



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17030/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business
On Thursday 25 March 2021

Decision & Reasons Promulgated
On Monday 12 April 2021

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ADEDEJI SOSANYA

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Slatter, Counsel instructed by Rahman & Co solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Bart-Stewart promulgated on 10 March 2020 (“the Decision”). By the Decision, the Judge dismissed the Appellant’s appeal against the Respondent’s decision dated 7 October 2019 refusing a human rights claim. That claim was made in the context of a decision to deport the Appellant to Nigeria.

2. The Appellant is a national of Nigeria. He came to the UK in June 2009 as a visitor and overstayed. On 22 November 2011, he applied for a residence card as the family member of an EEA national spouse. That application was refused. On 25 March 2013, he applied to remain as the primary carer of a British citizen child. That application also was refused. The Appellant did not appeal.
3. The Appellant was later granted leave to remain from March 2014 to September 2016. However, he was refused further leave. Following a judicial review challenge of that refusal, the Respondent agreed to reconsider the application.
4. On 28 March 2019, the Appellant was convicted of an offence of making false representations to make gain for himself or another or cause loss to another/expose another to risk. He was sentenced to two years six months in prison. On the basis of that offence, the Respondent gave notice of her intention to deport the Appellant. The Appellant claimed that deportation would breach his private and family life. He relies in particular on his relationship with his four children who are all British nationals or settled in the UK.
5. The Judge found that it would not be unduly harsh for the children to go to live in Nigeria or remain in the UK without him and that it was not unduly harsh for the Appellant's partner(s) to either go with him to Nigeria or remain in the UK without him. The Appellant could not meet the Immigration Rules ("the Rules") based on his private life. He has not been legally resident in the UK for more than half his life. The Judge found that the Appellant could not meet the exceptions to deportation within the Rules/Section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C"). Having conducted a balancing exercise outside the Rules, the Judge concluded that the refusal of the Appellant's claim was not disproportionate. He could be deported to Nigeria.
6. The Appellant challenges the Decision on three grounds as follows:

Ground 1: The Judge has failed to state the burden and standard of proof applied.
Ground 2: The Judge has failed to identify what are the best interests of the children.
Ground 3: The Judge has erred in her consideration of the OASys report.
7. Permission to appeal was, on the face of the decision, refused by First-tier Tribunal Judge Osborne on 1 May 2020. However, as is apparent from the reasoning set out below, this was in fact a grant of permission:

 "... 3. In an otherwise careful and detailed Decision, it is arguable that the Judge applied the wrong burden and standard of proof because the Judge failed to refer to the same.

 4. This arguably material error of law having been identified, all the Grounds are arguable."
8. Judge Osborne's decision was reviewed by Upper Tribunal Judge Frances in her Note and Directions. She concluded that the Judge had meant to grant permission as is evident from the reasons. She therefore amended the decision to a permission grant. In

her Note and Directions, Judge Frances also reached the provisional view that the error of law issue could be determined on the papers. The Appellant by written submissions sought an oral hearing.

9. The Respondent filed a Rule 24 reply on 9 September 2020 seeking to uphold the Decision.
10. On 3 December 2020, UTJ Mandalia directed that the error of law issue should be determined at a remote hearing.
11. So it is that the matter came before me to determine whether the Decision contains an error of law and, if I so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.
12. The hearing took place remotely via Skype for Business. There was some delay to the start of the hearing due to technical issues within the Tribunal. Thereafter, the hearing proceeded without incident.
13. Following brief submissions by Mr Slatter which I set out below, Mr Walker conceded that there is an error of law in the Decision. I agreed with that concession. It was agreed that, since the evaluation of the Appellant's family and private life would need to be considered entirely afresh as a result of the error made, it would be appropriate for the appeal to be remitted to the First-tier Tribunal for redetermination.
14. I therefore found there to be an error of law in the Decision. I set the Decision aside in its entirety and remitted the appeal to the First-tier Tribunal. I indicated to the parties that I would give short reasons in relation to the error of law and next steps which I now turn to do.

DISCUSSION AND CONCLUSIONS

Ground 1

15. The Respondent accepts in her Rule 24 reply that the Judge did not direct herself as to the appropriate burden and standard of proof. She says however that this is a criticism of "form over substance".
16. The Appellant's pleaded ground in this regard is that the Decision "is silent" as to burden and standard and "accordingly, the Appellant cannot be satisfied that his appeal has been properly determined by the FTTJ".
17. The ground is not developed in writing. Had it been put as it was argued by Mr Slatter I have no doubt that the Respondent would have conceded the error of law in this appeal in the Rule 24 reply. As it is, based on Mr Slatter's oral submissions and for the reasons which follow, I am satisfied that there is an error of law disclosed by this ground. Mr Walker rightly conceded as much.

18. Although the Judge does not direct herself in relation to the burden and standard of proof, she does set out what she considers to be the relevant legal approach when determining whether deportation of the Appellant would have an unduly harsh effect on his children.

19. At [53] of the Decision the Judge says this:

“With regards to whether it would be unduly harsh for the appellant’s children to remain in the UK without the appellant in KMO (Section 117 - unduly harsh) Nigeria [2015] UKUT 00543 and MAB (para 399: “unduly harsh”) USA [2015] UKUT 00435 the Upper Tribunal considered the matters to which the Tribunal must have regard as a consequence of the provisions of Section 117C, in particular that the more serious the offence committed the greater is the public interest in deportation of a foreign criminal and that the word “unduly” requires consideration of whether in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh. In MAB it is said that the consequences of deportation as unduly harsh requires more than “*uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging*” consequences and imposes a considerably more elevated or higher threshold.”

