Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12947/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons**
On 26 February 2019	**Promulgated**
	On 19 March 2019

Before

THE HON. MRS JUSTICE LANG
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

B A
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins, Counsel, instructed by OTS Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. This direction has been made in order to protect the Appellant's child from serious harm, having regard to the interests of justice and the principle of proportionality.

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge O'Rourke ("the judge"), promulgated on 28 November 2018, in which he dismissed the Appellant's appeal against the Respondent's refusal of his human rights claim.

2. The Appellant, a national of Bangladesh, arrived in the United Kingdom in August 2008 as a visitor. He subsequently overstayed. On 9 May 2011 he made an application to the Respondent for a No Time Limited confirmation of indefinite leave to remain in this country. In so doing, the Appellant used a passport issued in another individual's identity and which contained a fraudulent stamp. This deception went undetected and he obtained the endorsement in a new passport issued in this false identity.

3. In October 2011, the Appellant made another application to the Respondent on the same basis, claiming that his previous passport had been lost. Again, his dishonesty was not uncovered.

4. On 30 April 2013 the Appellant then applied for naturalisation as a British citizen, relying on his dishonest obtaining and use of the documentation described above. In considering this application, the Respondent sought further information. In light of this, the use of the fraudulent documents was finally detected and on 29 November 2013 the naturalisation application was refused on bad character grounds.

5. In March 2014 the Appellant took the step of instructing his then representatives to submit a Pre-Action Protocol letter to the Respondent, alleging that the refusal of the application was unlawful. Some months later the Respondent confirmed that the original refusal was being maintained.

6. The Appellant then changed tack and in April 2015 he made a separate application for leave to remain on human rights grounds. Notwithstanding what had occurred in respect of the previous applications already described, he used the same false identity. Unsurprisingly, that application was refused.

7. At some stage the Appellant had also used the false documents in his possession to apply for a driving licence.

8. On 24 August 2015 the Appellant was arrested on suspicion of committing offences relating to the use of the documents. On 30 November 2015 he was convicted on a guilty plea to two counts of possessing identity documents with intent, contrary to section 4(1) of the Identity Documents Act 2010 and, on 16 February 2016, he was sentenced to 16 months' imprisonment.

9. By virtue of section 32(5) of the UK Borders Act 2007 and the custodial sentence imposed, the Respondent was obliged to make a deportation order against the Appellant. A decision to deport the Appellant was made on 11 March 2016, following by the order itself on 26 October of that year. Representations from the Appellant asserting that deportation would contravene his Article 8 rights were initially refused and certified by the Respondent pursuant to section 94B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). A challenge to this was lodged and, following the judgment of the Supreme Court in Kiarie and Byndloss [2017] UKSC 42, the original decision was withdrawn. The Appellant made further submissions on Article 8 (the last of these dated 25 May 2017) and on 4 October 2017 the Respondent finally produced the refusal of the human rights claim which led to the appeal before the First-tier Tribunal.

10. During the course of most of the events set out above, two material changes in the Appellant's personal circumstances occurred. First, in September 2012 he married SB, a British citizen. Second, in July 2013, SB gave birth to a daughter, A. She too is British.

11. The Appellant's family circumstances in the United Kingdom underpinned the human rights claim presented to the Respondent. Evidence was provided to indicate that SB and A had certain medical problems. In particular, it was said that A suffered from eczema and mental health difficulties. Both of these were connected, to a greater or lesser extent, to the Appellant's immigration predicament.

The Respondent's refusal of the human rights claim

12. The Respondent noted the Appellant's offending history and concluded that he fell within paragraph 398(c) of the Immigration Rules ("the Rules"). It was acknowledged that there was "some degree" of a genuine and subsisting parental relationship between the Appellant and A. There was an express acceptance in the reasons for refusal letter that it would be "unduly harsh" for A to go and live in Bangladesh with the Appellant. However, it was said that she could be separated from him without such a consequence. Therefore, paragraph 399(a)(b) of the Rules could not be met.

13. The Respondent accepted that the Appellant had a genuine and subsisting relationship with SB, although because that relationship was formed when the Appellant was in the United Kingdom unlawfully he was caught be paragraph 399(b)(i) of the Rules and could not rely on that provision at all.

14. The Respondent concluded, with reference to paragraph 399A of the Rules, that any private life the Appellant might have could not provide a route to success because of his unlawful status in this country and the absence of "very significant obstacles" to reintegration into Bangladeshi society.

