



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

Appeal Number: HU/20967/2018

THE IMMIGRATION ACTS

**Heard at Birmingham
On 17th December 2019**

**Decision & Reasons Promulgated
On 13th January 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

**PETER [F]
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Salam, Salam & Co Solicitors

For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria. He arrived in the UK on 17th July 2012 with a student visa valid until 1st December 2012. In July 2013 he made an application for an EEA residence card. The appellant and his spouse were interviewed separately in December 2013, and in February 2014 the application for an EEA residence card was refused. That decision was subsequently withdrawn by the respondent for

further enquiries. Meanwhile, in December 2015 the appellant was charged for his part in a conspiracy to facilitate the commission of a breach of UK immigration law. On 17th August 2016 he was convicted at Wolverhampton Crown Court of conspiring to do an act to facilitate the commission of a breach of UK immigration law and possession/control of identity documents with intent. On 21st October 2016 he was sentenced to 3 years and 6 months imprisonment.

2. Following that conviction, on 3rd November 2016 the appellant was served with a decision to deport pursuant to the Immigration Act 1971 and UK Borders Act 2007. The appellant's representatives made representations on 18th June 2017, 27th June 2017, 25th October 2017 and 22nd March 2018 setting out why he should not be deported. A deportation order was made against the appellant and his human rights claim was refused for the reasons set out in a decision dated 5th October 2018. That decision gave rise to an appeal that was heard by First-tier Tribunal Judge Watson ("the judge") on 20th February 2019. The appeal was dismissed for the reasons set out in a decision promulgated on 27th February 2019.

The decision of First-tier Tribunal Judge Watson

3. The judge noted, at [5], that the appellant has been sentenced to a period of at least 12 months imprisonment. The judge noted, at [6], there are certain exceptions to the automatic deportation provisions set out in s33 UK Borders Act 2007. One such exception is where the removal of the foreign criminal in pursuance of the deportation order would breach the person's Convention rights or the United Kingdom's obligations under the refugee Convention.
4. In considering whether the deportation of the appellant would be in breach of Article 8 ECHR, the judge turned to paragraphs 398 to 399D of the immigration rules. The judge noted the relevant provisions are

paragraphs 399(a) and (b) and paragraph 399A of the immigration rules. At paragraph [11], the judge stated:

“In accordance with paragraph 399A(a) the appellant has not shown that he has been lawfully resident for most of his life in the UK. The appellant agreed that the history as set out in the refusal letter was correct and this shows that the first period of lawful leave that the appellant had was from 01.06.12 to 01.12.12. This was agreed by the appellant, who took no issue with the history as recounted in the respondent’s refusal letter. He cannot satisfy this exception.

5. In any event, for the reasons set out at paragraphs [32] to [34], the judge also found that the appellant does not satisfy the requirements of paragraph 399A(b) and (c). That is, the appellant is not socially and culturally integrated in the UK and there would not be very significant obstacles to his integration into Nigeria.

6. The Article 8 claim based upon the appellant’s relationship with his partner and child is summarised at paragraph [17] of the decision;

“The appellant stressed his relationship with the child and partner. The partner gave evidence that the child, and the new child to be born would go to Nigeria with the appellant and she would remain in the UK to pursue her education, if the appeal failed. The appellant’s submissions were that this would place the children in a terrible position.”

7. It was uncontroversial that the appellant has a genuine and subsisting parental relationship with his son who was born on 16th January 2017 and is a British citizen. The issue was twofold. First, whether it would be unduly harsh for the child to live in Nigeria, and second, whether it would be unduly harsh for the child to remain in the UK without the appellant. The judge states at [24] and [25]:

“24. Ms Walker gave oral evidence that if the appeal failed that the child, and expected child, would go to Nigeria with the appellant. This is a choice that the family can make and her evidence is that she wishes to pursue her education, has no family support and therefore the children would have to leave the UK, be deprived of their mother and would be unable to access proper education and healthcare in Nigeria. The appellant stated that he worried that his son would be kidnapped by Bokul Harum.

The appellant has produced no evidence that education is not available in Nigeria and no evidence of specific threats against him or his family. The appellant himself has stated that he was a maritime engineer and mechanic in Nigeria and has access to education there. The appellant is in touch with his mother and also has siblings outside Nigeria, but near to the border. This will assist in integration and give family links to his children if the family choose that the children go to Nigeria with the appellant. I have not been shown that it is unduly harsh for the child to relocate to Nigeria. He is young and adaptable and can settle. His best interests are provided for by being with one or both of his parents. Paragraph 399(a)(a) is not satisfied.”

