**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/25354/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 13 November 2017** | **On 21 December 2017** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ESHUN**

**Between**

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

Appellant

**and**

**EJIRO [O]**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr D Clarke, HOPO
For the Respondent: Mr N Aborisade, Solicitor, O A Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Andonian to allow the appeal of the respondent Miss [O], against refusal to revoke a deportation order made against her by virtue of Section 5(2) of the Immigration Act 1971.

2. For the sake of convenience Miss [O] will from now on be referred to as the applicant.

3. The applicant is a citizen of Nigeria born on 24 December 1979. She entered the UK on 26 February 2008 although there does not appear to be any record of her actual entry into the UK. On 27 February 2008 she was arrested at Gatwick Airport when she attempted to board a flight to Canada using a British passport, to which she was not entitled. On 13 March 2008 the applicant was convicted at Lewes Crown Court for possession and use of a false instrument. She was sentenced to twelve months' imprisonment and recommended for deportation.

4. On 15 April 2008 a liability to deportation was issued to the applicant together with a questionnaire for her completion. On 22 April 2018 representations were received from the applicant. Further representations were received on 25 July 2008.

5. On 28 February 2008 the applicant had claimed asylum in the UK. This was refused by the respondent by letter dated 26 August 2008. The applicant lodged an appeal against the refusal to grant her asylum. She abandoned the asylum appeal at the hearing before the judge.

6. On 19 December 2008, a deportation order was signed against the applicant.

7. The applicant has three children who were born in the UK. Her daughter PI was born on [ ] 2008, a second daughter CI was born on [ ] 2009 and her son DI was born on [ ] 2012. The children have the same father. He is a British national. The applicant's three children are all British nationals.

8. The judge said at paragraph 12 that notwithstanding the fact that the children are British citizens and being British is not a trump card for the applicant, she still has to show that it would be unreasonable to ask her to leave the UK and to return to Nigeria with the children, notwithstanding that they are British children. The judge found that she was not telling the truth when she said she did not know where the father of the children lived as it was obvious he was around in the children's lives but that he was not their carer and appreciated that the father could not look after them.

9. The judge said at paragraph 13 that the children go to school. A letter from the family's GP dated 13 October 2014 confirmed that the applicant was their patient and that according to their records the children resided with the applicant mother. The judge also noted a letter from the children's father dated 6 August 2014 in which he stated that he was the father of all three children. He was in a relationship with their mother, the applicant, who lives with the children and has sole care of them. He said he was responsible for his children financially and took care of all their needs without recourse to public funds. The judge noted that there were various bills addressed to both the applicant and her partner.

10. The judge noted at paragraph 16 that the nature of the applicant's Article 8 claim is that she has claimed that it would place the UK in breach of its obligations under Article 8 of the ECHR to deport her to Nigeria because of her relationship with the

three British children. The judge went on to say that the applicant's deportation is conducive to the public good and in the public interest insofar as the respondent is concerned because she has been convicted of an offence for which she has been sentenced to a period of imprisonment for less than four years but at least twelve months. The judge stated that in accordance with paragraphs 398 of the Immigration Rules the public interest required the applicant's deportation unless an exception to deportation applies. The exceptions he said are set out in paragraphs 399 and 399A of the Immigration Rules.

11. The judge at paragraph 18 cited paragraph 399A of the Immigration Rules, namely a foreign criminal under this paragraph, must have a genuine and subsisting parental relationship with a child under the age of 18 who is in the UK and the child is a British citizen ….. and it would be unduly harsh for the child to live in a country to which the person is to be deported and it would be unduly harsh for the child to remain in the UK without the person who is to be deported.

12. The judge at paragraph 17 stated that he has considered Section 55 of the Borders, Citizenship and Immigration Act 2009 and the best interest principle. He has also taken into account the interest of the applicant's children and that their best interest is as primary consideration in the making of his decision. He noted that the best interest of the children is not the only or prior amount consideration, although they are a primary one and that they must be balanced against other relevant factors including the public interest in deporting foreign criminals to determine whether the applicant's deportation is proportionate or not. He also noted that paragraphs 398 and 399 of the Immigration Rules take into account the best interest as capable of outweighing the public interest and sets out in what circumstances that would be the case.

13. With those principles in mind the judge made findings as follows. He accepted that the children are all under the age of 18. They are all British citizens. The judge held at paragraph 19:

> *"… Unless there are other matters that the SSHD can show that make deportation still conclusive to the public good, it seems to me that the factors herein Plus the fact that the appellant's former partner who is not a carer for the children but who finances them and sees them from time to time, and taking into account the best interest of the children 2of whom are at least 7 years and above years of age, these matters should indicate that the deportation order should be revoked and that the appellant should be given leave to remain in the Uk so that she can case [sic] of her British children as there is no one else to care for them. Their father by seeing them twice a month and providing them with maintenance from time to time does not become their main carer or sole carer. It is the appellant mother who is their sole carer, and if she had to leave the UK then the British Children would have to leave too and they would be going to a country outside the EU. These matters would suggest to me that it would be unreasonable for the mother appellants to leave with the children accordingly. See the case of Zambrano."*

14. The judge at paragraph 20 said he believed the father of the children did see the children from time to time and also had some rights and that taking the children to Nigeria would deprive him (he works and studies) of seeing the children twice a month as at present (see case of ***Beoku-Betts***).

