Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05198/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 February 2018	**On 11 May 2018**

Before

THE HONOURABLE MR JUSTICE NICKLIN
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR BARRY ADEWALE LAWAL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr J Babarinde, Legal Representative, Hatten Wyatt Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. Mr Lawal is the respondent in this appeal. Following a hearing on 30 November 2017 on 8 January 2018 First-tier Tribunal Judge Andonian allowed an appeal by Mr Lawal against a decision to deport him dated 17 March 2017.

2. Mr Lawal has a long immigration history. He is now 49 years old. He is a citizen of Nigeria. There are no records of when he first came to the UK but he has previously claimed to the Secretary of State that he entered the UK in June 1989. He first came to the attention of immigration control on 11 August 2005 when he applied for indefinite leave to remain. That application was finally refused on 23 November 2005 because of problems with fee payment. On 2 February 2006 Mr Lawal

submitted an application for fourteen years long residence indefinite leave to remain. On 3 February 2006 Mr Lawal was arrested on suspicion of forgery. He pleaded guilty to a charge of possession of a false instrument, a passport, with intent to use. Then, on 31 March 2006, Mr Lawal was sentenced to twelve months' imprisonment by the Inner London Crown Court. There was no appeal against that sentence.

3. On 28 July 2006 Mr Lawal was served with a notice of intention to make a deportation order on the basis of his criminal conviction. Mr Lawal appealed that decision. In the meantime, on 2 August 2006, he was detained under immigration powers on the conclusion of his sentence. On 26 August 2006 Mr Lawal submitted a further application for fourteen years' long residency ILR. On 12 September 2006 Mr Lawal applied for and on 26 September 2006 was granted immigration bail subject to reporting restrictions. On 8 February 2007 Mr Lawal's appeal against his deportation was refused and he became appeal rights exhausted. At this time Mr Lawal stopped complying with his bail condition. He stopped reporting to Becket House reporting centre weekly.

4. On 28 July 2008 Mr Lawal's application for ILR submitted on 26 August 2006 was refused. On 11 December 2008 Mr Lawal submitted an application for an EEA residency card under an alias as a family member of an EEA national. He was asked to submit further evidence on two occasions, but he did not do so, and the application was refused on 23 March 2010 with no right of appeal. On 24 August 2009 a deportation order was made. There is then a gap of about three years and during this time Mr Lawal was in breach of his reporting conditions and had on that basis absconded.

5. On 24 September 2012 M A Consultants acting on behalf of Mr Lawal sought an update on his case. A response was sent the same day including a copy of a restriction notice requiring Mr Lawal to report on 28 August 2012 to Becket House. He did not do so. Mr Lawal continued to fail to report. On 2 March 2016 Mr Lawal applied for further leave to remain on the basis of his relationship with his British citizen partner, his British citizen child and claimed residence of over twenty years. On 29 March 2016 Mr Lawal was issued with restrictions requiring him to report to Croydon reporting centre on 5 April 2016 and every 28th day thereafter. Mr Lawal did report on 5 April and on 3 May 2016.

6. On 7 June 2016m Mr Lawal was detained under immigration powers. On 8 June, Mr Lawal's application for further leave to remain was refused under paragraph 353 with no right of appeal. Ultimately Mr Lawal sought judicial review of this refusal. On 7 July 2016, a stay against his removal was granted. On 29 July 2016, Mr Lawal was granted immigration bail and released on 1 August 2016. On 15 December 2016, in the judicial review proceedings a consent order was agreed. By that, the Secretary of State withdrew the various decisions in 2016 and Mr Lawal was given until 5 January 2017 to submit any further representations which the Secretary of State agreed then to consider within three months.

7. The nature of Mr Lawal's Article 8 claim was that his deportation would be in breach of his Article 8 rights because he had a current relationship with a British citizen, her

daughter from a previous relationship, who is entitled to apply for British citizenship, and his child in the United Kingdom. Mr Lawal claimed that it would be unduly harsh for his partner, stepchild and child to relocate to Nigeria with him because all were or were entitled to being British citizens and were all settled in the UK. Mr Lawal also alleged that his partner suffered from health conditions and entered the UK as a minor and had no memory of her life in Nigeria. Mr Lawal submitted that it would be unduly harsh for his partner to remain in the UK and care for his children and that this would be extremely difficult for her as well as working at the same time. Finally, Mr Lawal claimed that he had established a private life in the UK, having lived in the country for over twenty years.