25. Ms Walker looked after the child whilst the appellant was in prison on her own. She states that her education is very important to her and that she will not be able to pursue it if the appellant is not there. She is no worse position than many other persons who have to juggle family life, and their own plans for education and work. She has the option in the UK of having state assistance by way of benefits and childcare places and the fact that she may find it more difficult or may have to postpone plans because of childcare responsibilities does not make it unduly harsh for the child to remain in the UK without the appellant. The mother will, undoubtedly, make sure her son is safe and well as will she for the future of the child. The appellant’s imprisonment caused the separation, and she has managed. There is nothing in this family’s circumstances that make the effect of the appellant’s deportation unduly harsh upon the child, existing and future or upon Ms Walker.”

8. The judge had already stated in the closing sentence of paragraph [25] that there is nothing in this family’s circumstances that make the effect of the appellant’s deportation unduly harsh upon Ms Walker. It was uncontroversial that the appellant has a genuine and subsisting relationship with Ms Walker, who is a British citizen. The issue was threefold. First, whether that relationship was formed at a time when the appellant was in the UK lawfully and his immigration status was not precarious. Second, whether it would be unduly harsh for Ms Walker to live in Nigeria because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM. Third, whether it would be unduly harsh for Ms Walker to remain in the UK without the appellant.
9. The judge found, at [27], the relationship between the appellant and Ms Walker was formed at a time when the appellant was in the UK

unlawfully. The appellant could not therefore benefit from paragraph 399(b) of the immigration rules and the public interest in his deportation could only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraph 399 of the immigration rules. Nevertheless, for the sake of completeness the judge stated, at [28] to [31]:

“28. ...I find that Ms Walker can remain in the UK without the appellant. It would not be unduly harsh. She has lived successfully in the UK prior to the commencement of the relationship. Their relationship is of relatively short duration. The appellant has deprived her of his company by virtue of his imprisonment and I have no evidence before me of any harsh consequences that have resulted for Ms Walker in her life on her own. She looked after her son on her own. She has given oral evidence and states that she wishes to pursue her studies and that she will not be able to do this if the appellant is not there to look after her children.

29. Ms Walker confirmed in oral evidence that she has no particular health difficulties that would make the appellant’s deportation unduly harsh upon her.

...

31. Ms Walker has stated that she would not go to Nigeria. There is nothing that forces her to do so. But **b**. She may wish not to go, but this is not the same as an insurmountable obstacle. English is an official language of Nigeria and this will assist her if she chooses to go. There are no compelling circumstances over and above the insurmountable obstacles required for paragraph 399(b)(ii). The exceptions contained in the rules do not apply to the appellant circumstances.

10. Having addressed paragraphs 399(a) and (b) and paragraph 399A of the immigration rules, the judge addressed the Article 8 claim outside the rules and whether the public interest in deportation is outweighed by other compelling circumstances over and above those described in paragraphs 399 and 399A of the immigration rules. The judge referred to s117C of the 2002 Act and at paragraph [40] concluded:

“In considering the Article 8 claim outside of the Rules, I find that the public interest in deporting the Appellant, who is a foreign criminal and who committed a serious offence is not outweighed by the appellant’s stated desire to remain in the UK and be with his partner and son and child to be. The public interest is not outweighed by the partner’s wish to continue her studies and for the appellant to assist in child care, nor is it outweighed by

anything in the child's best interests and it is for all of those reasons that the appeal is refused."

The appeal before me

11. Permission to appeal was granted by Designated Judge Shaerf on 3rd May 2019. The judge noted that since the refusal of permission to appeal by the FtT, a Presidential panel of the Upper Tribunal has considered the interpretation of s117C and the relationship between it and the provisions of paragraph 399 of the immigration rules in MS (s117C(6): very compelling circumstances) Philippines [2019] UKUT 122 and RA (s117C: unduly harsh; offence; seriousness) Iraq [2019] UKUT123. In granting permission, the judge indicated that the appellant's advocate will need to have given these two decisions careful consideration.
12. Mr Salam refers to paragraph [28] of the decision. He submits that having found that the appellant's relationship with his partner was formed at a time when the appellant was in the UK unlawfully, the judge completed what is a meaningless assessment as to whether it would be unduly harsh for the appellant's partner to live in Nigeria because of compelling circumstances over and above those described paragraph EX.2 of Appendix FM, and as to whether it would be harsh for the appellant's partner to remain in the UK without the appellant. He submits the judge was of the view that she is not required to make findings in relation to paragraphs 399(b)(ii) and (iii), and in light of that, carried out nothing more than a superficial analysis "*for the sake of completeness*".
13. The appellant claims that although the judge recited the relevant provisions of the immigration rules, she did not recite the provisions of s117C of the 2002 Act and erred by focusing upon the provisions of the immigration rules. It is said that in considering whether the effect

