Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16211/2017 (V)**

THE IMMIGRATION ACTS

Heard at : Field House
On : 7 May 2021

Decision & Reasons Promulgated
On : 26 May 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MUKAILA ADETOYESE BAKARE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Sultan, instructed by Bridges Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was Microsoft Teams. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. No issues arose with regard to the proceedings.

2. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the decision to refuse his human rights claim following the making of a deportation order against him.

3. The appellant is a citizen of Nigeria. There is an inconsistency between the information provided by the respondent and by the appellant in regard to his age and the date and basis of his grant of leave to remain in the UK, but it seems to have been accepted by all parties and accepted in the decision of the First-tier Tribunal that the appellant was born on 22 May 1966, that he entered the UK on 25 May 1991 and that he was granted indefinite leave to remain on 14 years long residence grounds on 9 October 2009. There is also some inconsistency in the information provided as to the appellant's previous convictions, prior to the index offence, as the respondent refers in the various decisions to two convictions for fraud and three for theft between 1998 and 2001, whereas the sentencing judge's remarks and the PNC referred to the appellant as having no prior convictions. The First-tier Tribunal Judge accepted the appellant's explanation that those convictions related to a false identity he had used to find employment and the convictions were for offences committed by someone else using the same identity and therefore that is the basis upon which I shall proceed.

4. The index offence which gave rise to the deportation proceedings was conspiracy to defraud. The appellant was arrested for that offence on 4 June 2015, convicted on 19 December 2016 and sentenced on 24 January 2017 to 14 months' imprisonment. The offence involved the theft of bank cards and personal details from letters the appellant was supposed to deliver as part of his job as a postman employed by Royal Mail, which he then passed on to his co-defendant Daryl Backry. The stolen details were used to fraudulently pay for goods and withdraw cash which amounted, in the appellant's case, to £10,262. The appellant initially lied to the police about his involvement and he pleaded not guilty before a jury who found him guilty at trial.

5. On 27 February 2017 the respondent made a decision to deport the appellant pursuant to section 32(5) of the UK Borders Act 2007, but that decision was subsequently amended on two occasions, with the final decision being served on 10 May 2017. The appellant was invited to respond. His solicitors provided a written response in a letter dated 6 June 2017, raising human rights grounds and relying upon the appellant's family life with his four British children (three sons, born on 15 August 1996, 5 January 2000 and 1 September 2002 and a daughter born on 3 April 2004), his 26 years of residence in the UK and his medical conditions, namely diabetes and hypertension, for which he required ongoing medical treatment. It was stated that whilst the appellant was separated from the mother of his children and did not live with his children, he took an active role in their welfare, education and development and was very close to them.

6. On 14 November 2017 the appellant became the subject of a Deportation Order and on 16 November 2017 the respondent made a decision to refuse his human rights claim. In the absence of supporting evidence the respondent did not accept that the appellant's children were British citizens, that they were living in the UK, that he had a genuine and subsisting relationship with them or that it would, in any event, be unduly harsh for them to live in Nigeria or remain in the UK without him if he was deported. The respondent noted that the appellant did not claim to have family life with a partner and therefore considered that he could not meet the requirements of paragraph 399(a) and (b) of the immigration rules. As for the appellant's private life, the respondent did not accept that he could meet the

requirements of paragraph 399A since it was not accepted that he had been lawfully resident in the UK for most of his life and it was not accepted that he was socially and culturally integrated in the UK or that there would be very significant obstacles to his integration in Nigeria. The respondent did not consider there to be very compelling circumstances outweighing the appellant's deportation.

7. The appellant appealed against that decision and his appeal was heard by First-tier Tribunal Judge Neville on 26 September 2018. The appellant gave oral evidence before the judge. His priest and four children were also tendered but simply adopted their statements. It was confirmed on behalf of the respondent that the appellant's relationship with his children was accepted and that it was accepted that two of the four children were qualifying children (the other two being adults) and were living together as a family unit with their mother S. The judge accepted that it would be unduly harsh to expect the four children to relocate to Nigeria and he therefore focused on the relevant question of whether it would be unduly harsh for the children to be separated from the appellant. Applying the guidance in KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent) [2018] UKSC 53 the judge found that, whilst the separation would cause the children emotional and psychological distress, it did not meet the test of being unduly harsh. The judge found further that the appellant was socially and culturally integrated in the UK but concluded that there were no very significant obstacles to integration in Nigeria. In so concluding the judge considered that there was no evidence that the appellant would be without ties or support in Nigeria and concluded that, whilst his medical problems were serious and that his compliance with medication was poor, he would be able to access basic medication and advice with the support of his family and friends, whether in Nigeria or in the UK. He found that there were no very compelling circumstances and that the appellant's deportation would not be disproportionate. He accordingly dismissed the appeal, in a decision promulgated on 14 February 2019.