8. In reaching her decision the Secretary of State applied paragraph 399(a) of the Immigration Rules and decided

that Mr Lawal did have a genuine and subsisting relationship with his stepdaughter but that she was not a UK citizen, but a Nigerian citizen, and she had not lived in the UK for seven years as she had entered the UK on 3 February 2012;

that it would not be unduly harsh for the stepdaughter to live in Nigeria, the decision on relocation being one for Mr Lawal's partner;

it was not unduly harsh for the stepdaughter to remain in the UK if Mr Lawal were to be deported. The stepdaughter was not dependent upon Mr Lawal for either her right or ability to reside in the UK or for any of her day-to-day needs;

Mr Lawal's deportation was proportionate on the basis of his serious criminal conviction in the UK;

it was accepted that Mr Lawal's daughter was a British citizen and that he had a genuine and subsisting relationship with her;

it was not accepted that it would be unduly harsh for the daughter to live in Nigeria. She was a dual citizen of both the UK and Nigeria. The decision to relocate would lie with Mr Lawal and his partner; and

it was not accepted that it would be unduly harsh for the daughter to remain in the UK following Mr Lawal's deportation. The daughter was not dependent upon Mr Lawal for her right or ability to reside in the UK or for any of her day-to-day needs, and, finally, the Secretary of State considered that there was adequate education infrastructure in Nigeria for both children.

9. In considering Mr Lawal's relationship with his partner the Secretary of State applied paragraph 399(b) of the Immigration Rules. She made the following findings:

(1) The Secretary of State accepted that the partner was a British citizen and Mr Lawal had a genuine and subsisting relationship with her. However, the Secretary of State determined that the relationship with his partner was formed when Mr Lawal was in the UK unlawfully. Mr Lawal has never been in the UK lawfully and indeed the Secretary of State contended that his relationship with

his partner had been formed when he knew that the Home Office intended to deport him. His partner, the Secretary of State found, would also partially have been aware of that fact.

It was not unduly harsh for the partner to live in Nigeria if she chose to do so. She was born in Nigeria spent a significant part of her formative years in Nigeria.

It would not be unduly harsh for the partner to stay in the UK even if Mr Lawal were to be deported. Both she and Mr Lawal entered in a relationship knowing that he had a precarious immigration status.

10. As to the partner's medical condition, the Secretary of State accepted that she occasionally suffered from high blood pressure but that there was insufficient evidence of any more serious conditions. The blood pressure issues, she found, could be treated in Nigeria.

11. The Secretary of State considered the private life exception under 399A Immigration Rules, but determined that he failed to qualify as he had not been lawfully resident in the UK for most of his life. The Secretary of State also considered that Mr Lawal was not socially and culturally integrated into the UK and, finally she considered that there would not be very significant obstacles to Mr Lawal's integration into Nigeria.

12. Under the general consideration of Mr Lawal's Article 8 claim, the Secretary of State accepted that Mr Lawal had established a family life and private life in the UK and accepted that the decision to remove him from the UK would interfere with his right to a family and private life. Nevertheless, Mr Lawal's removal was in accordance with the immigration legislation and would be proportionate to this aim. The Secretary of State did not consider that there were any compelling circumstances why Mr Lawal should not be deported. Mr Lawal was informed of his statutory right of appeal under Section 82(1) of the Nationality and Immigration Act 2002 from within the UK.

13. On 22 March 2017 Mr Lawal submitted an appeal against the Secretary of State's decision. The grounds simply stated: "The decision to remove the appellant will lead to a breach of Article 8 of the ECHR. The appellant cannot be separated from his partner and daughter as it will have an adverse impact on their lives."

14. Before turning to the First-tier Tribunal's judgment the starting point is the statutory framework. The judge considered Sections 117B to D when considering Mr Lawal's Article 8 claim. Under Section 117D(2) Mr Lawal as someone who has been sentenced to at least twelve months' imprisonment was classified as a foreign criminal. As such, in addition to the consideration of the matters in Section 117B, which apply to all cases, the judge had to have regard to Section 117C. This provides:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where -

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated into the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh."

15. Section 117D provides, so far as material, that a qualifying partner means a partner who is

"(a) a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see Section 33(2A) of that Act)"

and that a qualifying child means a person who is under the age of 18 and who is

"(a) a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more."

16. It is also important to note that paragraphs 396 and 397 provide as follows:

"396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with Section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed."

