Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20178/2018**

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 16 August 2019	**On 09 September 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

EG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Abraham, Counsel
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS (given ex tempore)

1. The appellant has appealed against a decision of First-tier Tribunal ('FtT') Judge R D Taylor sent on 2 April 2019 dismissing his appeal on asylum and human rights grounds. Although the appeal was also dismissed on asylum grounds, the grounds of appeal relate solely to Article 8.

Background

2. The appellant has claimed to be a citizen of Eritrea but that has not been accepted and the respondent has treated him on the basis that he is a citizen of Ethiopia, with the intention that he will be deported there. The appellant was convicted of being concerned in supplying class A drugs as well as assault and possession with intent to supply on 13 February 2017. He was sentenced to two years and three

months' imprisonment on 6 March 2017. He was therefore imprisoned until September 2017 before being transferred to immigration detention where he remained until April 2018. Prior to his imprisonment the appellant had a relationship with his daughter whom he saw regularly. By the time he was released from detention he had a second child. After his release the appellant saw both children two to three times a week. The respondent refused the appellant's protection and human rights claim on 20 September 2018 and made a deportation decision, that necessarily followed from the appellant's sentence of imprisonment of over twelve months. The appellant appealed against that decision to the FtT.

FtT Decision

3. The FtT set out the relevant background as well as the respondent's position, as set out in the decision letter. Before detailing the evidence available to it, the FtT at [10] recorded the appellant's evidence as set out in his witness statement that he met the children's mother in 2012 and although they did not live together his first daughter was born in 2013 and he helped look after her on most days. The FtT set out the appellant's evidence under cross-examination in some detail, as well as re-examination before turning to the evidence of the mother of the children. She confirmed her witness statement which said that she lived in Manchester and the appellant lived in Liverpool, but that he came to visit the children two to three times a week and that included collecting the older child from school. She described the older child as being upset when her father was in prison and described the close nature of the relationship between the appellant and his children.

4. The FtT then set out the submissions provided by both representatives, again in some detail. The FtT summarised the submissions regarding Article 8 at [17]. These referred to the relevant case law as well as an independent social worker's ('ISW') report that was available to the FtT. The FtT expressly recorded the submissions made on behalf of the appellant that the ISW report sets out the likely impact of the appellant's deportation on the children and on their mother and refers to the appellant being an integral part of the family and without him there would be no stability. The FtT also referred to the legal submission made on behalf of the appellant in these terms "*undue harshness is self-standing but these factors weigh against the public interest and the undue harshness here is that the children are British and the nature of the country to which they are to be removed makes ongoing contact more difficult*". Having summarised the respective submissions, the FTT then went on to make findings both in relation to the protection claim and in relation to Article 8. I need say no more about the protection claim because those findings are not challenged. The FtT's findings in relation to Article 8 are set out at paragraphs [20] to [22] and it is helpful to have these set out in full at this stage:

"20. As far as Article 8 is concerned the deportation order has been made on the basis of the appellant being a foreign criminal guilty of an offence to which he has been sentenced to more than twelve months but less than four years. Under paras 398, 399 and 399A of the Rules the public interest requires deportation unless one of the exceptions apply. The first exception in 399A does have to be considered as the children are now British citizens even though they have not been in the UK for at least seven years and this is the exception on which Ms Motashaw primarily relies. Their best interests of course have to be a primary consideration. I indicated in the course of submissions that I did not consider it to be in their best interests to go with their father to Ethiopia especially as on the evidence including the social worker's report there is no prospect that their mother would accompany him as the relationship between the two of them is not that strong, has been severely strained by his offending and as a refugee from Eritrea herself now with status in the UK it has no appeal whatsoever. It would clearly be unduly harsh in all these circumstances to expect the children in these circumstances to go to live in Ethiopia with their father. As far as staying in the UK whilst the appellant is deported in terms of their best interests it is also clear that it is in their best interests that their father should remain here and be able to continue to have the level of contact that he has so far been able to maintain albeit punctuated as it has been by his time in prison and by the fact that he does not live with them or in the same town or city. It would also be in their best interests for that contact to improve although whether it would do must be a matter of speculation given the history of the relationship between the appellant and their mother and the inevitable uncertainties as to the appellant's future behaviour if the prospects of deportation were to be removed. I note that the independent social worker's report at 14.7 says Mr [G] is acutely aware of the negative impact on Ms [A] and the children should he be deported and is also concerned for his own safety and wellbeing in Ethiopia. He is understandably very concerned about [various matters affecting him in Ethiopia] should he be deported.

