Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00955/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 14 December 2015

Decision & Reasons Promulgated
On 26 January 2016

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OPEYEMI OLAWAIYE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr. C. Avery, Home Office Presenting Officer
For the Respondent: Ms M. Vidal, counsel, instructed by Duncan Lewis Solicitors

DECISION AND REASONS

History of Appeal

1. The Respondent, who was born on 7 August 1985, is a citizen of Nigeria. He first arrived in the United Kingdom in 1986 with his mother and was granted indefinite leave to remain as her dependent on 26 January 1998.

2. On 8 July 2003 he was convicted of possessing an offensive weapon in a public place and given a 24 month conditional discharge. On 19 January 2004 he was convicted of four counts of supplying cocaine and one count of supplying heroin and

sentenced to five years in a young offender institution which was reduced to three years on appeal.

3. On 19 July 2007 he was convicted of dangerous driving and of possessing an offensive weapon in a public place and sentenced to three months imprisonment on each offence. On 18 June 2013 he was convicted of facilitating the acquisition or acquiring or possessing criminal property and sentenced to 30 months in prison.

4. On 7 May 2014 the Appellant decided to make a deportation order against him. The Appellant appealed on 27 May 2014 and First-tier Tribunal Judge Canavan allowed his appeal on 5 February 2015.

5. The Appellant appealed against her decision on 19 February 2015 and First-tier Tribunal Judge Cox granted her permission to appeal on 3 March 2015. The Respondent subsequently filed a Rule 24 Response, dated 18 March 2015.

6. The appeal came before me on 9 November 2015 but the Respondent was not legally represented, as those previously representing him had been the subject of an intervention by the Law Society. As a consequence, I found that it was not in the interests of justice to proceed on that date and adjourned the hearing so that he could be represented by Duncan Lewis, who were willing to represent him but did not yet have all of his papers.

Error of Law Hearing

7. Paragraph 398(b) of the Immigration Rules states that the deportation of a person from the United Kingdom is conducive to the public good and in the public interest where a person has been sentenced to a period of imprisonment of at least 12 months and less than four years but the Appellant also has to consider whether paragraphs 399 or 399A of the Rules applies and, if they do not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A..

8. The Appellant accepted that the Respondent had son, who was a British citizen and in paragraph 33 of her decision First-tier Tribunal Judge Canavan found that the Respondent had a genuine and subsisting relationship with him. Therefore, sub-paragraph 399(a) of the Rules was met. However, it was also necessary for her to consider whether it would be unduly harsh for him to live in Nigeria if the Respondent were to be deported there.

9. In paragraph 37 of her decision, First-tier Tribunal Judge Canavan noted that it was unclear how the “unduly harsh” test contained in paragraph 399(a) or section 117C(5) of the Nationality, Immigration and Asylum Act 2002 would be applied. She did not then go on to formulate any test for circumstances which could be said to be “unduly harsh”.

10. Instead, she partly relied on the fact that the Respondent had found that it would be unreasonable for him to have to leave the United Kingdom. I find as submitted by the Appellant that this is a lower test and does not assist when considering whether circumstances would be “unduly harsh”. The other factors which First-tier Tribunal Judge Canavan took into account were that the Respondent’s son would be

separated from his father with who he now had daily contact (as they were living together) and that when the Respondent had been in prison he had been sad and had misbehaved more often. She also noted that occasional visits to Nigeria and contact by Skype would not be adequate contact given his young age.

11. Paragraph 2.5.2 of the IDI *Chapter 13: Criminality Guidance in Article 8 ECHR Cases* (version 5.0, 28 July 2014) notes that "when considering the public interest statements, words must be given their ordinary meanings. The Oxford English Dictionary defines "unduly" as "excessively" and "harsh" as "severe, cruel"." Furthermore, in *MK (Section 55 – Tribunal options) Sierra Leone* [2015] UKUT 223 (IAC) the President noted that "by way of self-direction, we are mindful that *"unduly harsh"* does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher". At paragraph 72 of *MAB (para 399; "unduly harsh") USA* [2015] UKUT 435 (IAC) the Tribunal also stated that in its judgment "albeit to add a gloss of our own, the word "unduly" requires that the impact upon the individual concerned must be 'inordinately' harsh. By that we mean that the impact would be "unusually large" or "excessive". I find that First-tier Tribunal Judge Canavan did not carry out any similar and necessary interrogation of the term "unduly harsh" and did not apply a sufficiently rigorous test. Therefore, she made a material misdirection in law when assessing paragraph 399(a) of the Immigration Rules.

12. I find that her approach also undermined her findings in paragraph 42 of her decision as to whether it would be unduly harsh for the child to remain in the United Kingdom with his mother. I note that, as argued by the Appellant in ground three of the grounds of appeal, there was no evidence that his mother would not be able to adequately care for him or would neglect him in the Respondent's absence or any evidence that his health would suffer if the Respondent were to be deported

13. First-tier Tribunal Judge Canavan also allowed the Respondent's appeal under paragraph 399A and section 117C(4) of the Nationality, Immigration and Asylum Act 2002 but when doing so she appeared to conflate the present and previous rules. In particular, in the last sentence of paragraph 44 of her decision she found that he had nothing more than remote and abstract links to Nigeria and therefore also meets the requirement of paragraph 399A (c) of the Immigration Rules". Earlier in the paragraph she relied on *Ogundimu (Article 8-new rules) Nigeria* [2013] UKUT 00060, which was no longer applicable. She did not give sufficient reasons for finding that there would be very significant obstacles to the Respondent's integration in Nigeria for the purposes of paragraph 399A(c) of the Rules.

14. The Judge also found in paragraph 54 of her decision that the Respondent's deportation would amount to a disproportionate breach of Article 8 of the European Convention on Human Rights. However, paragraph 398 of the Immigration Rules makes it clear that the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

15. The material errors of law made by the First-tier Tribunal Judge when considering paragraphs 399 and 399A meant that there were no clear factors pertaining to the

content of these paragraphs on which to gauge whether there were very compelling circumstances over and above the factors already considered in the Rules.

16. For all of these reasons I find that First-tier Tribunal Judge Canavan's decision did include material errors of law.

Decision

17. I allow the Appellant's appeal and set aside First-tier Tribunal Judge Canavan's decision.

18. I remit the Appellant's appeal to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Canavan.

Date: 15 January 2016

Nadine Finch

Upper Tribunal Judge Finch