17. In relation to the second sentence of paragraph 396 it is right to note that in the Rule 24 response to the appellant Mr Lawal made the following points, that his 2009 deportation order was made pursuant to Section 3(5)(a) of the 1971 Immigration Act

rather than Sections 32(4) and (5) of the UK Borders Act as his conviction was prior to the 2007 Act and the Secretary of State had not made any case that he is liable to deportation under 32(5). The impact of that for the present purpose is as follows. This was not a case of mandatory deportation under Section 32 of the 2007 Act. It was a question of a discretionary deportation.

18. Nevertheless, the fact is that, as I have recounted in the immigration history, a deportation order has already been made and that there has been no challenge to the legality of that order, so the position is that the Immigration Judge was required to consider the matters that were identified in 396 and 397. He was also required to consider specifically paragraph 399 of the Immigration Rules and whether the deportation of Mr Lawal would be unduly harsh for either the children or Mr Lawal's partner either for them to accompany him to Nigeria or for them to remain in the UK without him. The First-tier Tribunal noted the statutory provisions and the Immigration Rules that I have identified in paragraph 21 of his judgment.

19. Thereafter the First-tier Tribunal Judge summarised the decision of the Secretary of State before concluding in paragraphs 35 and 36 as follows:

> "35. However, it is my view that the appellant's human rights in this matter do outweigh the need to maintain proper immigration control. I do believe that consideration has not been given to the fact that this offence that occurred had been ten years ago and since then the appellant has been a reformed character, looking after his family and living a law-abiding life. During that ten year period of time when he has not been involved in any further issues with the authorities he has concentrated in looking after his family, taking his stepdaughter to school and back home, spending time with her, and looking after his son [that is a mistake for daughter]. He does not have a good immigration history but the crime he committed was some ten years ago, during which time he has built up substantial family life in the UK. If he were to be removed from the UK now he would most likely not be able to return for many years. It was clear that the appellant's partner would find it financially impossible to make frequent trips to Nigeria and take the children with her so they can see the appellant. The stepdaughter is very much attached to the appellant, who treats her as his own daughter. If he were removed that contact will fade away it is reasonable to conclude as contact by electronic means is not the same as physical contact on a daily basis when the family sit together for meals and spend time together and when the appellant interacts with his family and children. As regards the 1 year old son [again, that is a mistake for daughter] if the appellant were removed his [daughter] would be a stranger to him if the appellant is one day able to return, life would have moved on by then as well. Now is the time for bonding to take place.
>
> 36. The burden of proof is on the respondent to satisfy this Tribunal on the civil balance of probabilities that deportation is conducive to the public good; it is a rebuttable presumption that deportation is conducive to the public good in regard to a foreign criminal in the UK. I do believe that the

> respondent has not discharged the burden of proof incumbent upon her, and that the appellant has in this instance successfully rebutted the presumption in favour of deportation. It is not proportionate to remove the appellant in the circumstances of this case."

As such the First-tier Tribunal Judge allowed the appeal against the Secretary of State's decision.

20. On 10 January 2018 the Secretary of State lodged an appeal against the First-tier Tribunal's decision. Essentially the Secretary of State contends that the First-tier Tribunal Judge has in paragraphs 35 and 36 failed to give clear reasons why the appeal was allowed and failed to give consideration to Section 117A to D as he was required to do. It is also submitted that the FtTJ got the burden of proof wrong and that his reliance upon ten years since Mr Lawal had been convicted of the offence and his rehabilitation was misplaced in light of the authorities of the Court of Appeal in **Danso [2015] EWCA Civ 596** [20] and **Velasquez Taylor [2015] EWCA Civ 845**, in which the court made clear that the weight that could be given in a deportation case to any rehabilitation of the foreign criminal was limited.

21. The grounds that the Secretary of State has relied upon today are three, first, that the First-tier Tribunal Judge

    (1) failed to apply either the requirements of paragraphs 398, 399 and 399A of the Immigration Rules or the mandatory statutory considerations of Section 117A to D of the Nationality, Immigration and Asylum Act 2002 as amended,

    (2) failed to properly give weight to the public interest in the appellant's deportation,

    (3) failed to give clear findings adequately reasoned as to why the claimant's deportation was disproportionate.

    Essentially though those grounds represent a challenge of the findings and the application of the relevant law.

22. In response on behalf of Mr Lawal, Mr Babarinde has today sought to uphold the decision of the First-tier Tribunal Judge, contending that it is clear from the decision that the judge had all the relevant considerations in mind and that he was entitled to reach the conclusion that he did.

