Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07729/2017
UI/2021/000819

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 March 2022	**On 17 May 2022**

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL JARVIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR EMMANUEL IDOKO-OKPI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T. Lay, Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Ms J. Isherwood (Home Office Senior Presenting Officer)

Respondent

DECISION AND REASONS

INTRODUCTION

1. The Appellant in these proceedings is the Secretary of State, however, for ease of reference with the decision of the First-tier Tribunal we shall continue to refer to Mr Idoko-Okpi as the Appellant.

2. On 15 September 2021, Designated Judge of the First-tier Tribunal Shaerf (hereafter "the Judge") promulgated his decision allowing the Appellant's

Article 8 ECHR appeal against the Secretary of State's refusal of his human rights claim made in response to the attempt to deport him from the United Kingdom to Nigeria. The original refusal letter is dated 27 July 2017 and there is also a supplementary refusal letter dated 8 October 2019.

3. On 20 September 2021, the Secretary of State applied for permission from the First-tier Tribunal to appeal to the Upper Tribunal; this was granted on all of the pleaded grounds by First-tier Tribunal Judge Grant on 28 October 2021.

THE APPEAL HEARING

4. The error of law hearing was conducted with all parties in person at Field House, albeit the Appellant himself did not attend the hearing.

5. During preliminary discussions it became clear that the stitched bundle provided to the Tribunal did not include the Appellant's extensive evidence bundle from the First-tier hearing of the appeal (on 23 August 2021 at Taylor House). Mr Ley and Ms Isherwood helpfully provided us with a digital version of the bundle and we are satisfied that after preliminary discussions that we had all of the relevant documents.

6. As the grounds of challenge were the Secretary of State's we heard submissions from Ms Isherwood of which we have kept a careful note, and having heard those submissions we decided that we did not need to hear from Mr Ley, and orally dismissed the Secretary of State's appeal.

THE FTT JUDGMENT

7. In order to explain why we have dismissed the Secretary of State's appeal and why we did so without hearing oral submissions from Mr Ley (albeit we had the benefit of his detailed and extensive rule 24 response dated 14 December 2021), it is important to lay out some of the material features of the First-tier's decision:

   (a) The Judge noted that the Appellant came to the United Kingdom when he was nine years old (on 5 May 1999) and was eventually granted Indefinite Leave to Remain on 11 November 2009, [2].

   (b) The Appellant's criminal history is also properly detailed by the Judge including the Appellant's conviction for burglary with intent to steal (24 February 2014) with an accompanying 24 months imprisonment, [4].

   (c) Additionally on 4 November 2016 the Appellant was convicted for offences of disorderly behaviour, obstructing an officer in the exercise of the powers to search for drugs and assaulting a constable which also included the racist abuse of the arresting officers. He was sentenced to 4 months imprisonment suspended for two years and ordered to undertake rehabilitation activities to address his abuse of alcohol, [6].

(d) The Judge also carefully laid out the submissions from the Presenting Officer (Mr Marcantonio-Goodall) at [35–41], which included reliance upon the Supreme Court's decision in KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent) [2018] UKSC 53, with the additional submission from the Presenting Officer that the Appellant's criminality was towards the less serious end of medium offending, [35].

(e) Importantly, in respect of the independent social worker's report and addenda as well as the expert country report from Prof. Aguilar, the Presenting Officer left those documents to be considered by the Tribunal independent of any submission from the Secretary of State other than the observation that the independent social worker's report and addenda were consistent with the oral evidence of the parties as given before the Tribunal, [38].

(f) The Presenting Officer also accepted that the evidence of the Appellant and his partner, Joanna, had been straightforward and consistent, [39].

(g) The Judge also prompted the Presenting Officer to provide submissions on the Court of Appeal's decision in HA (Iraq) v Secretary of State for the Home Department (Rev 1) [2020] EWCA Civ 1176 ("HA") and in response the Presenting Officer referred to the severity of the Appellant's offending and the history of the Appellant's overuse of painkillers which had been previously concealed, [40]. At [41], the Presenting Officer submitted that the Appellant's son (Isaiah) was young enough to both adapt to life in Nigeria or to life without the Appellant.