15. Finally, having considered medical evidence submitted by the Appellant, the Respondent took the view that there were no “very compelling circumstances over and above” those contained in paragraphs 399(a) and 399(b).

16. This was the factual context in which the judge came to consider the Appellant's appeal.

Relevant legal framework

17. The core legal framework applicable to the Appellant's appeal before the judge included the following.

18. Paragraphs 398 – 399A of the Rules state:

> 398. “Where a person claims that their deportation would be contrary to the UK’s obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> 399. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

19. Sections 117A-D NIAA 2002 set out in primary legislation the public interest considerations which a court or tribunal must take into account in an appeal based upon Article 8. The provisions of relevance to the appeal before us state:

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), *"the public interest question"* means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117C Article 8: additional considerations in cases involving foreign criminals

(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 in 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.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport

a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

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

(a) is a British citizen, or

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

"qualifying partner" means a partner who—

(a) is 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).

(2) In this Part, *"foreign criminal"* means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months.

20. The leading case on the meaning of "unduly harsh" with paragraph 399(a) and section 117C(5) NIAA 2002 is KO (Nigeria) [2018] UKSC 53 ("KO (Nigeria)"). At paragraph 23 of his judgment with whom the other Justices agreed), Lord Carnwath stated:

> "On the other hand 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. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

The judge's decision

21. Having provided a summary of the Respondent's case against the Appellant at [3] and then making an initial reference to KO (Nigeria) at [8], the judge sets out two sections of his decision entitled "Undisputed Facts" and "Disputed Facts". The former, at [9]–[10], summarises the accepted immigration and offending history. The latter, at [11]–[18] relates to contested evidence provided by the Appellant, SB, and two supporting witnesses.

22. The respective submissions of the two representatives (Mr Collins appearing for the Appellant, as he does before us) are laid out in detail at [19]–[20]. It is clear that the focus of the Appellant's case before the judge was very much on A's circumstances and whether it would be unduly harsh for her to be separated from the Appellant.

23. The section entitled "Findings of Fact" begins, by way of self-direction, with another reference to KO (Nigeria), in particular paragraph 23 of Lord Carnwath's judgment, cited above. An extract from the specific factual analysis and conclusions of the Upper Tribunal in the case of appellant KO himself is then quoted, followed by a confirmatory direction that the focus is on the child (in this case, A) and a reference to Zoumbas [2013] UKSC 74.

24. The judge's analysis of the evidence pertaining to A is contained in [23]. He reiterates the stringency of the unduly harsh test, noting the factual matrix in one of the linked appeals in KO (Nigeria), and states that what is effectively required are circumstances which are, as he puts it, "out of the ordinary".

25. The judge concludes that it would not be unduly harsh for A to be separated from the Appellant as a result of his deportation.

26. In summary form, the reasons provided for this are as follows. First, the fact that SB would have to care for A as a single mother following the Appellant's deportation could not be considered as something out of the ordinary. In the judge's view, this scenario would be "routine".

27. Second, A's eczema was subject to treatment, was not particularly serious, and, even if exacerbated initially by the Appellant's departure, would be likely to reduce over time. Any mental problems on A's part would, in the judge's view, follow a similar path.

28. Third, the judge regarded SB's medical problems as not being serious and clearly not a matter which would impede her ability to look after A.

29. The remainder of the judge's decision is taken up with an assessment of Article 8 outside the context of the Rules, in line with the approach set out in Hesham Ali [2016] UKSC 60. Various factors pertinent to sections 117B and 117C NIAA 2002 are discussed. The only point of note in the context of the appeal to us is the fact that A's best interests are addressed in terms at [27(d)], wherein it is concluded that these lay in remaining with the Appellant. Notwithstanding these best interests, the "very strong public interest" in deporting the Appellant outweighed all other considerations.

30. The appeal was duly dismissed.

The grounds of appeal and grant of permission

31. The grounds of appeal confirm that the "core issue" before the judge and in respect of the challenge against his decision relates to the question of whether it would be unduly harsh to separate A from the Appellant.

32. The first ground asserts that the judge failed to make a finding of fact as to the particular nature of the relationship between A and the Appellant. It is said that there was a very close bond.

33. The second ground attacks the judge's reasoning in [23] of his decision. Specifically, is said that he: wrongly sought to compare the facts of one of the appeals within KO (Nigeria) with those of the present case; failed to address material aspects of the Appellant's case; failed to provide adequate reasons in respect of medical evidence relating to A; failed to deal with a letter from A's school at all; and erred when considering certain factors outside the context of the Rules.