23. It is important to look at the statutory framework and the interpretation that has been placed upon it by the courts. In **Richards v Secretary of State for the Home Department [2013] EWCA Civ 244** the Court of Appeal stated that "the strong public interest in deporting foreign criminals is now not merely the policy of the Secretary of State but the judgment of Parliament", a point emphasised in the subsequent case of **SS (Nigeria) v Secretary of State for the Home Department [2014] 1 WLR 998**. It also recognised that the public interest in deportation encompassed the need for deterrence, the promotion of public confidence in the treatment of foreign criminals and the need to express society's condemnation of those who commit serious

offences. Parliament has prescribed a detailed set of considerations for any court or Tribunal to assess. It is not for an individual judge to ignore these provisions and perform a purported balancing exercise without regard to them. Such an approach is wrong in principle and it risks producing inconsistent decisions. I am afraid to say that I have reached a very clear conclusion that First-tier Tribunal Judge Andonian has done just that.

24. On the facts of this case the only real issue upon which there could be any argument was whether the deportation of Mr Lawal would be unduly harsh on his daughter, his stepdaughter not qualifying under paragraph 399(a) and his partner not qualifying under paragraph 399(b)(i) because the relationship was formed when Mr Lawal was not in the UK lawfully. An assessment of undue harshness requires a careful analysis of the evidence of the likely impact on the child measured against the offending and public interest in deporting foreign criminals. This can be a difficult exercise and there are numerous authorities guiding the Tribunal Judges as to how to perform it. The key decisions are **KMO (section 117 - unduly harsh) (Nigeria) [2015] UKUT 543 (IAC)**, **MM (Uganda) [2016] EWCA Civ 450** and **AJ (Zimbabwe) [2016] EWCA Civ 1012**. They establish that undue harshness requires a high threshold beyond what might be regarded as the typical harshness that would follow from the separation of a child from his or her parent.

25. In **MM (Uganda)** Lord Justice Laws held that when determining undue harshness the court should have regard to all of the circumstances. These included the applicant's immigration and criminal history. At paragraph 24 he said this:

> "This steers the Tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh."

26. That decision was followed in **MA (Pakistan) & Ors v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705**. In **AJ (Zimbabwe)** at paragraph 17 the court indicated that it would be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals.

> "Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. … In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the Rule of any practical significance."

And then at paragraph 31 the court stated:

> "It was not open to the First-tier Tribunal to find that the separation of the children from the father or stepfather was a compelling reason to allow the respondent to remain. Far from being an exceptional circumstance, this is an

> everyday situation as the authorities I have set out demonstrate. They show that the separating parent and child cannot, without more, be a good reason to outweigh the very powerful public interest in deportation. No doubt the First-tier Tribunal was right to say that these children would unfortunately suffer from the separation but for reasons I have already explained, if the concept of exceptional circumstances can apply in such a case, it would undermine the application of the Immigration Rules."

At paragraph 46 the Court of Appeal indicated on the facts of that case that there would be some emotional damage to the children but noted that this was not unusual whenever a parent is deported and the child is unable to live with that parent outside the UK.

27. In **NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662** at 34 the court said:

> "The best interests of children certainly carry great weight, as identified by Lord Kerr in **HH v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338** at paragraph 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. As Lady Justice Rafferty observed in **Secretary of State for the Home Department v CT (Vietnam) [2016] EWCA Civ 488** at paragraph 38: 'Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation.'"

28. Finally, in **WZ (China) v The Secretary of State for the Home Department [2017] EWCA Civ 795**, paragraph 14, Sir Stanley Burnton said this:

> "I bear in mind that he has an established family life in this country, that his family and children have UK nationality, and that his wife would have to give up work to look after the children if he were removed and they were to remain in this country. However, none of these facts takes his case out of the ordinary. Deportation necessarily results in the break-up of the deportee's family if they remain in this country after his removal."

29. It is apparent from the authorities that I have set out that the 'unduly harsh' test in paragraph 399A of the Immigration Rules, reflected in Section 117C of the Nationality, Immigration and Asylum Act 2002, has a very high threshold. Separation of parent and child even where this may result in some emotional damage to the child will not ordinarily meet that test. The First-tier Tribunal Judge's reasoning in this case could be summarised as "it would be better for this family to stay together". No doubt that is right, but that is not the test.

30. In light of those conclusions and the authorities I have identified it is clear that the First-tier Tribunal Judge has not carried out the necessary assessment in this case.

The appeal will be allowed and the matter will be remitted to the First-tier Tribunal for reconsideration.

Notice of Decision

The appeal is allowed. Case remitted to the First Tier Tribunal to be reheard by a Judge other than Tribunal Judge Andonian.

No anonymity direction is made.

Signed:  Date: 15 March 2018

Mr Justice Nicklin

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Mr Justice Nicklin