21. Accepting though that it is in the children's best interests for their father to remain in the UK that is not the ultimate issue as Ms Motashaw acknowledged. The ultimate issue is taking account of those best interests as a primary consideration would it be unduly harsh for the children to remain in the UK without their father. The Supreme Court case of KO is reported in the skeleton including para 23 where Lord Carnwath having previously said it is self-contained (that is unduly is not a reference to the relative seriousness of the level of offending) says:

> '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. ... It assumes that there is a due level of harshness ... Unduly implies something going beyond that level. ... 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'.

22. Bearing in mind those observations I find it impossible to say on the basis of the relationship of the appellant with the children in this case including everything said about it in the independent social worker's report even taking into account that it is in the children's best interests for him to stay to be able to maintain and have the possibility to build on that level of relationship and even bearing in mind what Ms Motashaw said about the difficulties (but not impossibilities) of maintaining contact from Ethiopia but the harshness involved in these facts goes beyond that which would be involved for any child faced with the deportation of a parent or for any other reason could be said to be unduly harsh when balanced against the very strong public interest identified by the legislation and by the Rules in the deportation of foreign criminals as defined and as applying to the appellant. I conclude that taking into account all the evidence before me on the facts it would not be unduly harsh and the exception in para 117B(5) and para 399A of the Rules is not made out".

Pausing there the reference to para 117B(5) is clearly a mistake and that should be a reference to section 117C(5) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

5. In grounds of appeal prepared by another Counsel, that is not Counsel who represented the appellant before me or Counsel who represented the appellant before the FtT, the focus was upon the failure to take into account and/or give reasons for rejecting the conclusions of the ISW. FtT Judge Gumsley granted permission to appeal in a decision dated 1 July 2019. The following observation was made:

> "In relation to the assertion that the judge failed to apply the correct legal test when considering whether the appellant's removal would be unduly harsh although it is not set out in specific terms within the grounds of appeal I am satisfied that it is arguable that the judge has failed to consider the unduly harsh test in accordance with relevant case law namely KO (Nigeria) & Ors v SSHD [2018] UKSC 53 and has taken into account factors that he should not have done namely the public interest in removal of criminals at that stage of his consideration of the case ... Although I can see less force in the other ground of appeal as drafted in the circumstances permission to argue both matters is granted".

6. In a Rule 24 notice dated 16 July 2019, the respondent submitted that the grounds merely disagree with the findings and also submitted that any reference to the public interest at [22] of the decision is a reflection of the fact that the public interest is already established within the Immigration Rules and legislation rather than the misapplication of the legal test required.

Hearing

7. At the hearing before me, in clear and helpful submissions Mr Abraham relied upon two grounds of appeal. The first ground of appeal was taken from Judge Gumsley's grant of permission. Mr Abraham submitted that there was a degree of ambiguity in the judge's approach to KO (Nigeria) and the extent to which he factored in public interest considerations when analysing the effect of the appellant's deportation on the children and whether it would be unduly harsh. Mr Abraham also relied on the grounds of appeal as drafted and submitted that there were two limbs to those grounds. Firstly, the FtT failed to take into account the relevant factual background as set out within the mother's witness statement. This spoke to the close nature of the relationship prior to the appellant being imprisoned and was relevant to the assessment of the likely future development of that relationship. Mr Abraham's second limb relied upon the FtT's failure to adequately refer to the ISW evidence and failure to give adequate reasons for not following the conclusions of the ISW.

8. Mr Bates submitted that the first ground was simply a misreading of the FtT's decision and when it is read as a whole, it is clear that the FtT had given itself the correct self-direction regarding the unduly harsh test. As to the second ground, Mr Bates submitted that the ISW did not raise any specific issues of concern regarding the children, that is to say they were healthy and there were no specific reasons provided as to why the effect on these particular children got anywhere close to the high threshold of unduly harsh and in that context the reasons provided by the FtT in relation to the ISW report were adequate.

Legal Framework

9. Paragraphs 399 and 399A of the Immigration Rules are reflected within section 117C of the the 2002 Act. This is a case in which the FtT found that Exception 2 could not be met. Exception 2 is set out in this way:

> "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".

10. It is noteworthy that paragraph 399 of the Rules divides Exception 2 into two limbs. The first limb 399(a) says this "*it would be unduly harsh for the child to live in the country to which the person is to be deported*". The first limb in this case is not in dispute because the FtT clearly accepted that it would be unduly harsh for these children to live in Ethiopia. The second limb to 399(b) states as follows "*it would be unduly harsh for the child to remain in the UK without the person who is to be deported*". It is this aspect of the unduly harsh test that was in dispute before the FtT and which continues to be in dispute. The correct approach to the unduly harsh test has been considered by the Supreme Court in KO (Nigeria) (supra). It was made clear by Lord

Carnwath that the unduly harsh test is self-contained, that is to say it does not require a balancing of the relative levels of severity of the parent's offence other than is inherent in the distinction drawn by Section 117C itself. Lord Carnwath also made it clear that the unduly harsh test requires an elevated threshold to be met. Paragraph 23 of KO (Nigeria) says this:

> "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".

