Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08967/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reason Promulgated**
On Tuesday 12 November 2019	**On Friday 15 November 2019**

Before

MR JUSTICE NICOL
[SITTING AS AN UPPER TRIBUNAL JUDGE]
UPPER TRIBUNAL JUDGE SMITH

Between

AO
[Anonymity direction made]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr M Moriarty, Counsel instructed by Halliday Reeves Law Firm

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity direction was made by the First-tier Tribunal Judge. However, as the appeal involves minor children, it is appropriate to anonymise the identity of the Appellant. 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

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to the Appellant and to the Respondent.

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. However, we continue to refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against a decision of First-Tier Tribunal Judge N Haria promulgated on 17 June 2019 ("the Decision") (not 17 June 2017 as stated on the face of the Decision) allowing the Appellant's appeal against the Respondent's decision dated 9 August 2017 refusing his human rights claim. The Respondent's decision was made in the context of a decision refusing to revoke an order to deport the Appellant based on his criminal offending.

2. The Appellant asserts that removal will breach his Article 8 rights based on his relationship with his partner, [VO] and her child (the Appellant's stepson) [BHO] and also the relationship which the Appellant has recently re-kindled with his biological child [VO2] who lives with her mother in the UK. [VO2] has limited leave to remain in the UK. [VO] and [BHO] are British citizens.

3. The Judge recognised that [VO2] was not a "qualifying child" within the definition in the Immigration Rules ("the Rules") and Section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C") ([16(viii)] of the Decision). She also found at [74] of the Decision that the impact of deportation would not be unduly harsh for [VO]. However, for reasons set out at [76] to [86] of the Decision, the Judge found that it would be unduly harsh for [BHO] to relocate to Nigeria with the Appellant or to remain with [VO] in the UK without the Appellant.

4. The Respondent appealed the Decision on one ground which contends that the Judge made a material misdirection or failed to provide adequate reasons for the finding that deportation would have an unduly harsh impact on [BHO].

5. On 12 July 2019, First-tier Tribunal Judge Fisher refused permission to appeal in the following terms so far as relevant:

> "... 3. In her decision, the Judge reminded herself, at paragraph 75, of the degree of harshness required. She gave careful consideration to all of the evidence relating to the children, especially the Appellant's stepson, who suffers from various educational, social and mental health issues, and was entitled to conclude that it would be unduly harsh for the child to relocate to Nigeria, or to lose his close and personal relationship with the Appellant.
> 4. The Judge's findings were open to her, and she was entitled to conclude that the consequences of deportation would be unduly harsh.

She was at pains to adhere to the appropriate test. I am not satisfied that the grounds disclose any arguable error of law. Accordingly, permission to appeal is refused."

6. On renewed application to this Tribunal, permission was granted by Upper Tribunal Judge Pickup in the following terms, again so far as relevant:

   "... 3. It is arguable that, whilst at [75] the judge correctly stated that one is looking for a degree of harshness going beyond that which would necessarily be involved for any child faced with the deportation of a parent, the various consequences relied on from [84] onwards do not go beyond harsh to the point of being unduly harsh. At [86] the judge found that the appellant's removal would have a material adverse effect on the child and mean he is no longer going to be able to maintain contact with the appellant in accordance with the family court order. That cannot arguably amount to being unduly harsh.
   4. In the circumstances, an arguable material error of law is disclosed by the grounds."

7. The matter came before us to decide whether the Decision does contain any error of law. At the end of the hearing, we indicated that we were satisfied that no material error of law was disclosed by the Respondent's grounds and that we would provide our reasons in writing for so finding which we now turn to do.

RESPONDENT'S GROUNDS

8. The Respondent's grounds are pleaded in short order. In short summary, it is said that:
   (a) the Judge has "failed to give clear reasons as to how the high threshold of unduly harsh consequences" is met;
   (b) the reports from the professionals as to impact on [BHO] cited at [84] of the Decision "do not show that the appellant's absence will lead to a complete collapse in the physical, or psychological welfare of the child" and that the difficulties shown to exist by those reports "are significantly lower than the threshold of unduly harsh consequences";
   (c) the Judge did not suggest that the "physical and emotional needs of the child" could not continue to be met by [VO] and has given no consideration to the support offered by other agencies.