15. The judge at paragraph 21 accepted the evidence of Dale Gavin Matil that the applicant and her three children live with him at the property which he owns. The judge also accepted letters from the children's schools to find that the applicant has a genuine and subsisting relationship with her children.

16. The judge then went on to consider whether it would be unduly harsh to send the children and the applicant back to Nigeria. He noted that the Secretary of State did not accept that it would be unduly harsh for the children to live with the applicant in Nigeria. The judge found that the children have never been to Nigeria and do not know the culture and customs or language. He accepted that they are British citizens who cannot be compelled to leave the UK. He noted that the respondent had said their father could chose to relocate to Nigeria on the applicant's removal but found that there was no evidence that he would be willing to do so. The judge found that their father and the applicant are separated and he cannot care for the children on a 24 hour basis and has voluntary contact with them twice a month. On the totality of the evidence he did not consider that the father of the children would have an intention to leave the UK to migrate with the family to Nigeria. He works here and also studies here.

17. At paragraph 24 the judge considered the issue of reasonableness. He considered whether there was anyone in the UK who could actually care for the children. On the evidence he found this would not appear to be the case because whereas their father is prepared to give money and help them, there was nothing to indicate to him that the father would be able to take the responsibility of looking after the children and for them to remain with him in his care and control whilst the applicant left the UK to serve out her deportation term.

18. The judge found that returning the children to Nigeria would cause a huge strain on the relationship between the applicant and the children. They would have to go to a country they have never seen which could affect their education and insofar as medical assistance is concerned they are entitled to the NHS services in the UK but this would not be possible if they were removed. Furthermore, the applicant said the children could not sleep without her and she is the one they live with and they are used to being with her. Although the Home Office have said that there are available educational and local facilities in Nigeria, the judge believed that there would be substantial and reasonable disruption for the older two to adapt to such a system and it would not be reasonable for the two elder ones to be separated from the 6 year old.

19. The judge said at paragraph 28 that there was one question left, which was whether it is reasonable in all the circumstances for British children to be forced to leave the UK and out of the territory of the Union as the mother who has no right to remain in

the UK and is under a deportation order?" The judge found that the children are minors and need to be looked after by a parent or guardian, and so they would have to leave with the applicant. As British children, they would not be able to enjoy what they are enjoying now in terms of healthcare, their peers and other activities and education.

20. The judge then looked at the applicant's own immigration history. He found that she has never been granted any form of leave to remain in the UK and therefore has never been residing lawfully in the UK. He found that she is not culturally or socially integrated in the UK and it is not accepted that she is financially independent as she does not work. She is dependent on her ex-partner Precious Izobo to support her. Therefore, she is not contributing to the economic wellbeing of the UK.

21. The judge found that the applicant's blatant disregard to the laws of the UK further demonstrated that she was not fully integrated in the UK. He did not accept that there would be very significant obstacles in the applicant's integration into Nigeria where she spent her youth and formative years from when she was born in 1979 until her arrival in the UK in 2008.

22. The judge then went on to hold as follows:

> "32. *As the exceptions to deportation do not apply in the appellants case, consideration has been given as to whether there are compelling circumstances. On 13.3.2008 the appellant was convicted at Lewes Crown Court of possession and or use of false instruction. She was sentenced to 12 months imprisonment and recommended for deportation. On 15.4.2008 a liability to deportation was issued to the appellant together with a questionnaire for her completion. In order to outweigh the very significant public interests in deporting the appellant she would need to provide evidence of a very strong Article 8 claim, over and above the circumstances described in exceptions to deportation, I take a particularly serious view against people who are convicted of particularly serious offences, particularly offences which involve falsifying documents such as passports due to the harm that this can cause to the integrity of the border and immigration system of the UK and the damage that using such false documents can cause to the confidence of the British public, particularly those groups who rely on these documents such as banks, to conduct their business, in the light of this it is evidence that the appellant is a person of questionable character and that her deportation from the UK is conducive to the public good and in the public interest, and it is therefore considered that on this basis , it is not disproportionate to deport the appellant from the UK.*
>
> 33. *I have given full consideration in this matter as to whether the appellant would meet any exception to deportation on the basis of her relationship with her British children, and on this ground alone I consider that the appellant would meet the exception to deportation on this basis that there are very compelling circumstances that the appellants case should succeed on the evidence before me. I believe all that I have said about the children in this decision, show that there are*

