Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08876/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 March 2019	**On 16 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR N O W
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell (Senior HOPO)
For the Respondent: Mr Neil Garrod (Counsel)

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Chohan, promulgated on 15th May 2018, following a hearing at Birmingham Priory Courts on 2nd May 2018. In the decision, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me. For convenience I will refer to the parties as they were referred to in the First-tier Tribunal.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, and was born on 29th February 1976. He appealed against the decision of the Respondent dated 1st

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August 2017, against the making of the order for deportation on 28th July 2017.

The Appellant's claim

3. The Appellant's claim is based upon his family and private life in the United Kingdom. He first entered the UK with a student visa on 17th September 2005. He was then 29 years of age. Further extensions of leave to remain were given. The Appellant's ex-partner is Miss A, and is the mother of their two children. The Appellant's son, Z, was born on 14th June 2006. The Appellant's daughter, S, was born on 29th January 2010. The Appellant's son was granted British citizenship on 21st November 2016. The daughter, however, remains a Nigerian citizen. Both the Appellant's children have a pending application for leave to remain. The Appellant himself is in a relationship with his current partner, Miss D, a British citizen, and they are engaged to be married.

The Judge's Findings

4. The judge began with the observation that it was not disputed that the Appellant has established a family and private life in the United Kingdom. As far as his private life is concerned, he had entered legally in the UK in September 2005, and had remained here for twelve years, less the time spent in prison. The bulk of the time in this country has been trouble-free for him. He was convicted in September 2016 and sentenced to a prison sentence of eighteen months. That did not, however mean that he was socially and culturally integrated into the UK. The question remained however, whether there were very significant obstacles to his return to Nigeria. The Appellant had not been back to Nigeria since his arrival here. That did not mean to say that he could not return.

5. On the other hand, it was the case that both the children were qualified children. The Appellant's son was a British national and his daughter, having been born in this country, had been in this country for more than seven years. His partner also was a qualifying partner, as she was a British citizen. Although she was of Nigerian origin as well, she was 8 months old when she came to the UK and had not returned back to Nigeria.

6. Ultimately, what this appeal rested upon was whether the return of the Appellant to Nigeria would be "unduly harsh", taking into account the fact that the children would have to remain in the UK without the Appellant. The judge had regard to an independent social worker's report, by the name of Rachel Ravu, which was dated 19th December 2017. He makes it clear that he had considered the report "as a whole" but that in particular he referred to the fact that were their father to return to Nigeria this would:-

> "result in a sense of grief and loss and disruption of the routine of their lives. This is likely to affect not only the physical and material wellbeing, but also their self-esteem and confidence. Consequently,

their health, emotional wellbeing, mental health, and resilience would all be negatively affected …" (see paragraph 18 of the decision).

7. On the basis of the social worker's report, the judge concluded that it was apparent from this report that "if the appellant were to be deported it would have a significant impact on the children" (paragraph 19). Significantly, the social worker's report did take into account the views of the children (paragraph 20). The judge concluded that the evidence made it clear, and in particular the social worker's report made it clear, that the status quo was a major factor in the children's lives and that it was important that the children remain with the natural mother. The parents had an amicable understanding for the benefit of the children which was to their credit (paragraph 20). Having considered the children's best interests (paragraph 21) the judge went on to state that the fundamental presumption in these cases was in favour of deporting foreign criminals (paragraph 22). Nevertheless:-

> "since the appellant's release from prison on 14 June 2017, there is nothing to suggest that he has been in trouble again or that he has not rehabilitated. Indeed, in light of the letter from the probation service, it does seem he has rehabilitated and that he is of a low risk of reoffending" (paragraph 22).

The judge concluded that it would be a disproportionate interference with the family life of the Appellant were he to be removed (paragraph 23).

8. The appeal was allowed.

Grounds of Application

9. The Grounds of Application state that the judge erred in concluding that it would be unduly harsh for the child to remain in the UK without the Appellant who was to be deported. In this respect, the judge found that the Appellant satisfied exception (2) of Section 117C of the 2002 Act. However, the judge had failed to adequately reason this finding in order to satisfy the rigorous test of being unduly harsh. It was necessary to identify factors that go beyond the normal father and child interactions or the natural love exhibited between a parent and the child. The judge had also relied upon a social worker's report in support of the finding, adding weight to the finding that removal would "result in a sense of grief and loss and disruption of the routine of their lives", but this did not meet the high threshold required in such cases.

10. Second, the judge wrongly attached weight to the fact that there was no risk of reoffending because it is well-known that deportation appeals are one-dimensional, with reliance being placed on the public interest, which is wider than other considerations, because it includes the marking of public revulsion at the offender's conduct and the need to deter others.

11. On 13th July 2018, permission to appeal was granted by the Upper Tribunal on the basis that it was arguable that the judge's conclusion that it would be unduly harsh to remove the Appellant was inadequately reasoned.