8. The appellant sought permission to appeal that decision to the Upper Tribunal on the grounds that the judge had contradicted himself in his findings on the impact of deportation on the appellant's children and had failed to consider their evidence properly; and that he had misdirected himself on the issue of very significant obstacles to integration, by stating that there was no evidence to suggest that the appellant had no family in Nigeria, which in turn was relevant to his findings on support in relation to his medical condition and access to treatment in Nigeria.

9. Permission to appeal was refused in the First-tier Tribunal, but was granted in a renewed application to the Upper Tribunal, in a decision of Upper Tribunal Judge Jackson dated 8 February 2021. UTJ Jackson found that the grounds did not disclose any properly arguable error of law in the First-tier Tribunal Judge's decision and stated in her decision that she would have refused permission to appeal on all grounds, but for the subsequent decision in HA (Iraq) v Secretary of State for the Home Department (Rev 1) [2020] EWCA Civ 1176. UTJ Jackson found a *Robinson* obvious arguable error in the judge's decision, in the approach to the assessment of whether the appellant's deportation would be unduly harsh on his children, which was arguably contrary to the approach as confirmed in HA (Iraq).

10. In a Rule 24 response dated 3 March 2021, the respondent opposed the appellant's appeal and stated that it was not accepted that what the Court of Appeal said in HA (Iraq) fundamentally altered the test as out by the Supreme Court in KO (Nigeria).

11. The matter then came before me. Both parties made submissions.

12. Mr Sultan submitted that the judge made irrational findings on material matters. His development of that challenge in his submissions was difficult to comprehend but I have attempted to extract some form of summary. Essentially he submitted that the appellant would have benefitted from HA (Iraq), that the judge had overlooked the appellant's length of residence in the UK, that he had made assumptions as to the appellant having some form of support in Nigeria, that he had failed to give consideration to the significant obstacles which would be faced by the children, that he had failed to give paramount consideration to the best interests of the children and that his decision was accordingly flawed.

13. Mr Kotas submitted that the caution expressed by Underhill LJ in HA (Iraq) in regard to errors that could arise when looking for something beyond an ordinary level of harshness, did not apply in this appellant's case and that the judge's approach in practice did not breach the guidance in HA (Iraq). Mr Kotas submitted that, in any event, the evidence before the judge came nowhere near the unduly harsh threshold.

Discussion and Findings

14. Mr Sultan's submissions were somewhat difficult to comprehend and failed, for the most part, to engage with the relevant issues in the appeal. I sought on two or three occasions to direct him to the fact that this was an error of law hearing and to the grant of permission, which he assured me he understood. I was nevertheless assisted by the grounds of appeal, the grant of permission and the clear and comprehensive submissions made by Mr Kotas to which Mr Sultan had an opportunity to respond, and in addition I was able to elicit some submissions of relevance from Mr Sultan.

15. In granting permission, Upper Tribunal Judge Jackson made it clear that she was doing so on the basis of guidance in HA (Iraq) which had not been available at the time of the hearing before Judge Neville. She did not find any arguable merit in the appellant's grounds of challenge but she did not exclude the grounds since they overlapped with the basis upon which she was granting permission.

16. Like Upper Tribunal Judge Jackson, I find there to be no merit in the grounds of appeal as they stand and, likewise, I have no hesitation in rejecting Mr Sultan's submissions as being no more than a disagreement with the judge's decision and an attempt to re-argue the appellant's case. There is no basis for the assertion made by Mr Sultan that the judge failed to take account of the appellant's length of residence in the UK or that he failed to give full consideration to the best interests of the children, when it is clear that those were matters which were accorded full consideration by the judge at [30] and [32]. The grounds

of appeal, as originally pleaded, refer to contradictions in the judge's findings in relation to the appellant's children, asserting that the judge's references to the evidence set out in the children's letters as to the impact upon them of their father's deportation contradicted his finding that there was no evidence of emotional or psychological distress beyond what would necessarily be involved for any child faced with the deportation of a parent. However, as Mr Kotas submitted, the judge's findings were consistent with the limited evidence before him and with the absence of any independent supporting evidence such as medical or psychological evidence, or an independent social worker's report. The judge plainly gave careful consideration to the letters from the appellant's children and, as he said at [25], he did not diminish the emotions, feelings and reaction of the children, but he was fully entitled to accord the weight that he did to that evidence in his overall findings.