20. The Tribunal decisions in KMO and MAB to which the Judge there refers were considered by the Supreme Court in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 (“KO (Nigeria)”). In relation to the test to be applied, the Supreme Court had this to say:

“21. The difficult question is whether the specific rules allow any further room for balancing of the relative seriousness of the offence, beyond the difference between the two categories. The general rule stated in subsection (2) might lead one to expect some such provision, but it could equally be read as no more than a preamble to the more specific rules. Exception 1 seems to leave no room for further balancing. It is precisely defined by reference to three factual issues: lawful residence in the UK for most of C’s life, social and cultural integration into the UK, and ‘very significant obstacles’ to integration into the country of proposed deportation. None of these turns on the seriousness of the offence; but, for a sentence of less than four years, they are enough, if they are met, to remove the public interest in deportation. For sentences of four years or more, however, it is not enough to fall within the exception, unless there are in addition ‘very compelling circumstances’.

22. Given that exception 1 is self-contained, it would be surprising to find exception 2 structured in a different way. On its face it raises a factual issue seen from the point of view of the partner or child: would the effect of C’s deportation be “unduly harsh”? Although the language is perhaps less precise than that of exception 1, there is nothing to suggest that the word ‘unduly’ is intended as a reference back to the issue of relative seriousness introduced by subsection (2). Like exception 1, and like the test of ‘reasonableness’ under section 117B, exception 2 appears self-contained.

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.”

21. At [32] of its judgment and on the basis that the Tribunal in KMO had concluded that the relative seriousness of the offence fell to be balanced in the evaluation whether the impact of deportation would be unduly harsh, the Supreme Court disagreed with the Tribunal’s analysis of the test as appears in that case. The Supreme Court did not disagree with the outcome of the Tribunal’s reasoning in the appeal itself because it concluded at [36] of the judgment in KO (Nigeria) that when the Tribunal made its findings “no account is taken of the seriousness of the particular offences, or of the particular criminal history of the father”.
22. The Judge in this case wrongly directed herself that the test whether deportation is unduly harsh required her to consider the impact of deportation on the children taking into account the seriousness of the Appellant’s offending and public interest considerations. Whilst that is not a wrong approach when a Judge is evaluating the impact of deportation under Section 117C(6) in order to decide whether there are very compelling circumstances over and above the exceptions in Sections 117C(4) and (5) which outweigh the public interest in deportation, it is the wrong approach when considering whether the exceptions are satisfied. A balancing of the seriousness of the offending is not part of the test when considering the exceptions. The “unduly harsh” test set out in Section 117C(5) is a threshold test. Whilst I accept that the Judge has correctly directed herself as to the high threshold which applies when considering whether the impact is unduly harsh, she has erred in her statement that the seriousness of the offending is to be taken into account at this stage.
23. I accept that there is little in paragraphs [50] to [52] and [54] to [55] of the Decision which suggests that the Judge did in fact take into account the seriousness of the Appellant’s offending when looking at whether deportation would be unduly harsh for the children. However, given the clear misdirection in this regard which sits immediately between the analysis in this regard, I cannot be confident that the Judge

has not applied that approach when assessing whether deportation would be unduly harsh. Mr Walker did not submit that the error was not for that reason material.

24. As I have indicated above, the taking into account of the seriousness of the offending is not incorrect when one comes to look at Section 117C(6). The Judge at [59] onwards of the Decision does not refer to Section 117C(6) but is in effect conducting that exercise as she puts it outside the Rules. I asked Mr Slatter whether it might be said that the error made at [53] of the Decision would make no difference because the Judge was entitled to take into account the seriousness of the offending at this point and has reached the overall conclusion that deportation is not disproportionate.
25. I accept Mr Slatter's response that it cannot be said that the error made no difference. That is because, at [63] of the Decision, as part of the balancing of impact of deportation against the public interest, the Judge repeats her earlier finding that exception 2 (that is to say Section 117C(5)) is not met. It is perhaps here that one sees how the error has impacted the Judge's earlier assessment as she says the following:
- "Exception 1 does not apply for the reasons already stated. This is also the case in respect of exception 2. The appellant's sentence was 2 ½ years' imprisonment. The public interest is very strong policy. The sentence of 2 ½ years' imprisonment for a first offence reflects the seriousness of the offence."
26. For those reasons, I am satisfied that there is an error disclosed by the first ground albeit not for the reasons set out in the written pleading.

Grounds 2 and 3

27. In light of my conclusion on the first ground, I do not, strictly, need to go on to consider the other grounds. I do so for completeness.
28. I would not have found an error disclosed by either ground. The Judge has made findings in relation to the children's best interests at [47] of the Decision. Paragraphs [62] to [64] of the Decision have to be read together in relation to what is said about the Appellant's offending. The Judge recognised at [64] of the Decision that the evidence showed, as the Respondent accepted, that the Appellant is at low risk of reoffending. Nonetheless, the risk of serious harm was said to be medium. Read as a whole, what is said at [62] to [64] of the Decision is a fair reflection of the evidence, including the OASys report, considered in the round.
29. I do not however preserve any of the findings made in the Decision. The best interests of the children will need to be re-evaluated as at the date of the next hearing. Although the findings of the Judge on the evidence are, as I say, a fair reflection of what that evidence shows, another Judge will potentially need to consider that for himself or herself in the context of an overall assessment. It would not be appropriate to preserve another Judge's views of what the evidence shows.

CONCLUSION

30. For the foregoing reasons, I conclude that there is an error of law disclosed in the Decision by the first ground. I do not preserve any of the findings. I therefore set the decision aside in its entirety.

DECISION

The Decision of First-tier Tribunal Judge Bart-Stewart promulgated on 10 March 2020 involves the making of an error on a point of law. I therefore set aside the Decision. I remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Bart-Stewart.

Signed: *L K Smith*

Dated: 31 March 2021

Upper Tribunal Judge Smith