Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02667/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*
On 22 April 2021

Decision & Reasons Promulgated
On 05 May 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

BABATUNDE OKANLAWON OGUNMAKIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. F Khan, Counsel, instructed by Direct Access
For the Respondent: Mr. S Kotas, Senior Presenting Officer.

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Sangha ('the Judge'), sent to the parties on 17 November 2020, by which the appellant's

appeal against a decision of the respondent to refuse a human rights claim and to maintain a deportation order was dismissed.

2. Judge of the First-tier Tribunal Adio granted the appellant permission to appeal to this Tribunal by a decision dated 30 December 2020. Though the clear intention of Judge Adio was not to grant the appellant permission to appeal on ground 1, he did not limit the grant of permission in the section of the standard form document that contains the decision and so the grant of permission to appeal is considered by this Tribunal to be on all grounds: *Safi and others (permission to appeal decisions)* [2018] UKUT 00388 (IAC), [2019] Imm AR 437.

Remote Hearing

3. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in exactly the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Anonymity

4. The Judge made an anonymity order, simply reasoning at the conclusion of his decision that 'there are four young children involved in this appeal'.

5. The requirement that justice should be administered openly and in public is a fundamental tenet of the domestic justice system. It is inextricably linked to freedom of the press and so any order as to anonymity must be necessary and reasoned: *R. (Yalland) v. Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin).

6. The public enjoys a common law right to know about court proceedings and such right is also protected by article 10 ECHR.

7. As observed by the Supreme Court *In re Guardian News and Media Ltd and Others* [2010] UKSC 1, [2010] 2 AC 697 where both articles 8 and 10 of the ECHR are in play, it is for the Tribunal to weigh the competing claims under each article. Since both article 8 and article 10 are qualified rights, the weight to be attached to the respective interests of the parties and family members will depend on the facts. A Judge is therefore obliged to provide reasons as to why article 10 rights are given lesser weight than those given to the appellant's article 8 rights. Such reasons may

permissibly be short, with reference to Guidance Note 2013, No. 1 which is concerned with anonymity orders, but they are required.

8. Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules') contains a power to make an order prohibiting the publication of information relating to the proceedings or of any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.

9. Guidance Note 2013 No 1 addresses considerations to be applied to children at paras. 18 to 20. The identity of children whether they are appellants or the children of an appellant (or otherwise concerned with the proceedings), will not normally be disclosed nor will their school, the names of their teacher or any social worker or health professional with whom they are concerned, unless there are good reasons in the interests of justice to do so. Where the identity of a child is not to be revealed the name and address of a parent other than the appellant may also need to be withheld to preserve the anonymity of a child. Consequently, there is no mandatory requirement that an anonymity order be made in respect of an appellant simply because they have a child or children.

10. I note the recent observation of Elisabeth Laing LJ in *Secretary of State for the Home Department v. Starkey* [2021] EWCA Civ 421, at [97]-[98], made in the context of deportation proceedings consequent to sexual offences, that defendants in criminal proceedings are usually not anonymised. Both the First-tier Tribunal and this Tribunal are to be mindful of such fact. The appellant in this matter has already been subject to the open justice principle in respect of his criminal convictions, which are a matter of public record and so considered to be known by the local community.

11. I am aware that the appellant's conviction was reported in the media. I am also mindful that the media may well be interested in reporting these proceedings consequent to previous coverage of the appellant's conviction. Such reporting would, on its face, be in the public interest. The appellant and another man set up an immigration advisory firm in Essex, called East London Legal Centre, offering advice on immigration matters and submitting in the region of 400 visa applications containing false documents to the respondent. The second defendant, Mr. Ifelola Owoseni, falsely claimed to be an immigration solicitor and neither man was registered by the Office of the Immigration Services Commissioner. In the circumstances, the public can properly be considered to have an interest in knowing whether the appellant is, or is not, to be deported.

12. I observe the Editors' Code of Practice which provides that editors of newspapers 'must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life'. The Tribunal can properly expect editors to abide by the Code of Practice.