34. In a decision dated 27 December 2018, First-tier Tribunal Judge Blundell granted permission to appeal. In his view it was arguable that the judge may have applied a form of exceptionality when considering the question of undue harshness and may then have wrongly examined relevant factors in isolation from one another.

The hearing before us

35. Both Mr Collins and Mr Wilding provided helpful skeleton arguments and we are grateful for their overall assistance in this appeal.

36. As re-stated in paragraph 5 of his skeleton argument and in his oral submissions, Mr Collins concentrated exclusively on the judge's approach to A's circumstances and the unduly harsh assessment. His challenge was very much in line with the grounds of appeal.

37. Particular emphasis was placed upon the following points:

    i. there had been inadequate analysis of evidence relating to A's mental health and her school;
    ii. there was a failure to make a specific finding on the closeness of the relationship between the Appellant and A.

38. Consistently with the way in which the Appellant's case has been argued throughout the appellate process, Mr Collins did not suggest to us that, as an alternative to the unduly harsh assessment, there were "very compelling circumstances over and above" those described in paragraph 399(a) and/or 399(b) of the Rules. Nor did he contend that the Appellant was able to satisfy paragraph 399A.

39. Acknowledging that the structure of the judge's decision was not as clear as it might have been, Mr Wilding urged us to view it in the round. All relevant evidence had been considered and it was open to the judge to conclude that A's situation would become "more settled" over time. Whilst the judge did not make a specific finding on the strength of the relationship between the Appellant and A, there was nothing to indicate that he did not assess that bond as being close. He submitted that there was enough in [23] to show that the impact on A of separation had been adequately considered.

40. In reply, Mr Collins submitted that it was difficult to see how the judge could have concluded that A would feel "more settled" at any point. In addition, the judge had failed to adequately resolve what had been described by the judge as the "disputed facts".

Decision on error of law

41. Although it is right that the judge's decision would have benefited from a clearer structure, having considered it sensibly and holistically, we conclude that he has not committed any material errors of law. Our reasons for this ultimate conclusion are as follows.

42. In our view, the judge correctly directed himself in law to the central issue in the appeal, namely whether it would be unduly harsh for A to be separated from the Appellant. It is clear from [22(i)-(iv)] that the judge accurately distilled the essential principles set out in KO (Nigeria), with particular reference to the stringent nature of the unduly harsh test and the focus being on the child in question.

43. There is no merit in the suggestion that the judge relied on the particular factual circumstances underlying two of the appeals in the KO (Nigeria) litigation and in some way used these as a benchmark against which to assess the Appellant's case. We see the references in [22(ii)] and [23(i)] as

simply a factual illustration of the high threshold imposed by the unduly harsh test.

44. The judge's use of the phrase, "out of the ordinary" to describe the type of circumstances required to be shown in order to satisfy the stringent threshold is unobjectionable. It sits well enough with Lord Carnwath's exposition of what is meant by unduly harsh in paragraph 23 of KO (Nigeria). We note too his Lordship's approval of the guidance provided by the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC):

> "….'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable, or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

45. The judge's phraseology could perhaps be substituted by, for example, "materially beyond the expected consequences", but that is in our view a distinction without a difference. We are satisfied that the judge was not applying a test amounting to a requirement for "very compelling circumstances", which of course would be impermissible in light of KO (Nigeria).

46. We turn now to the more particularised elements of the Appellant's challenge.

47. It is right that the judge has not made an express finding on the strength of the relationship between the Appellant and A. It would have been better if this had been done. However, having regard to the decision as a whole, we agree with Mr Wilding's submission to the effect that there is no indication that the close bond alleged was in fact being rejected. We note the judge's references to that relationship at [11], [17] and [20], in addition to the reported "close relationship" between the Appellant and A as stated in the letter from the Mental Health Practitioner at 84 of the Appellant's bundle and the "very strong bond" referred to in the school letter at 85-86 (evidence which, as we find below, the judge clearly took account of). It would be strange indeed if the judge had not had this aspect of the Appellant's case well in mind when undertaking the unduly harsh assessment.

48. Further, at [23(ii)b] the judge states that the Appellant's deportation would "no doubt be upsetting for the child", thus indicating an acknowledgement of the close relationship between the two. The conclusion at [27(iii)d] that A's best interests lay in remaining with her father reinforces our view that the judge had the parent/child bond in mind when undertaking the task of evaluating the impact of separation.

