Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20408/2018 (V)

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 14 January 2021	**On: 29 January 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

AAC
(Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms T Adams instructed by BID
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing, by way of skype for business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. Although a prior request had been made by the appellant for a face-to-face

hearing, there was no objection at the hearing to it proceeding remotely and in any event there were no problems arising which undermined the fairness of the proceedings.

2. The appellant is a national of Nigeria born on 16 August 1972. He arrived in the United Kingdom on 5 December 2002 on a visit visa and overstayed. He came to light on 19 September 2003 when he was arrested for handling stolen goods (credit cards) and, according to the respondent, he was served with illegal entry papers the following day and was released with reporting restrictions. He came to light again following his arrest on 18 March 2005 for conspiracy to obtain computers and computer equipment from IBM by deception, for which he was convicted and sentenced on 16 September 2005 to three years' imprisonment. A deportation order was issued against him on 10 July 2006 and he was deported on 25 August 2006.

3. Shortly after his deportation, in November or December 2006, the appellant returned to the UK in breach of the deportation order and, in 2007, obtained a mortgage by fraud. Some nine years later, following an immigration enforcement visit on 14 December 2016, he was arrested and charged with using false documents. On 17 December 2016 he applied for leave to remain on the basis of his family and private life and his application was treated as representations requesting the revocation of the Deportation Order. On 18 December 2016 he was served with a notice as an illegal entrant who had returned to the UK in breach of a Deportation Order. On 14 November 2017 and 19 March 2018 the appellant was convicted on four counts, one of dishonestly making false representations to make a gain for himself (in relation to the mortgage) and three counts of possessing identity documents (driving licence) with intent. He was sentenced to a total of two years' imprisonment (eight months for each of counts one to three and two years for count four, all to run concurrently). On 26 September 2018 the respondent refused the appellant's human rights claim and refused to revoke the Deportation Order previously issued against him.

4. In that decision, the respondent accepted that the appellant had an established family life with his British partner and daughter, M, and with his partner's daughter from a previous relationship, J, but did not accept that it would be unduly harsh for his partner and the children to relocate with him to Nigeria or for them to remain in the UK without him. The respondent found that the appellant could not, therefore, meet the requirements in paragraph 399(a) or (b). The respondent considered that the appellant could not meet the requirements in paragraph 399A on the basis of his private life as he had not been in the UK lawfully for most of his life, he was not significantly socially and culturally integrated in the UK and there would be no very significant obstacles to his integration in Nigeria. The respondent considered that there were no very compelling circumstances outweighing the public interest in deportation and that the appellant's deportation would not breach his Article 8 human rights.

5. The appellant appealed against that decision. His appeal was heard on 11 December 2019 by First-tier Tribunal Judge Brewer and was dismissed in a decision promulgated on 17 December 2019. The judge heard from the appellant and his wife. He noted that the appellant had used a large number of aliases in the UK and that he was found with a

number of fake documents, when arrested in 2016, some of which related to documents used to obtain a mortgage in November 2007. The judge rejected the appellant's claim that he had simply kept the documents and had not used them after 2007 and considered that he was seeking to minimise the seriousness of his offences. The judge also rejected the appellant's claim that he had committed the mortgage fraud in order to provide a home for his family and considered that he had lied in claiming as such before the Crown Court judge. Judge Brewer found that the appellant and his partner's evidence was inconsistent and lacking in credibility and he had concerns about the conclusions in a social worker's report in relation to the impact of the appellant's deportation on the children. Whilst he accepted that the best interests of the children lay in remaining with their parents, the judge concluded that the consequences of deportation would not be unduly harsh and that the appellant's deportation was proportionate. He accordingly dismissed the appeal on human rights grounds.

6. Following the grant of permission to appeal the decision to the Upper Tribunal, the matter came before me to decide the error of law issue. Due to the circumstances relating to coronavirus, and in the absence of any objection by the parties, the matter was decided on the papers without a hearing. In a decision promulgated on 5 October 2020, I found that Judge Brewer had materially erred in law and I set aside his decision on the following basis:

> "11. As for the first ground, the challenge is to the judge's assessment of credibility and the assertion is made that the assessment was based upon speculation, particularly with regard to the reasons given for rejecting the appellant's claim not to have used fake documentation after 2007. I accept that the fact that the appellant was charged with 'possession with intent' was not in itself necessarily a reason for concluding that the appellant was not credible in his claim not to have used the documentation after 2007. However, there were various other reasons given by the judge for making the adverse credibility findings that he did and for rejecting the appellant's account, starting with the fact that he had committed fraud and used fraudulent documentation, which in itself was a proper basis upon which to make adverse findings. The judge also had the benefit of hearing from the appellant and his partner and assessing their evidence as presented before him and at [13] he identified inconsistencies between their accounts of their living arrangements which were relevant to the motivation for the mortgage fraud. The challenge to the judge's assessment of credibility at [5] and [6] are little more than disagreements with the judge's findings and it seems to me that the judge was fully entitled to have the concerns that he did and to make the findings that he did.
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> 12. However, I find merit in the assertions in the second and third grounds. I accept that the judge's consideration of the social worker's report was cursory and failed properly to engage with the concerns raised therein. The grounds at [8] also have merit in the assertion that the judge failed to consider and make findings on relevant evidence and take account of relevant factors, and I note the absence of any assessment by the judge of the risk of re-offending. I would also add that, whilst not included as part of the grounds of challenge, the judge appears to have conflated the issues of "unduly harsh" and proportionality, taking account of the public interest and the appellant's criminality as part of the unduly harsh assessment, contrary to the guidance in KO (Nigeria) & Ors v Secretary of State for the Home Department

> (Respondent) [2018] UKSC 53, and failing to make a separate assessment of very compelling circumstances over and above the exceptions to deportation. Whilst it may well be that the outcome would be the same, the absence of such a full and proper assessment undermines the sustainability of the judge's decision.
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> 13. For all these reasons I accept that the judge materially erred in law and that his decision must be set aside, albeit to a limited extent. In light of my rejection of the first ground of appeal, the re-making of the decision will be limited to a determination of the 'unduly harsh' issue under paragraph 399(a) and (b) of the immigration rules and the question of 'very compelling circumstances' over and above the exceptions to deportation. I find no merit in the assertion at [10] of Ms Adams' written submissions that the appellant did not receive a fair hearing and, in view of the extent of the errors of law I have identified above, I see no reason why the decision cannot be re-made in the Upper Tribunal on the basis of further submissions.
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> 14. In light of the current circumstances relating to Covid 19, I am provisionally of the view that the re-making of this decision at a resumed hearing can and should be held remotely, by telephone or Skype for Business on a date to be fixed."

7. In reply to directions made with that decision, the appellant's solicitors requested a face-to-face hearing, whereas the respondent was content for the hearing to be held remotely. In a further note and directions issued on 6 November 2020, the appellant's request was refused on the basis of the absence of any satisfactory explanation as to why a face-to-face hearing was required.

Hearing and Submissions

8. The matter then came before me for the decision to be re-made, by way of a remote hearing on skype for business. The appellant and his wife gave oral evidence, remotely, from their home. Both adopted their previous and more recent witness statements as their evidence.

9. The appellant confirmed that the convictions listed in the Trial Record Sheet all related to the mortgage fraud in 2007 and the false documents used in that fraud. He denied the suggestion from Mr Lindsay that he had complete disregard for the law and said that he was ill-informed at the time that he committed the offences and that he was under pressure from his family in Nigeria. He had learnt from his past mistakes and had worked hard to make amends and to become a better person. He tried to be a good person and someone his children could look up to, and he was trying to give back to society through his charity and community work. Although he had committed offences previously, he was alone at that time, whereas now he had a family and he wanted to support his daughters. The appellant's wife said that she was not complicit in his offending and had not been aware of his past until his arrest in 2016 when the documents were found. They had tried to legalise his stay since then. She had found it very difficult when he was in prison and had found herself alone and in debt and had lost her job. She had had a mental breakdown. She had not asked for any medical treatment, preferring to deal with it by herself. She had managed to reduce her debt a lot since that time. It would be very difficult

for her to manage if he was deported as she would be unable to work full-time and could not survive on a part-time income.