9. The Respondent was directed to file a skeleton argument and did so. The focus of the arguments there put is that the Judge failed to have regard to the high threshold for a finding that the impact of deportation is unduly harsh. Reliance was placed on Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213 ("PG (Jamaica)"), in particular [38] and [39] of the judgment. Those paragraphs point to the need for the degree of harshness to go "beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation". The Court also made the point

that "great distress" for a child is the expected consequence of the deportation of one of the child's parents and that something more is needed to reach a finding that the impact is unduly harsh. Reliance was also placed on the support which [VO] would continue to provide and the additional assistance which [BHO] could obtain from agencies in the UK. It is also asserted that the Judge provided no evidential underpinning for the finding at [84(iv)] that [BHO] "would be unlikely to receive appropriate assistance and support in Nigeria". Finally, the Respondent points to [85] and [86] of the Decision where it is said that the Judge has incorporated her best interests' assessment into the unduly harsh consideration. It is asserted that best interests of a child cannot dictate the outcome in a deportation context.

SUBMISSIONS AND DISCUSSION

10. As Mr Moriarty pointed out in his submissions, some of Mr Lindsay's submissions strayed beyond the pleaded grounds. However, given the wide- ranging nature of the pleading and since those oral submissions focussed, in essence, on whether the Judge had recognised and applied the correct test, we did not prevent Mr Lindsay from developing the grounds in that way.

11. We note at the outset that Mr Lindsay accepted that on the facts of this case a Judge could conclude that the impact of deportation of the Appellant on [BHO] would be unduly harsh. He did not advance the case as one of perversity although he did indicate that, since part of the Respondent's case is that the conclusions are not borne out by the reasons, that may be tantamount to an assertion that the Decision is perverse.

12. Mr Lindsay's first point concerns the Judge's application of case-law and, in particular, whether she recognised the high threshold which applies to the "unduly harsh" test. Consideration of this test begins at [70] of the Decision with a heading "Section 117C (5): Unduly harsh – the partner". The Judge there correctly self-directs that the threshold is to be applied without any balancing exercise (per KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 – "KO (Nigeria)"). Reference is then made to what is said about the elevated nature of the threshold in MK (Section 55 – Tribunal Options) Sierra Leone [2015] UKUT 223 ("MK (Sierra Leone)"). The Judge thereafter considers the impact of deportation on the Appellant's partner [VO] and concludes at [74] that the impact is not unduly harsh. There then follows a further heading "Section 117C (5): Unduly harsh – the children". At [75], the Judge reminds herself of what is said in KO (Nigeria) that "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". The Judge thereafter reviews the evidence in relation to the impact on [BHO] predominantly (although with mention

of [VO2]) before reaching the conclusion at [87] that the impact on [BHO] would be unduly harsh.

13. Based on the drafting of those sections of the Decision, Mr Lindsay's first point was that the Judge considered that the elevated threshold applied only to the Appellant's partner and not the children. As he pointed out, it is customary for Tribunal decisions to set out the law in one section and thereafter apply the law in what follows. In this case, the Judge had already set out the relevant law in detail in the section at [31] to [38] of the Decision. Mr Lindsay submitted that the fact the Judge had reached a conclusion based on the elevated threshold in relation to [VO] before moving on to a different section dealing with the children which included no reference to that threshold indicated that the Judge had not (or may not have) applied that elevated threshold in what followed. He pointed to the Judge's conclusions at [88] that both [VO] and [BHO] would be "severely negatively impacted" by the Appellant's deportation and yet had previously found the impact on [VO] not to be unduly harsh whereas the impact on [BHO] would be. He also suggested that it was implicit in the Judge's consideration of the evidence in relation to [BHO] that she was considering whether the impact of deportation went beyond what would be the normal consequences of deportation based on the citation from <u>KO (Nigeria)</u> but without any consideration of the high threshold which applies.