13. Upon considering the papers filed in this matter, I am satisfied that there is no requirement that the appellant's wife and children be named, nor is there any requirement to identify where the family live nor for details to be given as to the schools the children attend.

14. I am satisfied that article 8 rights in this matter do not outweigh relevant article 10 rights so as to diminish the right of the public to know about the appellant and these proceedings. Consequently, I set aside the anonymity order made by the Judge.

Background

15. The appellant is a national of Nigeria and is presently aged 51.

Family Life

16. The appellant and his present partner were in a relationship with each other in Nigeria and the couple's first child was born in 2004.

17. The appellant married a French national in Cote d'Ivoire on 6 May 2006.

18. The appellant's partner married an EEA national in 2006.

19. The appellant was granted entry clearance as a visitor and entered the United Kingdom on 11 May 2006. He overstayed. In September 2008 he successfully applied for an EEA Residence Card on the basis of his marriage to his wife. The Residence Card was issued on 23 September 2009 and valid for five years until 23 September 2014.

20. The appellant's partner applied for an EEA Residence Card in 2009, 2010 and 2011 on the basis of her marriage to an EEA national.

21. In 2007, a second child was born to the couple in the United Kingdom, 13 months after the appellant arrived in this country and 17 months after he married his French national wife. The child's birth certificate confirms that the couple were living together at the time of the second child's birth.

22. The second child was born before the appellant's application for a residence card in September 2008.

23. Their third child was born in this country in 2009. The address on the third child's birth certificate confirms that the couple moved property together at least once following the birth of their second child.

24. The appellant's partner was residing with the appellant and their children when she applied for an EEA Residence Card.

25. The appellant divorced his French national wife on 6 November 2012.

26. The couple are also recorded as residing together on the birth certificate of their fourth child, issued in 2013.

27. The appellant's partner and youngest child are Nigerian nationals, enjoying leave to remain until 2021. The three eldest children are British.

Index Offence

28. On 23 December 2013 the appellant was convicted at Wood Green Crown Court of assisting unlawful immigration into the European Union and sentenced to 18 months' imprisonment. He was also convicted on the same day of providing immigration advice or service in contravention of the prohibition and sentenced to 6 months imprisonment, to run consecutively.

29. In sentencing the appellant, HHJ Patrick observed that having previously worked at a law centre the appellant's co-defendant, Mr. Owoseni, decided to place the name of a genuine solicitor onto writing paper and set out to give the impression that he was a solicitor. Both defendants were found after a trial to have used their knowledge of immigration law to exploit applicants who approached them for immigration advice. Though there was no evidence that the two defendants advertised their services, HHJ Patrick was satisfied that their reputation spread by word-of-mouth, to the point that the defendants moved premises twice as business grew. By 2010 they were working at premises requiring rental payment of £15,000 per annum. HHJ Patrick was satisfied that consequent to documentation found by the police at the premises false applications were being submitted accompanied by false documents and false evidence. At the sentencing hearing HHJ Patrick identified as an indication of what steps were being taken by the defendants that photographs purporting to show a Nigerian wedding were in fact taken in the defendants' office.

30. In respect of the appellant, HHJ Patrick observed:

> 'He is clearly an intelligent man. He made an application to live in this country on the basis of marrying a European national. The evidence of his interview suggests that the marriage was a sham. He was in his late 20s[1] and married a woman of 17 from whom he is now divorced, having recently had a child by another woman, with whom he has gone on to have three more.'
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> '… You, Ogunmakin, worked there over a lengthy period, and as the jury found, provided advice and assisted in the making of false applications.'

[1] The appellant was aged approximately 36 at the time of his marriage.

> 'You both contested the case, though neither compounded your dishonesty by giving evidence. Nevertheless, you have exploited vulnerable people. Those without legitimate incomes were charged significant sums of money for what you did. Some were successful, others weren't. … These offences strike at the heart of our immigration system.'

31. On 4 September 2014, the respondent revoked the appellant's EEA Residence Card as the appellant's marriage to an EEA national was found to have not been entered into genuinely, and so was considered to be one of convenience.