17. The grounds also challenge the judge's findings on the question of "very significant obstacles to integration", but again it is clear that the judge gave full and proper consideration to the matter. Contrary to the assertion made by Mr Sultan, the judge gave full consideration to the guidance in the case of Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813, as is evident at [35] onwards. He addressed the question of the appellant's ties to Nigeria and had regard to the assertions made by the appellant's children in their letters in that regard, but was nevertheless entitled to find that bare assertions were insufficient when considering the evidence as a whole. The judge went on to give detailed consideration to the appellant's medical condition and to the available treatment and access to that treatment in Nigeria. At [42] he addressed the issue of support in Nigeria enabling access to medical treatment, contrary to the assertion in the grounds, noting the appellant's current lack of compliance despite the existence of family support in the UK, and providing cogent reasons for concluding that he would be able to access basic medication and advice in Nigeria. The only submission made by Mr Sultan in that regard was that the judge did not take the appellant's medical circumstances in his favour. Accordingly, I find nothing of any merit in the grounds or in Mr Sultan's submissions.

18. I turn, therefore, to the most relevant issue, as pointed out by Upper Tribunal Judge Jackson, namely the lawfulness of the judge's approach to the "unduly harsh" issue in light of the judgment in HA (Iraq). Mr Sultan's only submission in relation to HA (Iraq) was that the appellant would have benefitted from that case and that the public interest question would have been answered in his favour. Despite being pressed for a more comprehensive response he was unable to provide any elaboration. Mr Kotas, however, made clear and helpful submissions on the impact of the judgment in HA (Iraq), which I found entirely persuasive.

19. As Mr Kotas submitted, the decision in HA (Iraq) did not undermine the principles set out in KO (Nigeria), upon which Judge Neville relied, but Lord Justice Underhill in HA (Iraq) expressed caution when considering an "ordinary" level of harshness, in two respects, as set out at [56]. Firstly, it was not the correct approach when considering an "ordinary" level of harshness to expect something exceptional or rare and neither was it correct to expect something that did not fit into "some commonly-encountered pattern". Lord Justice Underhill stated as follows at [56]:

> "How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

and at [57]:

> "I am anxious to avoid setting off a further chain of exposition. Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of the parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying *KO (Nigeria)* in accordance with the guidance at paras. 50-53 above."

20. It was Mr Kotas's submission that Judge Neville did not fall into error in the manner suggested by Lord Justice Underhill and was not looking for something exceptional when he considered the "unduly harsh" question at [22] to [27]. I agree with that submission and agree that the judge correctly applied the principles in KO (Nigeria) to the appellant's particular circumstances and to the circumstances and best interests of his children, taking all relevant factors into account and that he did not fall within the "dangerous" area identified by Lord Justice Underhill in HA (Iraq). The judge considered each child separately and carefully evaluated the impact upon each one of them of the appellant's deportation. He provided cogent reasons for concluding that there was nothing in the evidence before him to show that the appellant's deportation would reach the threshold of demonstrating unduly harsh consequences for his children. I agree with Mr Kotas that there was, in any event, nothing in the limited evidence before the judge which could have led to any other conclusion.

21. Accordingly, I find no error of law in the judge's approach to the issue and nothing inconsistent with the approach set out in HA (Iraq). Having properly addressed and resolved the "unduly harsh" test and provided cogent reasons for concluding that neither of the two exceptions to deportation were met, the judge went on to consider whether there were very compelling circumstances outweighing the public interest in the appellant's deportation. The judge, having given full and proper consideration to all relevant factors including the appellant's ties to the UK and to Nigeria, his length of residence in the UK, his medical condition, the best interests of his children and his offending and risk of re-offending, was perfectly entitled to conclude that the "very compelling circumstances" threshold was not met and that the appellant's deportation would not be disproportionate. The judge's decision to dismiss the appellant's human rights appeal was accordingly fully and properly open to him on the evidence before him and the grounds and grant of permission disclose no errors of law in his decision.

DECISION

22. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring the decision to be set aside. The decision of the First-tier Tribunal to dismiss the appellant's appeal therefore stands.

Signed *S Kebede*
Upper Tribunal Judge Kebede Date: 10 May 2021