14. As Mr Moriarty pointed out, the reference to <u>MK (Sierra Leone)</u> at [72] of the Decision follows on from the reference to <u>KO (Nigeria)</u> at [71] and is made in the context of the latter judgment. As such, the Judge was simply applying the guidance in <u>KO (Nigeria)</u>. Moreover, <u>MK (Sierra Leone)</u> is a decision dealing with the impact on children. As such, Mr Moriarty submitted that the citation at [75] was simply an additional reference and that the Judge throughout both those sections was applying the elevated threshold.

15. We remind ourselves that we are not here construing a statute. Of course, we must analyse the Decision to ascertain the test which the Judge has applied and whether she has applied the correct test to the evidence. The two sections to which we have made reference, at [70] to [74] (concerning [VO]) and at [75] to [87] (concerning [BHO]), are part of one longer section beginning at [56] of the Decision and dealing as a whole with Article 8 ECHR. As such, simply because the Judge chooses to include a relevant proposition of law in one part of that section and does not thereafter repeat it does not mean that she can be taken to have forgotten about it. As Mr Moriarty pointed out, there is no requirement for Judges to keep repeating the legal test which applies.

16. Moreover, we can find no indication that, in her review of the evidence relating to [BHO], the Judge had lost sight of the elevated

threshold which applies. As is pointed out at [77] of the Decision, and as the Respondent accepts, [BHO] "suffers from a range of social, emotional, mental health and learning needs, particularly following the Appellant's period of imprisonment and the death of his biological father in May 2016". The Judge points at [82] of the Decision to the "copious documentary evidence of the relationship between the Appellant and BHO showing the adverse effect on him of separation from the Appellant due to his imprisonment". The Judge places particular emphasis on three pieces of evidence from Dr Meheux (who is a Child and Adolescent Educational Psychologist), [BHO] himself and from [BHO]'s school. The extracts from those pieces of evidence are all concerned with the nature and extent of the adverse impacts on [BHO] caused by the Appellant's absence during his detention.

17. Mr Lindsay suggested that what is said at [84] of the Decision is indicative of the Judge having only considered whether the impact goes beyond what would necessarily be involved in a deportation case. No doubt referring back to what precedes that paragraph the Judge says that "[i]t is clear given the adverse impact on BHO of his separation from the Appellant whilst he was imprisoned, the impact of the Appellant's deportation on BHO is likely to go beyond what would necessarily be involved for most children faced with the deportation of a parent, due to BHO's personal characteristics and underlying developmental needs". Rather than assisting the Respondent's case, we consider that this sentence undermines it. The Judge is there making clear that what she had previously been considering was the extent of the impact on [BHO] before looking at this again in the context of whether it went beyond the normal consequences of deportation.

18. For those reasons, we cannot accept that the Judge did not have in mind the correct threshold when considering the impact of the Appellant's deportation on [BHO].

19. Mr Lindsay also made the point that the Judge had impermissibly included [VO2] when looking at the harshness of impact. As we have already noted, [VO2] is not a "qualifying child" for the purposes of the Rules or Section 117C. Mr Lindsay directed our attention to the heading dealing with Section 117C (5) between [74] and [75] to which we have already referred. He made the point that this refers to "children" rather than "child". There is however nothing to this point. First, the entire section from [75] to [87] of the Decision mentions [VO2] only once and that is at [86] where the Judge points out that the Appellant's removal would mean that the Appellant would not be able to maintain contact with [VO2] in accordance with the Family Court Order. That does not however amount to a finding that the impact on [VO2] would be unduly harsh. Second, and more importantly, what the Judge was rightly considering was the harshness of the impact on [BHO] alone. Once she had found that this would be unduly harsh, the

Appellant was entitled to succeed, irrespective of any reference to [VO2].

20. It was also suggested that the Judge had wrongly assumed that the best interests of the children dictate the outcome in a deportation case. That is based on what is said at [64] (wrongly numbered) and [85] of the Decision. However, the Judge had already conducted her best interests' assessment (as she was bound to do) earlier in the Decision (at [52] to [55]). As Mr Moriarty pointed out, what the Judge was considering at [85] was the Respondent's assertion that contact between [BHO] and the Appellant could be maintained through visits and "modern means of communication". That was relevant to the harshness of impact on [BHO] based on the loss of the physical presence of the Appellant. It was therefore a relevant consideration.