Submissions

12. At the hearing before me on 22nd March 2019, Mr Whitwell handed up two decisions for the court's consideration. The first of these was **KO (Nigeria) [2018] UKSC 53**. The second was the case of **Lee v SSHD [2011] EWCA Civ 348**. Mr Whitwell then relied upon the Grounds of Application. He submitted that the judge's conclusion (at paragraph 22) that the letter from the probation service makes it clear that "he has rehabilitated and that he is of low risk of reoffending" (paragraph 22) was a misdirection because following the case of **KO (Nigeria)** it was now clear (at paragraph 27) that such a matter was irrelevant to the assessment of proportionality. This is because what was said in **KO (Nigeria)** was that "unduly harsh" does not amount to "uncomfortable, inconvenient, undesirable or merely difficult" but poses "a considerably more elevated threshold" (paragraph 27). This being so the judge was wrong to have concluded that the Appellant's return would indeed be unduly harsh.

13. Second, although the judge refers to the independent social worker's report (which appears at C1 to C36 of the Respondent's bundle), it is plain that his citation of the report is selective. The judge cites the opinion of the expert from section 9 of the report (at page C11) and emphasises the fact that were the Appellant to be removed the impact of this on the children would be "a sense of grief and loss and disruption of the routine of their lives" (paragraph 18). If one reads the social worker's report in its entirety, it is plain that the circumstances do not amount to it being "unduly harsh" for the Appellant to return.

14. Third, the case of **Lee [2011] EWCA Civ 348** also makes it clear that:-

> "The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does. Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an immigration judge. Unless he has made a mistake of law in reaching his conclusion – and we readily accept that this may include an error of approach – his decision is final …".

15. For his part, Mr Garrod, appearing on behalf of the Appellant, relied upon the Rule 24 response drafted by his instructing solicitor. This makes it clear that there was no challenge made to the social worker's assessment and conclusion (from paragraph 20) which was that:-

> "The impact of the separation between appellant and children was unequivocally evidenced during the time that he was in prison. Resounding evidence was shown how this short period affected the two young children.
>
> It would be even more devastating if this separation is made permanent by deporting the appellant."

16. Second, submitted Mr Garrod, it is not the case at all that the judge attaches undue and controlling weight to the social worker's report. This is because prior to his dealing with the report, the judge concludes that the impact on the two children, who are dependent on their parents, would be unduly harsh (at paragraph 18). He is clear that, "It is apparent from the above report that if the appellant were to be deported it would have significant impact on the children" (paragraph 19). When the social worker's report is actually taken into account, it is plain that the views of the children are also elicited and taken into account, before the judge concludes that the social worker's report is that "the status quo is a major factor in the children's lives" (paragraph 20).

17. Third, the cases cited today by Mr Whitwell before this Tribunal do not assist the Respondent at all. First, if one looks at the case of **KO (Nigeria)**, it is plain that the Supreme Court concluded that in that case:-

> "it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less that (sic) cruel" (paragraph 27).

That conclusion was not interfered with by the Supreme Court. Second, as far as the case of **Lee [2011] EWCA Civ 348** is concerned, although that case suggested that the occurrence of "tragic consequences" was inevitable in deportation cases, because they always broke up the family, ultimately it is a question for the Immigration Judge and that his decision is final, provided it is a permissible conclusion. That was the case here.

18. In reply, Mr Whitwell submitted that the judge's reference to the fact that the letter from the probation service, suggesting that the Appellant had rehabilitated and he is of low risk of reoffending, was a misdirection because that consideration is no longer relevant after **KO (Nigeria)**.

No Error of Law

19. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision and remake the decision. This is a case where the facts in themselves are not fundamentally in contention. The Appellant has a genuine and subsisting relationship with his partner and his two children. He arrived in this country legally. He was 29 then. He is now over 42. He is in a relationship with a lady who herself came to this country when she was 8 months old. There are two children. Both of them are qualifying children. The eldest is a British citizen, but the younger one has now been in this country for over seven years. The Appellant was sentenced to imprisonment on 9th September 2016 for eighteen months for an offence of fraud. He has complied fully with the Rules of the establishment. He has shown remorse. At present he demonstrated motivation. There is expert evidence that there is no risk of

reoffending. The judge has emphasised that the fundamental presumption is for there to be deportation for a person such as the Appellant who has been guilty of the commission of offences. However, the judge has also considered individually and specifically the position of the two children. He does so when he considers their best interests. The children know of no other country. They have not been to Nigeria. The son is now 11 years of age and approaching 12.

20. Against this background, the judge had to consider whether it would be "unduly harsh" for the children to remain in the UK without the Appellant. It is not the case that the judge has quoted from the social worker's report in a selective manner. He is clear that, "I have considered the report as a whole but, in particular, I refer to the opinion of the social worker and the relevant paragraphs read as follows" (paragraph 18). It is clear from this that the judge is setting out to refer to particular aspects of the social worker's report, as he is entitled to do, after having read it in its entirety. Nothing shows that what he does cite is inaccurately stated. The judge's conclusion then drawn from this report is that there would be a "significant impact on the children" (paragraph 19). The social worker's report also draws attention to the fact that a short period of separation when the Appellant was in prison had a big impact upon the children (paragraph 20), and this being so, the judge was entitled to conclude as he did. He remained open to the presumption in favour of deporting foreign criminals right to the very end (see paragraph 22). Ultimately, however, it was a matter of his assessment of the balance of considerations, and he has concluded in the manner that was open to him. The decision is fully reasoned and is sustainable.

Notice of Decision

21. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand.

22. An anonymity direction is made.

23. This appeal of the Secretary of State is refused.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Juss 15th April 2019