10. Mr Lindsay submitted that the appellant's evidence and that of his wife was unreliable. The adverse credibility findings made by the First-tier Tribunal Judge had been preserved and therefore the evidence now given should be treated with caution. The independent social worker's report should be given little weight as it was based upon what the social worker had been told by the appellant and his wife and it was flawed in many other ways as well. The ISW's conclusions were based upon assumptions, namely that the children would suffer emotionally if the appellant was deported, whereas that was not supported by any evidence and the report did not define 'serious emotional harm'. Whilst it would be difficult for the children, that was not enough to reach the high threshold of 'unduly harsh' or 'very compelling circumstances'. Little weight could be given to the appellant's family life, in any event, pursuant to section 117B(4)(b) of the 2002 Act, since his relationship with his wife was established at a time when he was in the UK in breach of a deportation order. It was not an unduly harsh option for the appellant's wife and children to remain in the UK without him. Alternatively, family life could continue in Nigeria, with the appellant and his wife finding employment there and the children continuing their education there. There were no very compelling circumstances as there was a very pressing public interest in the appellant's deportation owing to his history of serious offending over a lengthy period and the importance of deterring foreign nationals from returning to the UK in breach of deportation orders and then committing crimes. The appellant's private life, in terms of voluntary and community work, carried little weight, as per section 117B(4)(a) of the 2002 Act. Although the appellant was considered to present a low risk of re-offending, that did not mean that there was no risk.

11. Ms Adams submitted that the low risk assessment was an important factor, as was the fact that the appellant's most recent offending was as long ago as 2007 and that the sentencing judge accepted that the mortgage had been obtained by the appellant to provide a home for his family. There was a vast amount of documentation showing that the appellant was trying to do the best he could to make amends for his past offending, by way of volunteering and looking after his children. Due weight should be given to the ISW report which was not based only upon what had been said by the appellant and his wife, but also from interviewing the two children. The report showed the direct impact the appellant's deportation would have on the children. Ms Adam relied on the findings in HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 in regard to the importance of the appellant's level of involvement in his children's lives and the closeness of the family unit.

Discussion and Findings

12. The re-making of the decision in the appellant's appeal involves a fresh assessment of the appellant's ability to meet the exception to deportation in section 117C(5), specifically the question whether: "*the effect of C's deportation on the partner or child would be unduly harsh*" and whether, if that exception does not apply, "*there are very compelling circumstances, over and above those described in Exceptions 1 and 2*".

13. It is clear from the recent caselaw, and in particular as a result of Lord Carnwarth's judgment in KO (Nigeria), that a consideration of 'unduly harsh' in section 117C(5) is based upon the interests of the children and does not include a balancing exercise against the severity of offending of the appellant, as was previously considered to be the case. The relevant findings in KO (Nigeria) were considered at [42] to [44] of HA (Iraq):

> 42. "At paras. 20-23 Lord Carnwath considers the language of section 117C, and more particularly sub-section (5), as regards the relative seriousness issue. At para. 21 he analyses the wording of Exception 1, describing it as "self-contained", and at para. 22 he concludes that the same is true of Exception 2. He continues, at para. 23:
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> "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."
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> That is an important passage, and it is necessary to identify exactly what Lord Carnwath is and is not saying.
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> 43. The starting point is that the question to which the reasoning is directed is whether the word "unduly" imports a requirement to consider "the severity of the parent's offence": that, as I have said, was the actual issue in the appeal. Lord Carnwath's conclusion is that it does not: see the sentence beginning "What it does not require …". The reason why there is no such requirement is that the exercise required by Exception 2 is "self-contained". I should note at this point that it follows that it is irrelevant whether the sentence was at the top or the bottom of the range between one year and four: as Lord Carnwath says, the only relevance of the length of the sentence is to establish whether the foreign criminal is a medium offender or not.
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> 44. In order to establish that the word "unduly" was not directed to the relative seriousness issue it was necessary for Lord Carnwath to say to what it was in fact directed. That is what he does in the first part of the paragraph. The effect of what he says is that "unduly" is directed to the *degree* of harshness required: some level of harshness is to be regarded as "acceptable or justifiable" in the context of the public interest in the deportation of foreign criminals, and what "unduly" does is to provide that Exception 2 will only apply where the harshness goes beyond that level. Lord Carnwath's focus is not primarily on how to define the "acceptable" level of harshness. It is true that he refers to a degree of harshness "going

> beyond what would necessarily be involved for any child faced with the deportation of a parent", but that cannot be read entirely literally: it is hard to see how one would define the level of harshness that would "necessarily" be suffered by "any" child (indeed one can imagine unusual cases where the deportation of a parent would not be "harsh" for the child at all, even where there was a genuine and subsisting relationship). The underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category."