32. On 20 September 2014, the appellant applied for an EEA residence card. The respondent refused this application on 5 December 2014. A request for reconsideration was made on 1 March 2015 and refused.

33. The respondent signed a deportation order on 12 February 2015, which was served on the appellant on 31 March 2015.

34. The appellant served further representations dated 1 April and 4 April 2015 requesting that the deportation order be revoked on article 2, 3 and 8 grounds. On 8 April 2015 the appellant submitted further submissions, which included a claim for asylum based upon a feud with other individuals that commenced whilst his father was acting as a traditional ruler. He stated that the feud had led to the deaths of three sisters and four cousins following 'spiritual attacks'.

35. He attended an interview with the respondent on 13 October 2015. The respondent refused the application by a decision dated 29 December 2015 and, having taken the appellant's claim at its highest, certified the international protection and human rights claims as being clearly unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

36. A subsequent judicial review challenge to this decision was unsuccessful following an oral hearing held in November 2016. The appellant appealed to the Court of Appeal and in line with an agreed consent order consequent to the Supreme Court judgment in *R (Kiarie and Byndloss) v. Secretary of State for the Home Department* [2017] UKSC 42, [2017] 1 W.L.R. 2380 the respondent withdrew her decisions of 12 February 2015 and 29 December 2015.

37. On 26 September 2017, the respondent issued a decision refusing the appellant's international protection and human rights claim. The appellant exercised statutory appeal rights, and his appeal was dismissed by the First-tier Tribunal on 5 February 2018. Judge of the First-tier Tribunal Chohan determined, *inter alia*:

    - The appellant enjoyed a genuine and subsisting family life with his wife and children.

- The appellant had committed a serious offence.
- There was no doubt that if the appellant were to be removed this would have a significant impact upon the children. However, it was open for the children to go to Nigeria with their father.
- Both the appellant's partner and the children enjoyed no status in this country.
- It would not be unduly harsh for the children to remain in this country without their father.
- There were no compelling circumstances preventing the appellant's partner from living in this country without him.

38. The appellant unsuccessfully sought to appeal the decision of the First-tier Tribunal and became appeal rights exhausted on 9 January 2019.

39. Following the promulgation of Judge Chohan's decision, the appellant's eldest three children were naturalised as British citizens. The appellant's partner was granted limited leave to remain in this country in February 2019.

40. On 7 March 2019 the appellant lodged further human rights (article 8) submissions which were refused by the respondent by means of a decision dated 5 February 2020.

Hearing before the FtT

41. The appeal came before the Judge sitting in Birmingham on 28 October 2020. In refusing the human rights appeal the Judge noted that the appellant had not engaged in any further criminal activity consequent to his release from prison, at [22] of the decision:

> '22. From all the evidence which has been placed before me I am satisfied that the Appellant committed serious offences and that is reflected in the sentence which was imposed upon him. Nevertheless, I also note that the Appellant does not have any other criminal convictions and according to the Pre-Sentence Report which was before the Criminal Court the appellant was recognised as being presenting [sic] a low risk of harm to others. I also take account of the fact that since the Appellant was released from prison he has not engaged in any further criminal activity.'

42. The Judge accepted that the appellant had a genuine and subsisting family life with his partner and four children, at [21]. He further accepted that if the appellant were to be removed there would be such interference in family life as to engage article 8, at [21].

43. As for the children, the Judge accepted that it would be in their best interests for them to remain with their father in one family unit, at [24]. The Judge observed that the status of the appellant's partner and children had changed since family life was considered by Judge Chohan in 2018, and three of the children were now British citizens, at [24]. However, the Judge determined, at [24]:

> '24. … I take into account that both the Appellant and his partner are Nigerian nationals and were born and brought up in this country. They came to the UK at a mature age and had therefore spent the most formative and majority of their lives in Nigeria and not the UK. It is clear that they are familiar with the culture, customs and language or languages of Nigeria. If the Appellant and his family choose to return to Nigeria they will be doing so as one family unit. The four children will be supported by both their parents. Whilst I note that the family have lived together in the UK there does not seem to be any reason why they could not continue to do so as one family unit in Nigeria. Whilst I appreciate that initially there would be some hardship and inconvenience for the family as a whole and no doubt it would take some time for the children to adapt to life in Nigeria, nevertheless, I am satisfied that the Appellant and his partner would be able to make adjustments and ensure that the children would be able to adapt to life in Nigeria. In this respect I have taken into account that the children are innocent of any wrongdoing and are not to be blamed for their parents' misdemeanours. I note that the Appellant was sentenced to a term of imprisonment despite the fact that it had an adverse impact on his children but as Judge Chohan found "that does not mean the children were being punished". Equally, I find that the deportation of a parent and requiring children to leave is not something that may be considered to be punishment for the children. It is the consequences of their parents' offending. Even though three of the children are now British nationals and one of the children has been resident here for more than seven years and their mother now has limited leave to remain in the UK, nevertheless, in my assessment, for all the reasons that I have set out above I find that it would not be unduly harsh for the children to go to Nigeria with the appellant and their mother. The children's best interests, on the facts of this case, and bearing in mind the findings of Judge Chohan in the previous determination, in my assessment, do not outweigh the strong public interest in deporting the Appellant, a foreign criminal. I find that the circumstances which were before Judge Chohan in February 2018 are not substantially different now.'

44. The Judge further found that it would not be unduly harsh for the children to remain in this country without their father, observing at [25]:

> '25. … in that respect I note that when the Appellant was in prison clearly that had an impact on the children and the family as a whole, they were cared for by their mother and they managed to survive and cope. I note that he

> was supported by Social Services who visited them regularly and they were supported financially. I find that there is no substantial evidence before me which would suggest that it is absolutely imperative that the Appellant be present in the UK to prevent any adverse effect on the children's health or development or their care. There is no evidence before me to show that the children would lose any contact with the Appellant because they can maintain contact with their father by telephone, email and other modern means of communication and, of course, it would be open to the children to visit their father in Nigeria. Whilst I note that if the Appellant is deported to Nigeria that his partner would be looking after the children virtually as a single mother I find that it is possible for her to adjust her working hours just as single mothers do in general. There is no evidence before me that the Appellant would not be able to support himself bearing in mind that he has worked previously in Nigeria. I note that the Appellant played down his contacts and connections and family ties in Nigeria even to the extent [of] saying that he did not have any contact or know of the whereabouts of his mother but I found that hard to believe. In all the circumstances, therefore, having considered all the evidence before me in the round, I find that it would not be unduly harsh for the children to remain in the UK without their father, the Appellant.'

45. The Judge determined that there were no compelling circumstances to demonstrate that the appellant's partner was not able to return to Nigeria with the appellant, at [27]. In the alternative there were no compelling circumstances which would prevent her from living in the United Kingdom without the appellant, at [28].

Grounds of Appeal

46. The appellant relies upon four grounds of appeal that can properly be summarised as follows:

1) The Judge erred at [22] of his decision by engaging in speculation when concluding it would not be unduly harsh for the children to remain as part of the family unit upon relocating to Nigeria.

2) The Judge gave inadequate weight to the fact that all four children have spent between 7 to 15 years in this country, and therefore can be considered to have be fully integrated. Disruption to their education would not be in their best interests. Further the Judge engaged in speculation when concluding that the children can easily reintegrate and resume their education in Nigeria.

3) The Judge failed to give proper consideration and due weight to the social services' letter filed with the Tribunal.

4) The Judge disregarded the guidance as to the definition of 'unduly harsh' provided by the Court of Appeal in *HA (Iraq) v. Secretary of State for the Home Department* [2020] EWCA Civ 1176, [2021] 1 W.L.R. 1327.

