Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **HU/01040/2015**

THE IMMIGRATION ACTS

At **Royal Courts of Justice** Decision signed: **10.11.2015**

On **26.10.2015** sent out: **on 13.11.2015**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Tunde KAZEEM

appellant

and

Secretary of State for the Home Department

respondent

Representation:
The appellant in person
Mr K Norton for the respondent

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Jane Nightingale), sitting at Hatton Cross on 13 August, to dismiss a human rights appeal against deportation by a citizen of Nigeria, born 16 June 1983.

NOTE: no anonymity direction made at first instance will continue, unless extended by me.

2. Notice of hearing was given on 6 October, to the appellant and his then solicitors, Rest Harrow LLP. Directions already sent out on 30 September had contained this:

> "The parties shall prepare for the forthcoming hearing on the basis that it will be confined to whether the determination of the First-tier Tribunal should be set aside for legal error and, if so, whether the decision in the appeal can be re-made without having to hear oral evidence; in which eventuality the Tribunal is likely to proceed immediately with a view to re-making the decision."

3. While some of the legal jargon in that notice might not have been as clear as one would have wished, the appellant's solicitors had discussed its implications with him before the hearing, and it was clear that he understood them. He told me, as the solicitors had confirmed in a letter of 23 October, enclosing a handwritten note from him, that he had chosen to represent himself before me, as he had been advised that a fresh hearing of the evidence was unlikely. This in my view was a realistic assessment of the situation by the solicitors, since, as will become clear, the result of this appeal will depend very much more on secondary evaluation of the facts than on primary findings on credibility or other points. I did my best to explain things to the appellant as it went along.

4. **History** The appellant had first come to this country with his father in 1996, when he was 13. He stayed on here with his mother; but it was not till 2007, by which time he was 24, that any attempt was made to regularize his situation, by way of an application for leave for him to remain as the 'unmarried partner' of a British citizen. That leave was granted, following a successful appeal in 2008, and lasted till 2011: before it ran out, the appellant applied for further leave to remain on a human rights basis, but that application was rejected, for lack of the necessary fee, and was not renewed. Meanwhile the appellant had already started to display symptoms of what was described as drug-induced psychosis, resulting in two stays in hospital between 2004 – 08; but in that year his prognosis was said to be good.

5. However the appellant had already begun to offend against the criminal law: in July 2007 he was disqualified from driving for 18 months, for failing to provide a specimen of breath; but in September that year he was before a magistrates' court again for driving whilst disqualified, which, not too surprisingly in the circumstances, resulted in his being sent to prison for four months. Another three months' sentence for the same offence followed in May 2008.

6. Meanwhile the appellant's personal life had been eventful, since he had begotten two children with different women: a daughter, now 12, and referred to by the judge as L, with a woman who in the interests of her daughter's anonymity I shall refer to simply by her Christian name, Samantha; and a son K, now 8, with another woman called Christine.

7. It was the appellant's relationship with Christine which had led to his recent, and more serious pattern of offending. In 2010 he had been sentenced to a community order, with a restraining order protecting her till 2012. However in 2011 he was back before the magistrates' court for breach of that order, for which a further community order was imposed, and the restraining order continued. Later that year he was dealt with for further breaches, this time of the community order, rather than the restraining order. In May 2013 he was sentenced to 20 weeks' imprisonment for harassing Christine; but in July that year he was back in court for the same thing, and this time received a sentence of 26 weeks, the most the magistrates could give for a single offence.

8. The next thing that happened on this front was on 6 September 2014, when the appellant went round to the flat where Christine and K were living, and began knocking, first on the door, and then on all the windows, including K's bedroom window, upsetting him. This went on for about half an hour, during which the appellant seemed to be laughing all the time. The police were called, and he was arrested.

9. The appellant's explanation in the Crown Court for his behaviour was that he was having trouble getting to see K; but, as the sentencing judge pointed out, he had solicitors dealing with that problem, and was well aware that was the way to handle it. This time the appellant again pled guilty before the magistrates; but they committed him for sentence to the Crown Court. The judge noted what was described in the pre-sentence report as the 'medium risk' of the appellant's re-offending; but he said he was particularly concerned about the risk he posed, "… because there is a pattern which appears to be escalating"; he went on to note with concern the risk the appellant posed to K's psychological well-being. The judge took the starting-point for what the appellant had done as 15 months' imprisonment; but, in view of his early plea, he reduced that to ten months. The judge made no reference to any psychological incapacity or lack of responsibility on the appellant's part.