(h) At [56], the Judge reiterated the acceptance by the Presenting Officer of the credibility of the oral evidence of the Appellant and his partner and therefore concluded that the Appellant (and his partner) were reliable witnesses. However, the Judge also noted that the Appellant's partner's oral testimony had been hampered by her mental fragility.

(i) The Judge furthermore recorded that the Presenting Officer had not challenged the content or expertise of the authors of the independent social worker's report or the country report, [60]. In our view it is worth summarising the content of these reports in a little more detail because of their material relevance to the conclusions of the Judge:

i. The independent social worker's report noted that Joanna's sister and brother had distanced themselves from her after learning of her pregnancy and also recorded that her father is unwell and drink dependent, [60].

ii. The Enfield report of May 2021 records the unusual circumstances in which the family were referred to social services – but importantly records that this was not because of any direct concern about the family itself. The Judge noted that the report indicated

that the case was stepped down to a child in need plan and that the relatively few criticisms in the report, looked at in light of Joanna's mental health problems, were minor and pointed towards difficulties negotiating with the local authority, school and medical authorities, [61] (the first numbered in this way.)

iii. In the second version of [61], the Judge formally placed reliance upon the independent social worker report and concluded that both the Enfield report and the independent social worker's report "*paint a picture of a family under immense pressure because of i) their worries about their child and the very real prospect of an adverse diagnosis in relation to the child's speech and language difficulties and that the child will be found to be on the autistic spectrum and need treatment aggravated by the delay in arranging the test because of the pandemic; ii) their dire financial circumstances; iii) their isolation as a family unit and lack of available support whether from family, friends or social services, regardless of the pandemic and iv) the overarching anxiety about the Appellant's threatened deportation. They also show the considerable dependence of Joanna in her parenting role on the presence and extensive involvement of the Appellant without which Joanna would be unable to cope and the consequent likelihood of a need for a very considerably increased involvement by social services and the unspoken possibility of the family unit of mother and child being split*."

(j) At [67], the Judge isolated the relevant issues to be determined from the statutory exception at section 117C(5) NIAA 2002.

(k) He concluded that for the reasons given in the independent social worker's report and the country report that it would be unduly harsh to expect Joanna and their child to join the Appellant in Nigeria. In doing so the Judge referred to Joanna's Ghanaian descent and more importantly that the Appellant and Joanna have recognised that the care and upbringing of their child is going to be different from other children. This is manifested in the accepted evidence that the couple's choice of nursery school for the child is likely to be governed by the presence or otherwise of a special unit for children with speech and language problems.

(l) At [71-72] the Judge then considered the secondary elements of the unduly harsh test: whether or not it would be unduly harsh for the Appellant to be separated from his partner and child as a consequence of the act of deportation. The Judge recorded that the Appellant would travel daily from E12 so as to arrive in Edgware before the child wakes and then departs after the child has been put to bed; he also acknowledged the overall evidence that showed that the Appellant was able to care more ably for the child than his partner. The Judge therefore concluded that this overall evidence confirmed the centrality of the

Appellant's role in the family and in the care and upbringing of his child in a way, as the Judge put it, "*far beyond the normal love and affection between a parent and child*".

(m) At [72] the Judge concluded by saying that he was satisfied on the balance of probabilities that the Appellant plays such a significant role in respect of the care of his child and in supporting his partner (who is a fragile person in respect of her mental health), that his absence from the family would be unduly harsh for both Joanna and their child. The Judge also concluded by observing that the family circumstances were difficult and far from typical.

THE GROUNDS OF APPEAL (DATED 15 SEPTEMBER 2021)

8. The Secretary of State challenged the decision of the Judge on two main bases:

   (a) That the Judge had failed to have regard to the relevant test of undue harshness in section 117C(5) NIAA 2002 whilst also failing to provide adequate reasons for finding that the Appellant's deportation would result in unduly harsh consequences to the relevant qualifying parties (paragraphs 1 to 7).