47. In granting permission to appeal Judge Adio gave reasons as to why he considered ground 1 to lack merit:

> '2. … Reference is made to paragraph 22 of the judge's determination in assessment of the issue as to whether the children would be able to remain a family by travelling with the Applicant back to Nigeria and in locating there. It is argued that the judge erred in stating that "whilst I note that the family have lived together in the UK there does not seem to be any reason why they could not continue to do so as one family unit in Nigeria". The grounds argue that since the elder three of the four children are British nationals, they would have no automatic entitlement to return to Nigeria equally because they are UK citizens, they would not be required in law to leave the UK. This ground does not raise an arguable error of law as the children with Nigerian parents will also be entitled to apply for Nigerian citizenship and return to Nigeria.'

48. As to the remaining grounds, Judge Adio reasoned:

> '3. … However, based on the evidence submitted and which is attached to the grounds Miss Stacey Beason of Social Services states in her letter that the children have historically been [known to social services] due to [the appellant's partner] not being able to cope while Mr. Ogunmakin was serving a prison sentence. The children have a strong relationship with both parents and the impact of Mr. Ogunmakin being separated from the family would be detrimental to their health and well-being. The letter goes on to state that Mr. Ogunmakin's emotional, material, domestic and academic support for his partner and four children is immeasurable and the negative effect of his separation from the family would be unduly harsh and result in devastating psychological consequences for the four children.
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> 4. It is arguable that there is no proper consideration given to these conclusions. the judge's finding is that there are no compelling circumstances to demonstrate that [the appellant's partner] would not be able to return to Nigeria with the Applicant. It is arguable the Applicant's deportation would be unduly harsh for the three British children and their mother, as well as the fourth child who has continuously been resident in the UK over seven years if in fact they choose not to go to Nigeria …'

Decision on Error of Law

49. Mr. Khan confirmed at the hearing that grounds 1 and 2 are concerned with the Judge's conclusion that it would not be unduly harsh for the appellant's children to accompany him to Nigeria and continue to be a family unit in that country. Grounds 3 and 4 are concerned with the Judge's conclusion that it would not be unduly harsh for the children to be separated from their father upon his deportation to Nigeria.

50. The core section of ground 1 details:

> '1.1.1 In the first place, the FTTJ errs in principle because he speculates; in simple terms there was no evidence before the FTTJ for him to conclude that 'there does not seem to be any reason why they could not continue to do so as one family unit in Nigeria …' In fact since the elder three of the four children are British nationals, they would have no automatic entitlement to return to Nigeria, equally because they are UK citizens they could not be compelled/required in law to leave the UK.'

51. I observe at the outset that the non-compellability of a British citizen to leave the United Kingdom is not determinative when considering the position of a child in relation to section 117C of the 2002 Act or paragraphs 398 and 399 of the Immigration Rules. In *Patel (British citizen child – deportation)* [2020] UKUT 00045 (IAC) the Tribunal confirmed that when considering both section 117C(5) and paragraph 399(a)(ii), judicial decision-makers are required to assess a hypothetical question, namely whether going or staying 'would' be unduly harsh. They are not being asked to undertake a predictive factual analysis as to whether a child will in fact go or stay. Nationality in the form of British citizenship is a relevant factor when assessing whether the 'unduly harsh' requirement is met, but it is not necessarily a weighty factor. The Tribunal further confirmed that the possession of British citizenship by a child with whom an appellant has a genuine and subsisting parental relationship does not mean that the appellant is exempted from the 'unduly harsh' requirements.

52. At the hearing Mr. Khan reflected upon relevant provisions of the Constitution of Nigeria (1999). He accepted that all four children are Nigerian nationals. The eldest child was born in Nigeria to Nigerian parents and secured Nigerian nationality from birth through the operation of section 25(1)(b) of the Constitution. The three younger children were born in the United Kingdom to Nigerian parents and so secured Nigerian nationality through birth consequent to the operation of section 25(1)(c).

53. In respect of the three eldest children having been naturalised as British citizens such process did not automatically result in their losing their Nigerian nationality.

Nigerians are permitted to hold dual nationality unless their Nigerian citizenship was acquired other than through birth: section 28 of the Constitution.

