper Tribunal Judge Canavan

Date 30 January 2020