The approach in KO has been underlined in a recent decision by the President of the Upper Tribunal, see RA (s.117C "unduly harsh": offence: seriousness) Iraq [2019] UKUT 00123 (IAC).

Error of Law Discussion

11. I shall deal with the two grounds in turn.

Ground 1

12. It is clear that the FtT was fully aware of KO (Nigeria). The FtT quoted the submissions made on the appellant's behalf in relation to KO. There was also a comprehensive skeleton argument before the FtT which set out the relevant legal framework. The FtT in my judgment did not make an incorrect self-direction and when paragraphs [21] and [22] are considered together and then read as a whole with the remainder of the decision, the FtT was clearly aware that the unduly harsh test is a self-contained one and does not require any balancing with the relative levels of severity of the parent's offending. Indeed, the FtT says this expressly at [21]. The FtT refers to Lord Carnwath having described the test as a self-contained one. Where at [22] the FtT refers to "*when balanced against the very strong public interest*", the FtT is doing no more than clumsily summarising that which Lord Carnwath said at paragraph [23] of KO (Nigeria). When applying the relevant test at paragraphs [21] and [22] it is noteworthy that the FtT made no specific reference to the nature and/or seriousness of this appellant's offending. Had the FtT added this as an ingredient in some sort of balancing exercise, one would have expected the FtT to have referred to the nature and/or seriousness of offending. The absence of any reference to this appellant's offending in [22] supports

the view that the FtT did not undertake any form of balancing exercise when applying the unduly harsh test, but applied the test as set out by Lord Carnwath.

Ground 2

13. Mr Abraham took me to the witness statement prepared on behalf of the children's mother in 2017 to make the point that the appellant had a very close relationship with his first child before he went into prison. In my judgment this is evidence that the FtT clearly had in mind and is referred to at [10] to [14] of its decision.

14. I now turn to the submission relevant to the ISW report. When summarising the evidence available to it, the FtT referred at [9] to "*a very lengthy independent social worker report*". The FtT also referred to the ISW's report and its contents when summarising the submissions on behalf of the appellant at [17]. The FtT again referred to the ISW's report when addressing best interests and the likely future relationship between the appellant and his children at [20], and then when summarising its conclusion at [22] expressly took into account a number of factors including "*everything said about it in the independent social worker's report*". It is clear from reading the decision as a whole that when applying the unduly harsh test, the FtT had the ISW report fully in mind. Mr Abraham took me to the conclusions of the ISW to support his submission that it was inevitable that the effect on these children would be unduly harsh. I acknowledge that the ISW sets out the effect on the children in robust terms - see paragraphs 14.29 to 15.3 of the ISW's report in particular. This includes reference to the impact on the children being inevitably damaging and significant both in the short and long term. In my judgment the FtT did not need to refer to the specific wording of the ISW report when giving reasons for its ultimate conclusion, as it is clear that it had the ISW's opinion fully in mind.

15. It is important when considering the duty to give adequate reasons to place that duty in context. The context of this case, as Mr Bates pointed out, is as follows: the children are both healthy; the mother has demonstrated an ability to cope without the father whilst he was in prison or detention for a period in excess of a year; the mother and father have never lived together; contact does not take place every day although the first child saw the father more regularly before he was detained; the father now lives in a different city to the mother and only sees the children two to three times a week. When that is considered alongside the ISW's views that the impact would be very significant, the FtT was nonetheless entitled to conclude that the effect would not reach the very high threshold of unduly harsh. In my judgment the reasons provided by the FtT are tolerably clear when the decision is read as a whole and it cannot be said that the FtT left the ISW's opinion out of account when reaching its ultimate conclusion. For those reasons the grounds of appeal are not made

out, notwithstanding Mr Abraham's efforts. He said all that could possibly have been said on behalf of the appellant.

Notice of decision

16. The FtT's decision does not contain an error of law and I do not set it aside.

Anonymity

17. The FtT did not make an anonymity direction but as this decision refers to the circumstances of two children I make the appropriate anonymity direction.

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: *UTJ Plimmer* Date: 23 August 2019
Upper Tribunal Judge Plimmer