



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/15105/2019

THE IMMIGRATION ACTS

**Heard at Royal Courts of Justice
On 10 February 2020**

**Decision & Reasons Promulgated
On 03 March 2020**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ADEWALE OLASUNKANMI OTENAIKE
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the Respondent: Ms E Harris, Counsel instructed by Kradh Harlington

DECISION AND REASONS

Introduction

1. These are a written record of the oral reasons given for my decision at the hearing.

Background

2. This is an appeal by the appellant, who was the respondent before the First-tier Tribunal, and who I will refer to as “the Secretary of State”. The

respondent was the appellant before the First-tier Tribunal (“the FtT”) and to avoid confusion, I will refer to him as “the Claimant”.

3. A deportation order was made against the Claimant on 22 August 2019, following his conviction on 8 November 2018 and sentence to two years in prison, for facilitating money-laundering. The Secretary of State appeals against the decision of Judge Cassel (“the FtT”) promulgated on 19 November 2019, by which he allowed the Claimant’s human rights appeal on the single, narrow point that it would be unduly harsh for the Claimant’s partner, a British citizen, to live in the country to which the Claimant is to be deported, Nigeria, because of compelling circumstances over and above those described in paragraph EX.2 of appendix FM of the Immigration Rules. The FtT had expressly found that the Claimant’s appeal in respect of subsisting parental relationships with qualifying children failed (paragraph [44]) and that conclusion has not been the subject of a cross-appeal by the Claimant.
4. Similarly, in relation to the Claimant’s private life, the FtT concluded that he did not meet the exception under paragraph 399A of the Immigration Rules or section 117C(4) of the Nationality, Immigration and Asylum Act 2002. He had not spent most of his life in the UK and therefore his appeal in respect of his private life failed. Once again there is no cross-appeal on this finding.
5. In respect of the sole issue on which the FtT allowed the Claimant’s appeal, and against which the Secretary of State appeals, the FtT concluded that it would be unduly harsh for the Claimant’s British partner to live in a country to which the Claimant was to be deported (Nigeria), for the purposes of paragraph 399(b) of the Immigration Rules, at paragraph [46] of the decision; and the effect of the Claimant’s deportation would be unduly harsh for the purposes of section 117C(5) of the 2002 Act, at paragraph [47] of the decision, for the reasons I set out below in the discussion on the error of law.

The Secretary of State’s grounds of appeal

6. The Secretary of State appealed the FtT’s decision in grounds dated 19 November 2019 on two grounds.
7. As ground (1), the Claimant asserted that the FtT’s analysis in respect of whether undue harshness was met was inadequate and instead the FtT had erroneously applied a test of ‘very significant difficulties’ which was the test under paragraph EX.2., whereas insurmountable obstacles amounted to compelling circumstances over and above those very significant difficulties.
8. As ground (2), in the alternative, even if the FtT had applied the correct test, the analysis was inadequate. There was no evidence of any harm that would befall the Claimant’s British partner in Nigeria; nor, if she were to remain in the UK, where she would continue to receive family support.

The Secretary of State's Submissions

9. In the hearing before me, without discourtesy to Mr Kotas, he did not develop his submissions beyond those already identified in the grounds.

The Claimant's submissions

10. In equally succinct, but clear submissions from Ms Harris, in relation to ground (1), she asserted that the test of what 'unduly harsh' meant had been expressly set out by the FtT at paragraph [41], followed by a detailed consideration at [42], by reference to the Supreme Court decision of KO (Nigeria) v SSHD [2018] UKSC 53. The FtT's decision had to be read as a whole.
11. In relation to ground (2), the FtT had clearly identified the cumulative factors at paragraph [46] which made out the test of the being unduly harsh in relation to the Claimant's partner living in Nigeria:
- (a) the Claimant's partner had no connections with Nigeria;
 - (b) she has close family members in the UK;
 - (c) she had only visited Nigeria once;
 - (d) the impact of the couple's miscarriage had been considerable;
 - (e) the Claimant had needed the support of her mother and other members of her UK family, in the context of suffering a miscarriage and her consequential mental health issues;
 - (f) the FtT had accepted her evidence (as to which there is no challenge by the Secretary of State) that because of her fragile mental state, she needs the continuing support of close members of her UK family.
12. The FtT had also considered why it would not be possible, and indeed would be unduly harsh for the Claimant's partner to remain in the UK without the Claimant, noting at paragraph [47]:
- (a) the Claimant's partner had very limited financial means and so separation would effectively mean the end of the relationship;
 - (b) the Claimant had expressed a genuine intention to kill himself and had previously attempted suicide;
 - (c) the effect on the Claimant and his partner of their miscarriage.

Discussion and Conclusions

Ground (1)

13. In relation to ground (1), I accept the force of Ms Harris's submission that whilst paragraph [46] of the FtT's decision refers to 'very significant difficulties' for the couple continuing their family life together, this has to be seen in the wider context of the correct and detailed consideration of

what 'unduly harsh' means at paragraphs [41] and [42]. Indeed, at paragraph [45], the FtT expressly referred to the need to consider compelling circumstances over and above those described in paragraph EX.2 of the Immigration Rules. I conclude that to take the phrase 'very significant difficulties' in [46], in isolation, would be to take the analysis out of the context of the FtT's detailed analysis of the correct legal test. In the circumstances, the FtT's decision has to be read as a whole and the FtT did not apply the wrong legal test.

Ground (2)

14. I further accept Ms Harris's submission that whilst his reasoning was succinct, at [46] and [47], the FtT reached conclusions which were unarguably open to him to reach, based on the evidence before him, about the compelling circumstances of the Claimant and his partner, in particular the consequences on the mental health of both the Claimant, who had previously attempted suicide, and his partner; her need for support from her UK relatives; the support she receives from the Claimant; and the practical impossibility of her continuing to see him in the event that he is removed to Nigeria. The Secretary of State does not allege that the FtT failed to consider relevant factors; or considered factors which he ought not to have considered. In reality, the Secretary of State's assertion that the combination of factors outlined and assessed by the FtT are not capable of amounting to matters which are unduly harsh, is a disagreement with the conclusions raised by the FtT. The FtT's conclusions were open to him and do not demonstrate an error of law, even noting the high threshold for the legal test, about which the FtT expressly reminded himself.

Notice of Decision

15. For the above reasons, the Secretary of State's appeal is dismissed on both grounds. The FtT's decision did not contain any error of law and stands.
16. No anonymity direction is made.

Signed **J Keith**

Date

18 February 2020

Upper Tribunal Judge Keith