54. Mr. Khan conceded that there is no evidence before this Tribunal that the eldest children have renounced their Nigerian citizenship in accordance with section 29 of the Constitution. This is unsurprising as the Tribunal observes that the children are not of an age where they can renounce their citizenship. In the circumstances, Mr. Khan withdrew reliance upon ground 1 at the hearing. The Tribunal is content that this was the only appropriate avenue available to the appellant.

55. By means of ground 2, the appellant submitted that the Judge gave insufficient weight to the length of time the children had been present in this country, and that they were fully integrated into their local community. It was asserted that the disruption to their education was clearly detrimental to their best interests, so breaching obligations established by section 55 of the Borders, Citizenship and Immigration Act 2009. Mr. Khan initially submitted that the Judge engaged in speculation when concluding that the children could easily reintegrate and resume their education in Nigeria.

56. Mr. Khan accepted that nowhere within the evidence authored by the children were concerns raised as to their integration upon relocating to Nigeria. The children were silent on the issue in their letters which are themselves some two years old. He further accepted that the appellant's wife provided no evidence on this issue. The sole evidence addressing relocation, in general terms, was one paragraph in the appellant's witness statement, dated 20 October 2020:

> '21. [The] United Kingdom is the only place and country that my four children have always known. It is the only country to continue their lives because they have deeply immersed into the UK system and laid down roots over the years, obtaining their British citizenship! United Kingdom is the only place and country my four children have always known. It is the only country to continue their lives because they have deeply immersed into the UK system and lay down roots over the years, obtaining their British citizenship! I humbly asked that consideration be given to the extent of my cadet son's and his siblings' private life in the UK, taking into account factors such as their ages, length of residence, wider considerations in the UK, other ties to the community to determine it would be unduly harsh to expect the children to live in a country other than the UK please.'

57. Mr. Khan acknowledged that such evidence as relied upon by the appellant provided no cogent engagement with the ability of his children to integrate, or otherwise, upon return to Nigeria. The Judge expressly observed the children's length of residence in this country, and that the eldest three children enjoyed British citizenship. He noted that the children were innocent of any wrongdoing. He considered the children's parents capable of helping them adapt upon

relocation. In the circumstances, the Judge could reasonably conclude that the children could adapt to life in Nigeria, though this may take time, and so it would not be unduly harsh for them to reside with their father (and mother) in that country. Such conclusion cannot properly be said to be speculation. Upon careful reflection, Mr. Khan withdrew reliance upon this ground at the hearing, and he was correct to do so.

58. The Tribunal confirmed in *Patel* that section 117C(5) of the 2002 Act imposes the same two requirements as are specified in paragraph 399(a)(ii) of the Immigration Rules, namely that it would be unduly harsh for a child to leave the United Kingdom and for a child to remain in this country, separated from their parent. In such circumstances, with no extant challenge to the decision of the Judge that it would not be unduly harsh for the children to live with their father in Nigeria this appeal must be dismissed.

59. In any event, I proceed to consider the remaining grounds. Ground 3 details in simple terms:

> '1.3 Insofar as the issue whether or not it would be unduly harsh to separate the father from his children, the FTTJ has erred in law because he failed to give proper consideration and due weight to the report of Ms. Stacey Beason of Social Services which amply demonstrates the great difficulty the family had been coping in his absence when he was in prison and the emotional harm it had on his children and partner.'

60. Ms. Beason is a social worker and her letter, dated 21 May 2018, runs to 1½ pages. In respect of the circumstances of the family at the time the appellant was serving his custodial sentence, Ms. Beason's evidence is solely limited to one sentence where she confirms that the children were at the relevant time known to social services because their mother was not able to cope whilst the appellant was in prison. No more of substance is said.

61. By means of paragraph 3.2.1 of his skeleton argument filed with the First-tier Tribunal Mr. Khan placed reliance upon Ms. Beason's letter as demonstrating 'the great difficulty the family had in coping in his absence when he was in prison and the emotional harm it had on his children and partner'. I am satisfied that when considering the decision in the round the Judge was clearly aware as to the family difficulties that arose when the appellant was imprisoned some six years previously. I am satisfied that Judge did consider Ms. Beason's letter, observing the appellant's reliance upon it at [23] of his decision and noting both the impact the appellant's imprisonment had upon his family and the support provided to the family by social services at [25].