14. Nevertheless, for the purposes of this appeal, it seems to me that it is relevant to start by considering the appellant's criminal and immigration history, since it is his case that his close relationship to his children and the best interests of his children have led to him becoming a changed person and an integral part of his children's lives. Further, there has to be a relevant distinction, in terms of the children's interests, between a person who is wholly invested in his children and who is a constant presence in their lives as opposed to one who is likely to re-offend and whose criminal and general profile is such that he is likely to be absent from the children's lives. To that extent, therefore, the appellant's criminal history and profile are not wholly irrelevant considerations when assessing the best interests of the children and the 'unduly harsh' issue.

15. It is undoubtedly the case that the appellant has a significantly adverse offending history, both in terms of criminal and immigration offending. He has been convicted of crimes involving fraud and deception on two occasions, both resulting in substantial periods of imprisonment, of three years in 2005 and two years in 2017/8. He also returned to the UK in breach of a deportation order only a few months after being deported, in 2006, and has remained in the UK without any lawful basis for the past 14 years, using an alias in the early part of his return to the UK.

16. The appellant claims, however, that that was all in the past, prior to the establishment of his family life, and that he has spent the last few years seeking to make amends and to give back to society, through volunteering and community work and encouraging his children in their development and academic and other achievements. He claims that, whilst his most recent convictions were in 2017 and that he was in prison from November 2017 to November 2018, those convictions related solely to crimes committed in 2007 and that he had not re-offended since that time. Judge Brewer, when dismissing the appeal in the First-tier Tribunal, did not accept the appellant's claim that the false identification documents found in his home at the time of his arrest in December 2016 had not been used since the mortgage fraud in 2007. Neither did Judge Brewer accept the appellant's claim that he had obtained the mortgage to provide a home for his family, despite that having been accepted by the Crown Court Judge in the criminal proceedings. Those adverse credibility findings were challenged in the appellant's appeal but were not set aside and they are therefore a starting point for my own assessment. However, I note that there still remains no evidence to show that any further offences were committed after the mortgage fraud in 2007 and that the convictions in 2017/8 related to anything other than that fraud. The Crown Court Judge, when sentencing the appellant on 19 March 2018, imposed a sentence of eight months for each of the three counts relating to possession of false documents with intent, to run concurrently, and it was the mortgage fraud itself which gave rise to the lengthier sentence of two years.

17. The appellant's claim not to have re-offended since the mortgage fraud and to be a changed person is certainly consistent with the prison and probation service reports, at pages 294, 297 - 307 referring to his role and achievements in prison, and at pages 308 and 309 referring to the low risk of re-offending he presented and his level of engagement in supervision, the glowing reports in the Offender Data reports in particular at pages 322 to 325 of the appeal bundle, and the evidence of his efforts to integrate into society by way of his extensive volunteering and community activities (page 327 to 342), as well as the evidence of his efforts to support his children in their development.

18. As for the appellant's breach of his deportation order, despite the fact that there is evidence within the appeal bundle (pages 86 to 98) which goes some way to support his account of his reasons for returning to the UK, aside from his relationship with his partner, involving disputes with his extended family members over his father's will and his fears of violence in Nigeria, his disregard for the UK immigration laws is a very significant matter weighing against him. However, as discussed above, although a matter adversely affecting the appellant in a proportionality balancing exercise, that is not a matter of material relevance when considering the initial, 'unduly harsh' question.

19. I therefore turn to the relevant question, namely whether the appellant's deportation would be unduly harsh on his wife and children. I do so on the basis that the appellant has made positive efforts to change and has turned his back on offending in order to devote himself to his family. That of course is not in itself a basis to find that deportation would be unduly harsh on his family but, as I have mentioned above, is not an entirely irrelevant consideration. Nevertheless, the threshold is a high one. In assessing whether the effect of deportation is 'unduly harsh', the Court of Appeal, in HA (Iraq), endorsed the approach in KO (Nigeria), that that was a stringent test:

> "[51] …the criterion of undue harshness sets a bar which is "elevated" and carries a "much stronger emphasis" than mere undesirability"

although adding that:

> "[52]…while recognising the "elevated" nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of "very compelling circumstances" in section 117C (6)."

