Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **HU/08065/2017**

THE IMMIGRATION ACTS

Heard at Field House
On 14 May 2019

Decision and Reasons Promulgated
On 21 May 2019

Before:

The Hon Mrs Justice Whipple DBE
and Upper Tribunal Judge John Freeman

Between:

Carlos [A]
(anonymity direction not made)

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *David Jones* (counsel instructed by Sutović and Hartigan)
For the respondent: Miss Julie Isherwood

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Iain Ross), sitting at Hendon on 31 January, to allow a human rights appeal by a citizen of Ghana, born 1974. The appellant arrived as a visitor in 2000, and has overstayed ever since. His wife came here as a student a little later, with leave till 2004. During

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by us.
(2) persons under 18 are referred to by initials, and must not be further identified.

that year they married, and in 2005 they had a son 'D', with a daughter 'A' in 2009.

2. In 2010 both the appellant and his wife received suspended sentences for offences involving obtaining and possession of false ID, 15 months' in his case, and 9 in hers. Deportation decisions were served on them, and their appeals dismissed, coming to a final end following the refusal of permission to appeal by the Upper Tribunal on 11 January 2012. Deportation orders followed on 3 April, and further submissions were refused in 2012, 2013 and finally on 12 February 2016, each time without right of appeal.

3. Next D, being ten by this time, was registered as a British citizen on 23 June 2016, so he no longer faces deportation with his family. Further submissions were made about the effect of that, and refused on 8 July 2017. This gave the appellant an in-country right of appeal, following *Kiarie and Byndloss* [2017] UKSC 42, and is the decision under appeal in this case.

4. The appellant's suspended sentence did not involve automatic deportation; but he was regarded by the respondent, with whom the judge agreed on this, as someone whose offence had caused serious harm. This made him a 'foreign criminal': see Nationality, Immigration and Asylum Act 2002, s. 117D (2) (c) (ii). There is no dispute that both children are 'qualifying children', under s. 117D (1), nor that the appellant has a 'genuine and subsisting relationship' with both them and his wife.

5. The relevant part of s. 117C follows:

> '(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 2 applies.
>
> …
>
> (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.'

6. The judge approached the case from paragraph 399 (a) of the Immigration Rules; but his decision can be summarized by saying that he allowed the appeal on the basis that Exception 2 applied, because the effect of the appellant's deportation on both children would be unduly harsh. D of course could not be removed to Ghana; and the respondent does not pursue this appeal on the basis that either of the children should be expected to go there.

7. The real question for the judge was whether it would be unduly harsh for the children to stay in this country without the appellant. The appellant's r. 24 response suggests that the judge's consideration of this point should be taken as beginning at paragraph 23; but, apart from noting that the 'genuine and subsisting relationship' between them and him was not in dispute, paragraphs 23 – 25 are dealing exclusively with the consequences to the children if *they* had to leave this country.

8. The judge's consideration of what we regard as the real question is confined to paragraph 26:

> "I am also satisfied that it would be unduly harsh for the two children to remain in the United Kingdom without the appellant. He has been an integral part of their lives since they were born. The nature of the criminal offending is not such as could be said that it would be in the children's best interests for the appellant to be living apart from them. Further, given that the children's mother does not have leave to remain, it would not be an option for the children to remain in the UK with her."

9. The judge then sets out the legislation to be applied, citing s. 117C in full; but at no point does he look into the difference between 'harsh' and 'unduly harsh'. That crucial distinction had been drawn in this way in *KO (Nigeria) & others* [2018] UKSC 53 at paragraph 23:

> "… 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."

10. The existence of a 'genuine and subsisting relationship' between child and parent is not a basis on which that test can be satisfied, but a condition for its having to be applied at all; and the judge said no more about it than is set out at paragraph 26. Perhaps he may have thought the point was effectively settled by the last sentence, where he regards it as 'not an option' for these children to stay here with their mother, since she had no existing leave to remain.

11. That point is challenged at paragraph 2 of the respondent's grounds of appeal, since the children's mother has had a separate application for leave to remain, on the basis of her relationship with D, outstanding since March 2017. Miss Isherwood pointed out that, while that application was outstanding, the mother could not be removed. Mr Jones's answer to that was that any grant of long-term leave to her would be 'a long way off'.

12. It does not seem to us that either of these contentions forms an entirely satisfactory basis for deciding whether the children either could, or could not live here without their mother. If the respondent chose either to grant or refuse her leave to remain, their situation would become clear. As he had chosen, deliberately or not, to leave her in limbo, that was the situation with which the judge had to deal.

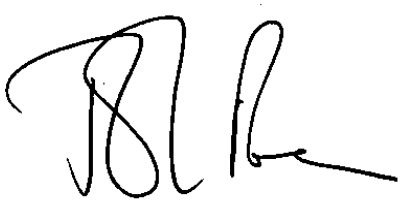
13. The result is that the judge's decision has to be set aside, for lack of reasons on the 'unduly harsh' point. As the authorities make clear, this in itself is an evaluative exercise, not a fact-finding one, and we have considered whether we could deal with it ourselves. However, it is an exercise which has to be carried out on a full evaluation of the factual situation.

14. As Mr Jones pointed out, the case put forward by the respondent in the decision letter was that both the appellant and the children's mother were to be removed. This was no doubt why the judge treated her position as settled, when it was not; and why he gave no further reasons as to whether or not it would be unduly harsh for them to remain in this country with her.

15. In our view, the appellant, and the family as a whole, were entitled to have the benefit of a detailed examination of the evidence as to how the children and their mother would cope here on their own without him, since on the respondent's case this is now at least a possibility. That will require a fresh hearing, on all points, which can best take place before another first-tier judge.

Appeal allowed: decision set aside

Fresh hearing at Taylor House, not before Judge Ross



(a judge of the Upper Tribunal)

Dated 20 May 2019