62. As Mr. Khan developed his submission on this ground before me it became one as to the proper weight to be given to Ms. Beason's letter. The difficulty for the

appellant is that the family circumstances in 2013 and 2014 are an unreliable indicator as to future emotional hardship. At the time of the appellant's imprisonment his partner enjoyed no status in this country and was unable to work. The children were all aged under 10 and the youngest was a babe in arms, being aged 5 months. The comprehension of the children as to the appellant's absence from the family home was limited by their lack of maturity. The household had lost its only breadwinner. By the time this appeal was heard by the Judge the children were aged 16, 13, 11 and 7. Three of the children were attending secondary school. Their mother was permitted to work and indeed was doing so. The evidence presented to the Judge was silent as to the actual or potential help that the older children could offer to their mother and to their younger siblings in the absence of their father. Mr. Khan accepted that the children were of an age where they would have a greater understanding as to the reasons why they may be separated from their father.

63. There is no merit in the appellant's submission that the family circumstances in 2013 and early 2014 can lawfully constitute a fixed basis for assessing the impact of future separation. Rather, the Tribunal was required to consider circumstances as they presently stood and no cogent evidence was provided as to the children's present needs, abilities and understanding of events being such as to make it unduly harsh for them to be separated from their father. This narrow ground of challenge enjoys no merits.

64. As to ground 4, Mr. Khan accepted that elements of the ground stood or fell with grounds 2 and 3. However, he relied upon paragraphs 1.4 and 1.4.1:

> '1.4. The FTTJ erred in law in disregarding the guidance on the definition of 'unduly harsh' given by the Court of Appeal in the case of *HA (Iraq) and RA (Iraq) v. SSHD* [2020] EWCA Civ 1176.
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> 1.4.1. In particular, it is arguable that FTTJ failed to appreciate that 'undue harshness' applicable in assessing offenders who have been sentenced to less than four years in prison is not equivalent to 'very compelling circumstances' (as set out in NIAA 2002, s 117C(6) - which applies to those offenders who have received sentences of four years or more) and in circumstances may have applied the wrong criteria to the facts of this case.'

65. Mr. Khan accepted that his submission could be concisely identified as the Judge having given lip service to the unduly harsh test but applying a higher test.

66. I am satisfied that the Judge clearly understood and applied the unduly harsh test. There is no requirement that a judge be required to expressly refer to specific authorities in a judgment. The Court of Appeal has recently reminded appellate tribunals that they should assume that experienced judges in specialised tribunals

are applying relevant principles, without the need for extensive citation, unless it was clear from what they said that they had not done so: *AA (Nigeria) v. Secretary of State for the Home Department* [2020] EWCA Civ 1296, [2020] I.N.L.R. 599, at [34].

67. The authoritative guidance on 'unduly harsh' has been set out in *KO (Nigeria) v. Secretary of State for the Home Department* [2018] UKSC 53, [2018] 1 WLR 5273 and *HA (Iraq)*. It involves a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. That does not posit some objectively measurable standard of harshness which is acceptable but sets a bar which is more elevated than mere undesirability but not as high as the 'very compelling circumstances' test.

68. Upon a careful reading of the decision, the Judge clearly had in mind that three of the children were British citizens and that the family had previously struggled during their separation from the appellant in 2013 to 2014. Mr. Khan complained as to Judge observing that the children 'managed to survive and cope' when their father was imprisoned. This is clearly a reference to past circumstances and cannot properly be said to form part of the unduly harsh assessment. I am satisfied that the Judge did not elevate the undue harshness test into one equating to 'very compelling circumstances'. This ground is therefore dismissed.