21. A further point made by Mr Lindsay concerns what he said was a muddling by the Judge of the harshness of [BHO] remaining in the UK without the Appellant and returning to Nigeria with him and [VO]. He drew our attention to the list of the factors at [84(i)] to [84(vi)] of the Decision. Initially, he submitted that (i) to (iii) were not relevant at all. However, as was pointed out, the impact of deportation on a child who has the right to remain in the UK has to be considered in the alternative scenarios that a child will remain in the UK without the parent to be deported or will return with that parent to the parent's country of origin (unless there is a concession by the Respondent that the child cannot be expected to leave which there was not in this case). He then said that the Judge should have considered the two alternatives separately as it was not clear which factor refers to which of the alternatives.

22. We reject that submission. First, it is in our view, very clear from the list at [84] of the Decision which of the factors are relevant to the possibility of the child leaving the UK. Those are at (i) to (iii). Similarly, the evidence referred to at [80] and [81] of the Decision is clearly relevant only to the possibility of [BHO] leaving the UK. We observe in passing, to deal with one of the Respondent's points in her skeleton argument, that the evidence referred to at [80] of the Decision is the foundation for the finding at [84(iv)] that [BHO] "would be highly unlikely to receive appropriate assistance and support in Nigeria". Second, what a Judge is directed to do by Section 117C (5) is consider whether "the effect" on the child would be unduly harsh which encompasses both alternatives. It is the overall effect which the Judge is bound to and did in this case consider.

23. We have already drawn attention to the Judge's conclusion at [88] of the Decision that both [VO] and [BHO] would be "severely negatively impacted" by the Appellant's deportation. Mr Lindsay referred to this as evidence that the Judge had applied the wrong test to the impact on [BHO]. He made a further point in this regard. He said that the reference at the start of that paragraph to "the real world scenario" is

clearly taken from KO (Nigeria) and is relevant only to the issue whether it is reasonable to expect a child to leave the UK (applying Section 117B (6)). We accept that in the context of KO (Nigeria), this is so. However, our understanding of what the Judge was there saying is that, if the Appellant were to be deported, the expectation would be that [VO] and [BHO] would remain. Even if we are wrong about that, any error is not material. The Judge had by then already found that the effect of the Appellant's deportation for [BHO] would be unduly harsh which is sufficient in this case for the Appellant to succeed.

24. Finally, we touch on two further points arising from the pleaded case and in response to Mr Moriarty's submissions.

25. First, although Mr Lindsay did not deal orally with the ground concerning the support which [BHO] would have from his mother and other agencies, Mr Moriarty drew our attention to the evidence in that regard. Although the Respondent says in the skeleton argument that the evidence from the school was that [BHO]'s behaviour had improved following his biological father's death, as Mr Moriarty pointed out, this was with the support of "his very caring family" ([83]) which includes the Appellant. The letter from the school goes on to point to the re-emergence of the same behaviour which the school considered to be "directly linked" to the Appellant's detention. Although we accept that the evidence shows that the family has the benefit of the support of other agencies which may be able to assist to support [VO] and [BHO], the Judge was entitled to have regard to evidence which pointed to [BHO]'s need for the presence of the Appellant in particular.

26. Second, Mr Moriarty drew our attention to the case of Secretary of State for the Home Department v JG (Jamaica [2019] EWCA Civ 982 which he said was analogous to, if not less compelling than, the instant case. As Mr Lindsay pointed out, though, the Tribunal is rarely assisted by a comparison between the facts of cases. We accept that the reliance which the Respondent seeks to place on PG (Jamaica) is not of the same nature; she relies upon that case for what it has to say about the relevant test. In this case, however, we are quite satisfied that the Judge applied the correct test, recognised the high threshold which applies and reached a conclusion which was open to her that the threshold was satisfied on the evidence for the reasons she gave.

CONCLUSIONS

27. For those reasons, we are satisfied that there is no material error of law disclosed by the Respondent's grounds. We therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

DECISION

We are satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal N Haria promulgated on 17 June 2019 with the consequence that the Appellant's appeal stands allowed

Signed Dated: 14 November 2019
Upper Tribunal Judge Smith