of the appellant's deportation on his partner and child would be unduly harsh, the judge required the appellant to establish whether there are compelling circumstances over and above those described paragraph EX.2 of Appendix FM, when in fact that is a requirement under s117C(6) of the 2002 Act, and only applies where the foreign criminal has been sentenced to a period of imprisonment of at least four years. Mr Salam submits the 'unduly harsh' test was not properly considered because the appellant was unrepresented, but Mr Salam was unable to identify any relevant evidence that was before the FTT, that the Judge did not consider.

14. Mr Salam accepts that the recent authorities establish that in every case, there is a second stage and a Tribunal must carry out a wide-ranging evaluative exercise in the case of all foreign criminals, in order to ensure that Part 5A of the 2002 Act produces, in each such case, a result that is compatible with the United Kingdom's obligations under Article 8.
15. In reply, Mr Mills submits the judge expressly deals with the position of the child at paragraph [24] and the position of the appellant's partner at paragraph [28] of her decision. The reasons given by the judge for her finding that the effect of the appellant's deportation upon his partner and child would not be unduly harsh, are perfectly adequate. The judge did not need to restate the reasons for those findings, and the appellant simply disagrees with the findings that were made by the judge that were open to her.

Discussion

16. It is now well established that it is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case, provided the judge identifies and resolves key conflicts in the evidence and explains in clear and brief terms their reasons, so that the parties can understand why they have won or

lost. The judge was not required to recite s117C of the 2002 Act, provided it is clear that the judge properly applied the relevant legal framework in her decision.

17. The judge found, at [23], the deportation of the appellant from the UK is conducive to the public good and in the public interest because he has been convicted of an offence for which he has been sentenced to a period of imprisonment of less than four years but at least 12 months. The Tribunal was required to consider whether paragraphs 399 or 399A of the immigration rules apply. If not, the public interest in deportation could only be outweighed by other factors where there are very compelling circumstances over and beyond those described in paragraphs 399 and 399A of the immigration rules.
18. At paragraphs [24] to [31], the judge found the appellant cannot meet the requirements of paragraph 399 of the immigration rules. Paragraph 399(a) of the immigration rules required the judge to consider whether it would be unduly harsh for the child to live in Nigeria and whether it would be unduly harsh for the child to remain in the UK without the appellant. Having carefully considered the evidence including the evidence of the appellant's partner, the judge found, at [24], that it would not be unduly harsh for the child to relocate to Nigeria. It is, as the judge said at [24], a choice that the family can make as to whether the child remains in the UK with his mother or relocates to Nigeria with his father. The Judge found that the child's best interests are provided for by being with one or both of his parents.
19. At paragraphs [25] to [31], the judge addressed the requirements of paragraph 399(b) of the immigration rules. The judge again considered the evidence of the appellant's partner and noted the appellant's relationship with his partner was not formed at a time when the appellant was in the UK lawfully as required by paragraph 399(b)(i) of the immigration rules. As the requirement in paragraph

399(b)(i) could not be met, the judge properly noted that she was not required to make findings in relation to paragraph (b)(ii) and (iii), but nevertheless went on to consider whether it would be unduly harsh for the appellant's partner to live in Nigeria and whether it would be unduly harsh for her to remain in the UK without the appellant. The Judge found that it would not be unduly harsh for the appellant's partner to remain in the UK without the appellant, for the reasons set out at paragraphs [28] and [29]. The judge also found that it would not be unduly harsh for the appellant's partner to live in Nigeria with the appellant for the reasons set out in paragraph [31].