69. For the reasons detailed, this appeal must be dismissed.

Postscript

70. By means of the appellant's grounds of appeal, there was an application to adduce fresh evidence that was said not to be available at the hearing before the Judge. The documents concerned are a report from Mr. Matthew Akal, Consultant Chartered Clinical Psychologist, dated 26 November 2020, and an independent social worker's report authored by Charles Musendo, dated 28 November 2020.

71. The grounds detail, at paragraph 1.5.1.:

> '1.5.1. It is submitted that these reports confirm (i) the long-term harm to the family (ii) the inadequacy of modern methods of communication as a substitute for parents [sic] physical presence in maintaining the emotion [sic] and psychological well-being of the children and [A]'s partner. These reports corroborate the findings of Ms. Beatson's [sic] the report which was before the FTT. The FTT [sic] is respectfully invited to allow [A] to rely on the above as it is in the interest of justice will enable the court [sic] to make a fair assessment of the best interest of [A]'s minor children pursuant to its duty under section 55 of the Borders, Citizenship and Immigration Act 2009.'

72. At the error of law hearing before me Mr. Khan quite correctly did not seek to make an application to adduce these documents under rule 15(2A) of the 2008 Rules. I was informed that if the decision of the Judge was set aside the appellant would make such application so that the documents would be before the Tribunal at the resumed hearing.

73. As I have dismissed the appeal, there is no requirement for me to consider these documents. However, two issues arise that have led me to decide that I should make observations as to the proposed application and the report of Mr. Musendo.

74. I observe that the hearing before the Judge was held on 28 October 2020 and the decision was sent to the parties on 17 November 2020. No application for an adjournment was sought before the Judge in expectation of these reports.

75. Mr. Musendo commenced conducting his interviews in relation to the assessment on 22 November 2020. The interview process therefore commenced some five days after the decision of the Judge was promulgated. Mr. Akal's meeting with the appellant and his family took place on 23 November 2020.

76. I express my concern as to the readiness of the appellant to secure purportedly relevant evidence so soon after Judge's decision in circumstances where no information is given as to why such evidence was not secured prior to the appeal hearing. There is appropriate concern as to the drip-by-drip nature of the production of evidence in this matter which goes against the public interest in an appellant enjoying a statutory appeal and upon the exhaustion of such appeal rights a deportation order being lawfully acted upon. In this matter two judges have confirmed as lawful decisions of the respondent to deport the appellant and not to grant him leave to remain in this country on human rights grounds.

77. As to Mr. Musendo's report I indicated to Mr. Khan at the conclusion of the hearing that I had concerns as to its uncritical nature. The lack of critical analysis may undermine the report's conclusions. It is unhelpful for legal representatives to fail to provide relevant information to an expert, and it appears that the appellant's former solicitors do not appear to have provided Mr. Musendo with either HHJ Patrick's sentencing remarks or the decision of Judge Chohan. Consequently, when addressing the appellant and his partner's relationship history at §25 Mr. Musendo appears to be unaware that both the respondent and HHJ Patrick considered the appellant to have entered a marriage in 2006 solely with the intent of securing residence in this country. Further, no critical consideration is given to the marriage of the appellant's partner, also conducted in 2006, her subsequent applications for an EEA Residence Card at a time when the couple were reunited in this country within at most months after their arrivals. I observe that even when Mr. Musendo is aware of concerns having been raised as to the appellant's veracity, such as the Judge concluding at [25] that it was 'hard to

believe' that the appellant did not have any contact or know the whereabouts of his mother, he proceeds to uncritically accept the appellant's contention that he has severed relationships with family members.

78. I observe that no consideration is given by Mr. Musendo as to the fact that the appellant has exercised deceit and manipulative behaviour on many occasions over several years when assessing the information provided to him in interview. Such uncritical assessment appears to me to flow through the document which is a significant concern for the Tribunal in respect of a report authored by a professional relying upon their independence.

Notice of decision

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

80. The decision of the First-tier Tribunal is upheld. The appeal is dismissed.

81. The anonymity order issued by the Judge is set aside.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 26 April 2021

TO THE RESPONDENT
FEE AWARD

No fee was paid and so no consideration is given to a fee award.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 26 April 2021