*compelling circumstances before me that would outweigh the presumption for deportation on the basis of the appellant serious criminal convictions in the UK. Therefore, having considered the facts of the appellants case I accept that there are very compelling circumstances which outweigh the public interest in seeing the appellant deported.*

34. *Article 8. Having considered all the available evidence about the appellant circumstances including the best interest of the children, I consider that the appellants deportation would breach the UK's obligations under ECHR Article 8 because the public interest in deporting her does not outweigh her Article 8 rights to family life. Consideration has also been given as to whether it would be appropriate in all the circumstances to revoke the deportation order made against the appellant. Part 13 of the immigration rules provides a framework for considering whether a deportation order should be revoked where a person is in the UK. Paragraph 390 says that an application for revocation of a deportation order will be considered in the light of all the circumstances including the light in which the order was made, any representations made report, the interest of the community including the maintenance of effective immigration control, the interest of the applicant including any compassionate circumstances.*

35. *The appellant's further submissions have been fully considered and I have concluded for the reasons set out above that she does through her Brutish children as their primary carer and indeed their sole carer qualify for leave to remain in the UK. I have considered all her evidence, have noted that she tendered her unreserved apology to this tribunal for her conviction for possession of a false instrument, and I noted that she said that her children could not relocate to Nigeria as it would not be in their best interest, she said that her former partner cannot take care of them in the UK, and having considered this part of her evidence, more particularly elaborated in this decision above, I believe this part of her evidence to be credible.*

36. *The burden of proof is on the respondent to show on the civil standard of proof that deportation is conducive to the public good and on the appellant to rebut that presumption on the same civil standard. The appellant has successfully rebutted the presumption in favour of deportation to satisfy this tribunal that she should be allowed remain in the UK. I believe she has discharged the burden of proof incumbent upon her."*

23. Permission was granted to the Secretary of State in the following terms:

(a) it is arguable that the judge has erred in law (by failing to give adequate reasons as to whether the father of the appellant's three British children would take responsibility for the children should the appellant be deported;

(b) by failing to give clear reasons as to why the appellant is the sole carer for the children given the biological father's involvement in their lives when he sees them and provides financial assistance;

(c) by failing to adopt the correct approach in paragraphs 24 and 26 of the decision and reasons when the judge considered the question of reasonableness as opposed to whether it would be unduly harsh for the children to accompany their mother; and

(d) by failing to adequately take into account the public interest in failing to apply the statutory provision of Section 117 of the Nationality, Immigration and Asylum Act 2002 at all.

24. Mr Clarke relied on the grounds upon which permission was granted. He submitted that from paragraphs 14 onwards the judge considered Article 8, paragraphs 399 and 399A. At paragraph 18 the judge correctly cited 399A and the test to be satisfied which is whether it would be unduly harsh for the British children to live in the country to which the person is to be deported and it would be unduly harsh for the child to remain in the UK without the person who is to be deported. However at paragraph 32 the judge found that the exceptions did not apply and therefore meant that the threshold for unduly harsh was not met. But then oddly at paragraph 33 found that there were very compelling circumstances which outweighed the public interest in the applicant's deportation. He said that the judge in reaching his conclusion relied on the same reasons upon which he found that the exceptions in relation to consideration of the unduly harsh test did not apply. If he was right, then the issues regarding whether the children stay or return to Nigeria with the applicant have been judged on a high threshold.

25. Mr Clarke further that there was no consideration of Section 117 of the 2014 Act by the judge. He said that the judge looked at the crime committed by the applicant and the public interest but did not take into account Section 117C. He was silent as to how he constructed the proportionality assessment in terms of the public interest.

26. Mr Clarke said that the judge found at paragraph 27 that the father of the children will not be able to look after the children. He referred me to paragraph 60 of **VM (Jamaica) [2017] EWCA Civ 255** where the Court of Appeal held

> *"As this court held in **FZ (China) v Secretary of State for the Home Department [2015] EWCA Civ 550**, following **Dereci** and the decision in **O, S and L** (at paragraphs [42 to 44] of the advocate general's opinion and para. (56) of the judgment), 'the critical question is whether there is an entire dependency of the relevant child on the person who is refused a residence permit or who is being deported' … ."*

27. Mr Clarke submitted that in the instant appeal the judge approached this issue as a matter of choice. Mr Clarke said that the father provides maintenance. However, the judge found at paragraph 20 that the deportation of the applicant and should the children go to Nigeria with her would interfere with their relationship with their father. He said that **VM** requires a proper assessment of dependency on the father

and a consideration as to whether the child would be required to leave if the applicant is deported.

28. Mr Clarke submitted that there was no evidence that the father would not be able to care for the children. The judge found that he was financially supportive of the children and visited them. The judge found that he would not be able to care for the children because he works and is a student. He said the judge should be looking at what level of dependence the father can offer. He said there is lacking any reasoning as to the level of care the father can give the children.