20. The first question is whether it would be unduly harsh for the entire family to relocate to Nigeria, so that there would be no separation of the children from their father. It is relevant to note that the appellant's wife is from Nigeria and lived there for the first 23 years of her life before coming to the UK. Whilst she has become a British citizen, with all the rights that that entails, and has established a good career in the UK, I do not consider that it would be unduly harsh for her to return to Nigeria in order to maintain her family life with the appellant, had there been no children involved. However, there are two British children involved and I have no doubt in concluding that it would be unduly harsh to expect them to relocate to Nigeria, a country to which they have never been. The two girls, J aged 15 years and M aged 13, have lived in the UK since birth and are at an age

when their lives are rooted in the society and education system of the UK, with J being at a crucial stage in her education, in her first year of GCSEs.

21. The more relevant question is whether it would be unduly harsh for the children to be separated from the appellant, bearing in mind the high threshold to be met. The Court of Appeal in HA (Iraq), at [56], expressed caution in treating KO as "*establishing a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent*"", and emphasised, at [82] and [83], the fact that cases of this kind were never truly identical and had to be individually assessed. At [56] the Court said:

> " 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."

22. In this case, the evidence produced demonstrates particularly strong ties between the appellant and the two girls. Although J is not the appellant's biological child, it is clear from the evidence that she is not aware of this and that the appellant treats her as his own daughter, there being no contact with her biological father. The evidence is that, whilst the appellant did not live on a permanent basis with his now wife and daughters until 2013, he was very much involved in their lives in the preceding years and has always been present in their lives. The girls were not aware that he was in prison from November 2017 to November 2018, but believed him to be working away from home. Not only is the appellant very much involved with the girls' lives, but the evidence shows that he is at the very least a joint carer, if not the primary carer, with his wife's previous studies and her job involving long hours and travel abroad (pages 103 to 107). All of that is supported by documentary evidence within the appeal bundle and includes evidence of his direct involvement in the girls' schooling, education and out of school activities (pages 123 onwards) and his wife's evidence in her second statement about his involvement in home-schooling the girls during the pandemic.

23. It is also apparent from the evidence in the appeal bundle that the appellant's wife struggled to maintain her work/life balance during the appellant's previous absence when in prison, that her work suffered to the extent that she was eventually dismissed from her job (pages 99 to 102). I accept the evidence she gave before me, and in her statement (paragraph 15 of her second statement), as to her struggles, emotional and financial, at the time, all of which is supported by the reports from Peter Horrocks, the independent social worker (ISW), whereby he refers to the impact of her stress upon the girls.

24. Mr Lindsay asked me to accord little weight to the ISW reports given that they were based on the accounts given to Mr Horrocks by the appellant and his wife, who had been found by the previous Tribunal to be lacking in credibility. However, Mr Horrocks

interviewed the two girls independently of their parents and I therefore see no reason why his expert opinion should not be accorded weight. Mr Horrocks speaks of the two girls being high achievers, both academically and in sporting and musical activities, who suffered from behavioural difficulties during the appellant's previous absence and who would clearly be very much affected by separation from him. He speaks of their emotional vulnerability (paragraph 4.6 of his second report) and, at paragraph 4.13, of the risk to the girls of "*experiencing long-term, if not permanent harm to their physical, their emotional, their educational and their social development*" and his concerns about their mother being able to cope if their father was absent again (paragraphs 4.13 and 5.2). Whilst it is the case that there is evidence of other family members in the UK, including the appellant's sisters, it is clear that they are not in a position to provide the level of support needed to alleviate the stress of the appellant's wife in coping with the family in the appellant's absence. In any event, it is the impact upon the girls of the absence of the appellant himself which was of concern to Mr Horrocks, given their close relationship and the role he plays in their lives

25. For all of these reasons, taking account of all the evidence and the overall picture of the family, their relationships with each other and the appellant's role in the family, it seems to me that the high threshold is met in regard to the 'unduly harsh' test. Not only is it clearly and undoubtedly in the best interests of the two children that the appellant remain in the UK with them and that they are able to continue their family life together in this country, but I accept that the effect of deportation upon the children would be unduly harsh. I accept that the exception to deportation in paragraph 399(a) of the immigration rules and section 117C(5) of the 2002 Act is met, such that the public interest does not require the appellant's deportation and that the appellant's deportation would breach his Article 8 rights and those of his wife and children.

DECISION

26. The original Tribunal was found to have made an error of law and the decision was set aside. I re-make the decision by allowing the appellant's appeal on Article 8 human rights grounds.

Signed *S Kebede*
Upper Tribunal Judge Kebede Dated: 18 January 2021