   (b) That the Judge also failed to give adequate regard to the broad principle of the public interest as relevant to the assessment of whether or not there are very compelling circumstances over and above the exceptions, as per section 117C(6) of the same Act.

THE SECRETARY OF STATE'S SUBMISSIONS

9. During Ms Isherwood's submissions, we sought to clarify if the Secretary of State's grounds of challenge to the unduly harsh findings effectively amounted to a reasons challenge. Ms Isherwood confirmed that this was an accurate description of the Secretary of State's complaint.

10. Ms Isherwood also sought to rely upon two cases, without objection from Mr Ley: Imran (Section 117C(5); children, unduly harsh : Pakistan) [2020] UKUT 83 and MI (Pakistan) v Secretary of State for the Home Department [2021] EWCA Civ 1711. Again during discussion Ms Isherwood clarified that she was only relying upon MI on the basis that it confirmed the high threshold of the unduly harsh test (albeit we note that it also establishes that the Upper Tribunal's reasoning in Imran was unlawful.)

11. In totality it was asserted that the Judge had not grappled with the high threshold of undue harshness and not explained how the facts of the case as found successfully engaged with that test.

FINDINGS AND REASONS

Ground 1

12. In our view the high point of the Secretary of State's case in this particular appeal was gaining permission to appeal to the Upper Tribunal in the first place. It is our view that this ground of appeal, challenging the Judge's conclusions on undue harshness, has failed to identify any error, let alone a material one.

13. There was, in reality, no difference between the parties in respect of the current position in binding authority as to the understanding and application of the undue harshness test in section 117(5). We have however found it useful to refer to the relatively recent decision of the Court of Appeal in KB (Jamaica) v Secretary of State for the Home Department [2020] EWCA Civ 1385 which summarises the learning since KO (Nigeria) v Secretary of State for the Home Department [2018] 1 WLR 5273

> "15. The meaning of "unduly harsh" in the test provided for by s.117C(5) has been authoritatively established by two recent decisions: that of the Supreme Court in *KO (Nigeria) v Secretary of State for the Home Department* [2018] 1 WLR 5273; and the decision of this court in *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 117. It is sufficient to note the following without the need to quote the relevant passages:
>
> (1) The unduly harsh test is to be determined without reference to the criminality of the parent or the severity of the relevant offences: *KO (Nigeria)* para 23, reversing in this respect the Court of Appeal's decision in that case, reported under the name *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617, in which at paragraph 26 Laws LJ expressed this court's conclusion that the unduly harsh test required regard to be had to all the circumstances including the criminal's immigration and criminal history.
>
> (2) "Unduly" harsh requires a degree of harshness which goes beyond what would necessarily be involved for any child faced with deportation of a parent: *KO (Nigeria)* para 23.
>
> (3) That is an elevated test, which carries a much stronger emphasis that mere undesirability or what is merely uncomfortable, inconvenient, or difficult; but the threshold is not as high as the very compelling circumstances test in s. 117C(6): *KO (Nigeria)* para 27; *HA (Iraq)* paras 51-52.
>
> (4) The formulation in para 23 of *KO (Nigeria)* does not posit some objectively measurable standard of harshness which is acceptable, and it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances; it is not possible to identify a base level of "ordinariness": *HA (Iraq)* paras 44, 50-53, 56 and 157, *AA (Nigeria) v*

> *Secretary of State for the Home Department* [2020] EWCA Civ 1296 at para 12.
>
> (5) Beyond this guidance, further exposition of the phrase will rarely be helpful; and tribunals will not err in law if they carefully evaluate the effect of the parent's deportation on the particular child and then decide whether the effect is not merely harsh but unduly harsh applying the above guidance: *HA (Iraq)* at paras 53 and 57. There is no substitute for the statutory wording (*ibid* at para 157)."

14. In our judgment, it is perfectly clear that the Judge of the First-tier Tribunal understood the relevant jurisprudence in respect of the test of unduly harsh consequences - it is even cited at [35-36] of the judgment itself.