29. Mr Clarke said that the judge erred in law when he repeated the reasonableness test when he looked at the unduly harsh issue. He said this was a confused determination.

30. Mr Aborisade submitted that the judge considered the letter dated 6 August 2014 from the father to the court and drew an inference that the father would not have the time to care for the children. There were letters from the children's schools and the GP and the applicant's landlord all confirming that the applicant was the one looking after the children. He submitted that the judge's decision was based on **MA Pakistan**. The judge used the word compelling to describe the circumstances of the children because they are British nationals. He submitted that the judge considered Section 117 at paragraphs 29 to 32 although he did not specifically mention Section 117.

31. Mr Aborisade submitted that the decision of the judge does not disclose an error of law. The judge considered all the issues that were before him, made findings of fact and reached conclusions that disclosed no error of law.

**Findings**

32. The judge at paragraphs 14 and 15 correctly set out the human rights laws, the Immigration Rules, namely paragraph A362 and paragraph 398 to 399D. He said Parliament's view of what the public interests requires for the purpose of article 8(2) is set out at Section 117A to 117G in part 5A of the Nationality, Immigration and Asylum Act 2002 as inserted by the Immigration Act 2014. He correctly set out at paragraph 16 that the applicant has been convicted of an offence for which she has been sentenced to a period of imprisonment of less than four years but at least twelve months. Therefore, in accordance with paragraph 398 of the Immigration Rules, the public interest required the appellant's deportation unless an exception to deportation applies. The judge said the said the exceptions are set out in paragraphs 399 and 399A of the Immigration Rules as exceptions. I note that these exceptions have been inserted at Section 117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002.

33. I note that the only findings of fact challenged by the Secretary of State concern the ability of the children's father to take responsibility for them; and their mother being

their sole carer. I find on the evidence that was before judge, that he made findings that were open to him. This means that all the findings of fact made by the judge shall stand.

34. I do not accept Mr. Clarke's submission that the judge failed to consider Section 117 of the 2014 Act. Whilst I find that the judge failed to specifically mention Section 117, I accept Mr. Aborisade's submission that the judge's findings at paragraphs 29 to 31 in respect of the applicant's immigration history indicated that the judge considered Section 117B (1)-(5). It was apparent from those findings that the applicant could not meet the requirements to exception 1 at Section 117(C)(4).

35. I found the judge's findings at paragraph 32 rather problematic. The judge said "as the exceptions to deportation to not apply the appellant's case, consideration has been given as to whether there are very compelling circumstances." The use of the phrase "*very compelling circumstances"* appear at Section 117C(6). It is a requirement that has to be established by a foreign criminal who has been sentenced to a period of at least four years. That is not the case here as this applicant was sentenced to a period of 12 months. The same phrase "*very compelling circumstances"* also appear at paragraph 398 of the immigration rules subject to whether the exceptions at paragraphs 399 or 399A apply. I note that these exceptions have been inserted at section 117C (4) – Exception 1 and at section 117(C) (5) – Exception 2. As stated at paragraph 32 above, it was apparent from the judge's findings at paragraphs 29 to 31 that exception 1 did not apply. I find that the judge failed to identify exception 2 and failed to give reasons as to why this exception did not apply. I find that the rest of paragraph 32 concerned the public interest in the deportation of the applicant.

36. The judge's findings at paragraphs 23 to 28 suggested to me that it would be unduly harsh to send the children and the applicant back to Nigeria. I would have thought that these findings would have led to a conclusion that exception 2 at 117C(5) and the similar exception at paragraph 399 did apply; that the applicant had met the requirements of that exception, namely, that she has a genuine and subsisting relationship with three qualifying British children and that the effect of her deportation on the children would be unduly harsh. I am therefore surprised that the judge made the finding at 32 that the exceptions to deportation did not apply in this case.

37. In any event, having found that the exceptions did not apply, the judge at paragraph 33 found that there were very compelling circumstances which outweighed the public interest in the applicant's deportation. I accept Mr. Clarke's submission that in reaching this conclusion the judge relied on the same reasons upon which he found that the exceptions in relation to consideration of the unduly harsh test did not apply. By so doing I find that the judge applied a high threshold in his consideration of the issues regarding whether the children stay or accompany the applicant to Nigeria. I find that this was the only route available to the judge having found that the exceptions did not apply. I find that any errors made by the judge are consequently not material.

38. In the light of the strong findings made by the judge in respect of the children, I uphold his decision that there are very compelling circumstances which outweigh the public interest in the deportation of the applicant.

339. The judge's decision allowing the applicant's appeal shall stand.

No anonymity direction is made.

Signed Date: 20 December 2017

Deputy Upper Tribunal Judge Eshun