49. We make it clear that it has not been suggested by Mr Collins that the nature of the relationship was sufficiently strong, in and of itself, to require a conclusion that separation would be unduly harsh. On the evidence before the judge, such a contention would have faced insurmountable obstacles.

50. The judge was referred (as we have been) to medical evidence at 80-84 of the Appellant's bundle. 80-81 are letters from a Consultant Dermatologist, Dr P Goldsmith. In essence, her evidence was that A's atopic eczema had been exacerbated and much more difficult to control during the Appellant's absence whilst he served his custodial sentence. There was a causal link between A's stress and the skin condition. It was, in Dr Goldsmith's view, "important" to keep A and her father together.

51. In our view the judge has dealt adequately with this evidence. It was open to him to say that eczema is not uncommon (although the nature of the condition could of course be more or less severe in any given case). It is clear from [23(ii)b] that he has accurately summarised Dr Goldsmith's opinion that A's then temporary separation from the Appellant had exacerbated the eczema. The judge was entitled to take account of the absence of up to date medical evidence (Dr Goldsmith's letters were, by the time of the hearing, over a year old) and the fact that the condition was not mentioned in the GP's consultation record at 97 of the bundle.

52. The judge's reference to eczema not being "life-threatening, excessively debilitating, or necessarily long-term in children" does not represent the imposition of an impermissibly high threshold. On a fair reading of the passage as a whole, it was simply one factor amongst a number and is to be seen in the context of the guidance on what is meant by unduly harsh provided in KO (Nigeria).

53. Turning to the evidence on A's mental health at 83-84 of the Appellant's bundle, it is quite clear that the judge took account of this in [23(ii)b]. He expressly acknowledges that emotional difficulties on A's part were, much like the eczema, exacerbated by the Appellant's absence. We note that the evidence did not suggest that A had an enduring mental health condition.

54. As it relates to A's overall wellbeing, we address the school letter at this point. This evidence, at 85-86 of the Appellant's bundle, is not dealt with in detail by the judge. Having said that, he clearly refers to it in [23(ii)b] and notes, accurately, that the Appellant's absence at the time resulted in her being unsettled at school. We are satisfied that the judge took adequate account of the substance of this evidence.

55. In respect of A's physical and emotional wellbeing, the judge took the view that her symptoms would, as had occurred in the past, reduce or cease altogether once her situation became "more settled" after an initial period of upset. Mr Collins takes issue with this, submitting that it amounts to excessive speculation.

56. We disagree. It will only be in very rare cases that a judge can ever be *sure* about future events. To an extent, there is almost always a degree of speculation involved when undertaking prospective assessments, whether that be in relation to protection claims or, like here, the separation of a child from her father.

57. In our view, when making that judgment as to A's future situation, the judge did, and was fully entitled to, take into account the following factors: single-parent families are relatively common; SB would be able to avail herself of some assistance from friends and family, as had occurred in the past; the nature of the health issues was not severe; A's relatively young age; the fact that SB's own health issues were no impediment to her ability to care for A; and the acknowledged distress caused to A by the removal of her father from her life.

58. It follows from we have said that the assertion that the judge failed to assess the various factors on a cumulative basis is misconceived. It is sufficiently clear that everything had been properly brought together.

59. Standing back from our analysis of particular aspects of the judge's decision and the challenges proffered against them, we conclude that in light of his sustainable consideration of the evidence and the legal test which he correctly applied thereto, he was entitled to find that the separation of A and the Appellant would not be unduly harsh. The Appellant could not therefore succeed in his appeal by reference to either paragraph 399(a) of the Rules or section 117C(5) NIAA 2002.

60. We reiterate the fact that it has never been suggested that the Appellant could have succeeded in the absence of a favourable conclusion on the unduly harsh assessment.

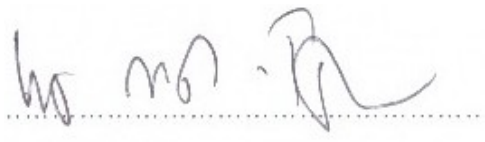
61. Thus, the judge was bound to have dismissed the appeal.

62. As there are no material errors of law in the decision, we too must dismiss the Appellant's appeal.

Notice of Decision

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

The decision of the First-tier Tribunal stands and the Appellant's appeal to the Upper Tribunal is dismissed.

Signed  Date: 12 March 2019

H B Norton-Taylor
Deputy Judge of the Upper Tribunal