15. It is also clear to us by reference to [40] of the judgment that the Presenting Officer did not even initially seek to make any submissions about the judgment of the Court of Appeal in HA. It also appears to be the case that the Presenting Officer, when prompted to assist the Tribunal with this issue, referred to the severity of the Appellant's offending which of course is simply not a permissible part of the assessment of s. 117C(5).

16. The judgment itself also shows that the Presenting Officer conceded that the Appellant and his partner had been credible and straightforward in their evidence (see [56]) and he expressly made no challenge to the content of the various expert reports before the First-tier Tribunal or the expertise of the various authors (see [59]).

17. Although it is true that some of the paragraphs in the latter part of the judgment occasionally switch between a record of the submissions made by the representatives and the observations or findings made by the Judge, nonetheless we have no hesitation in finding that it is abundantly clear what conclusions the Judge drew on the various strands of evidence before him.

18. The entirety of the judgment is of course relevant to the understanding of the decision, but we would simply highlight the second paragraph 62 in the judgment as well as the Judge's direct grappling with the two separate undue harshness questions: 1) the effect on the Appellant's child of relocating to Nigeria and 2) the effect on the child of the separation caused by the Appellant's deportation at [69-72].

19. As we have already summarised earlier in this decision, the Judge perfectly lawfully considered that the expert evidence before him painted a picture of a family under immense pressure and a relatively unusual situation in which the Appellant was better able to provide care for his child than the child's mother because of her own difficulties with her mental health.

20. In the same way we find that the Judge made clear findings in respect of why it would be unduly harsh for this child, bearing in mind the child's particular needs (even without a formal diagnosis of a disorder such as

autism), to be disconnected from his family in the UK and caused to live with his father in Nigeria.

21. In our judgment it is simply wrong for the Secretary of State to submit that the Judge had failed to explain why he considered that the unduly harsh test had been met in this case and we overall consider the grounds to be extremely weak.

22. We therefore find that the Judge did carry out his judicial role entirely compatibly with the requirements in the common law, including Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors [2019] EWCA Civ 1413 at [46]:

> *"...Third, the best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable..."*

23. We also think it necessary to re-emphasise the Court of Appel's long-standing view of the frequent and inappropriate use of the ground of irrationality/perversity. In R (Iran) & Ors v Secretary of State for the Home Department [2005] EWCA Civ 982, the Court stated in clear terms:

> *"11. It may be helpful to comment quite briefly on three matters first of all. It is well known that "perversity" represents a very high hurdle. In Miftari v SSHD [2005] EWCA Civ 481, the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJJ) said that it embraced decisions that were irrational or unreasonable in the Wednesbury sense (even if there was no wilful or conscious departure from the rational), but it also included a finding of fact that was wholly unsupported by the evidence, provided always that this was a finding as to a material matter.*
>
> *12. We mention this because far too often practitioners use the word "irrational" or "perverse" when these epithets are completely inappropriate. If there is no chance that an appellate tribunal will categorise the matter of which they make complaint as irrational or perverse, they are simply wasting time – and, all too often, the taxpayer's resources – by suggesting that it was."*

Ground 2

24. On the basis of our finding that the Judge did not materially err in his conclusion that the Appellant's deportation would lead to unduly harsh consequences, there is no need for us to formally decide the Secretary of State's further challenge to the Judge's assessment of the very compelling circumstances test under s. 117C(6) NIAA 2002. We note that the successful reliance upon s. 117C(5) is determinative (in the Appellant's favour) of the balancing exercise under Article 8(2), as per s. 117C(3).

NOTICE OF DECISION

25. We therefore conclude that the making of the decision by the First-tier Tribunal did not involve any error on a point of law by reference to s. 12(1) of the Tribunal, Courts and Enforcement Act 2007 and the appeal is therefore dismissed.

Signed  Date 29 March 2022

Deputy Judge of the Upper Tribunal Jarvis

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email