20. The authorities make it clear that "unduly harsh" does not equate with uncomfortable, inconvenient, undesirable or merely difficult. It poses an elevated threshold and "harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable, and the addition of the adverb "unduly" raises an already elevated standard, still higher.
21. I accept, as Mr Salam submits, that it is in the best interests of any child to be cared for, and to be raised by both parents. However, it is an inevitable consequence of the commission of serious crimes by a foreign national that there is a prospect of deportation and separation between a child and parent. The fact that the appellant's partner may wish to continue her education or that she would have difficulties in managing and looking after the child without the help she receives from the appellant, are matters that amount to inconvenience or mere difficulty and are the sort of difficulty faced by any parent when the other parent is removed. In my judgement, it is clear from a careful reading of the decision of the FtT judge that there was no doubt that the appellant's partner and child would suffer some disruption to their lives and their lives would be more difficult if the appellant is deported. However, those consequences did not go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported. The judge

carefully considered the evidence given by the appellant and his partner. I reject the claim that the judge carried out a 'meaningless' or 'superficial' assessment of the claim being made by the appellant. The judge had regard to the evidence and reached findings that cannot be described as irrational, or perverse. The findings made were open to the judge.

22. The judge found that the appellant could not satisfy the requirements set out in paragraph 399A of the immigration rules for the reasons set out at paragraphs [32] to [34] of her decision. Having found that the appellant cannot benefit from paragraphs 399 or 399A the immigration rules the judge noted, at [35], the public interest in deportation can only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A. No such circumstances were identified before the FtT, and Mr Salam was unable to identify any such factors that had not been considered by the Tribunal judge, before me.
23. I accept, as Mr Mill submits that at paragraphs [36] to [41] of the decision, the judge considered the human rights claim outside the immigration rules. At [38], the judge is considering the additional public interest considerations in cases involving foreign criminals as set out in s117C of the 2002 Act. Section 117C(3) is the relevant statutory provision. The appellant has not been sentenced to a period of imprisonment of four years or more, and so the public interest requires his deportation unless exception one or exception two applies. The judge found that the appellant was involved in a serious criminal offence, and at [38], she was referring to the two exceptions. Exception two could only apply where the appellant is in a genuine and subsisting relationship with a qualifying partner or in a genuine and subsisting parental relationship with a qualifying child and the effect of his deportation on the partner or child would be unduly harsh. The judge had already found, at [24], that the effect of the appellant's deportation would not be unduly harsh for the child. As

Mr Mills submits, at [24], the judge states that the best interests are provided for, that is, the child's best interests are looked after sufficiently, by being with one or other of the parents. The judge considered it to be a choice for the family in the end, as to where the child lives. At [28], the judge found it would not be unduly harsh for the appellant's partner to remain in the UK without the appellant and at [31], found that there are no insurmountable obstacles to the family life between the appellant and his partner continuing in Nigeria if that is what they choose to do.

24. I reject the claim by the appellant that the judge erroneously focused upon the requirements of the immigration rules and failed to properly address s117C of the 2002 Act. The issue in this appeal was whether the appellant's deportation would be unduly harsh on his partner and child. Thus, if the appellant had been able to establish that the effect of his deportation on his partner or child would be unduly harsh, he would meet the exception to deportation set out in paragraph 399 of the Immigration Rules, as replicated in section 117C(5) of the 2002 Act.
25. The judge had had regard to the public interest considerations set out in s117C of the 2002 Act. I reject the claim that the judge erroneously applied s117C(6) of the 2002 Act and required the appellant to demonstrate very compelling circumstances over and above those described in Exceptions 1 and 2. It is clear from a careful reading of paragraphs [37] to [40] of her decision, that the judge was addressing s117(3) of the Act. There is no doubt the deportation of foreign criminals is in the public interest. For the same reasons that the appellant could not benefit from paragraphs 399(a) and (b) of the immigration rules, it was in my judgment open to the judge to find that the appellant could not benefit from Exception 2 set out in s117C(5) of the 2002 Act.

26. The appellant and his partner might prefer to continue their relationship with each other and their child, together in the UK, but that does not equate to a right to do so in law. It was in my judgement open to the judge to conclude that there are no exceptional circumstances capable of establishing that the public interest in the deportation of the appellant is outweighed by other factors, such that it amounts to a disproportionate interference with the appellants right to enjoyment of family life. It was in my judgment open to the judge to dismiss the appeal for the reasons given by the judge.
27. The decision of First-tier Tribunal judge Watson is not tainted by an error of law and the appeal is dismissed.

Notice of Decision

28. The appeal is dismissed

29. The decision of First-tier Tribunal Judge Watson stands.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The First-tier Tribunal did not make an anonymity direction. No application for an anonymity direction was made before me, and no such direction is made.

Signed
2019

Date 20th December

Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and there can be no fee award.

Signed
2019

Date

20th

December

Upper Tribunal Judge Mandalia