10. That sentence did not of course make the appellant liable to automatic deportation; but on 15 November 2014 the Home Office decided to deport him, as a person whose persistent offending made his removal conducive to the public good. On 12 January 2015 a deportation order was served on the appellant, and on the 15th he was transferred to a psychiatric hospital "due to a relapse in his mental health". He is now however in immigration detention, and there was no suggestion before the judge or me that he was unfit to give evidence, or to be removed, if it came to that. The appellant impressed me as entirely lucid and reasonable during the hearing. In April the deportation order was revoked, and further representations invited, the rejection of which led to the decision under appeal.

11. **Law** The judge helpfully set out the Immigration Rules which applied to this case, as well as some which did not. I shall do the same, so far as necessary.

‘398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and …

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life …’

12. Quite rightly, there was no challenge, before the judge or me, to the Secretary of State’s view that the appellant was a ‘persistent offender’ under paragraph 398 (c). It follows that the Secretary of State, and the judge had first to consider whether paragraphs 399 or 399A applied to him. It is clear that paragraph 399A does not, because, though he may have been in this country for most of his life, only three years (2008 – 11: see History) were with leave. So one turns to 399: the Secretary of State and the judge accepted that the appellant had a ‘genuine and subsisting relationship’ with L, who is a British citizen, and for whom it would be unduly harsh to have to go to Nigeria. The next question is whether it would be unduly harsh for her to remain here without the appellant.

13. This was the first point on which the judge's decision was challenged by the Home Office. Without going into the details of their somewhat prolix grounds, I drew the appellant's attention to this readily understood point. At paragraph 65 the judge made this finding:

> "I am satisfied on balance, albeit only just, that there will likely be an adverse impact on "L" if she can not [*sic*] renew her regular face-to-face contact with her father."

However at her concluding paragraph 75 the judge went on to say this:

> "Taking the evidence before me in the round, I am satisfied on the balance of probabilities that the effect on the child "L" of this appellant's removal would be unduly harsh in all the circumstances."

14. I could not see anything between these two passages which had led the judge from being "only just" satisfied on the point she considered at 65, to the strong finding with which she ended at 75. There had been a good deal of intervening discussion of the appellant's own mental state; but I could not see anything to justify this progression on L; nor, when I put it to him with suitable explanation, could the appellant. It must follow that the judge's decision was wrong in law, at least to the extent that she failed properly to explain her conclusion on the point on which she allowed the appeal.

15. **Fresh decision** It followed that I needed to re-decide the case for myself: as I explained to the appellant, I was entirely content to adopt the judge's primary findings of fact, including her conclusion at 65, and her recital of the evidence given before her. The appellant relied on two main points before me: first there was the likely effect of his removal on L, which was the basis on which the judge allowed his appeal; and second the consequences of it for him.

16. **Effect on L** L's mother Samantha did not come to the hearing before the judge: the appellant said she had no-one to help her look after L or her two other children, though she did manage to hold down a part-time job. Nor did she appear before me: the appellant said she was on holiday with the children (it was half-term for many). So, like the judge, I have to rely on the letter Samantha sent on 26 April, to 'whom it may concern'.

17. Samantha said she and the appellant had parted soon after L was born in 2003:

> "… although me and [the appellant's] relationship came to an end we have a great connection for our daughter also [the appellant] has a great bond with his daughter he has regular contact with her every fortnight from when she was little and this has been an on-going thing despite him being in and out of hospital and prison he has always been a part of her life he has also financially help us both.
>
> I believe [the appellant] being deported to his home country will put a huge impact on L and I because I will not have that extra support of money and it was also will affect L.

> For the last few months L has been suffering from depression due to a lot of new changes such as being bullied at school and not being able to see her dad I believe its best that she doesn't see him in a deportation centre as it's not for children especially when they are suffering themselves L has been referred by her GP to a child psychologist we are still waiting for some counselling sessions to help her with what she is going through.
>
> I also believe if [the appellant] was deported back to his home country this will break her and their relationship for good which I don't want to happen."

18. Since there is no evidence before me from any child psychologist, or even from L's GP or her school, the only other evidence about the appellant's relationship with L is his own, and his mother's and sister's before the judge. The appellant told her he used to see L, and K too before he was sent to prison for breaking the restraining order (presumably in 2013), every other week-end from Friday to Sunday. They stayed with him, though sometimes he took them to his mother's: he used to take them to the park too, and play football and spend time in the garden with them. However the appellant's mother told the judge the children had used to stay with her, and then she would call him and he would come and take them out. She couldn't explain the difference between her evidence and his. The appellant's sister too said she had used to see the children at her mother's: the last time had been in perhaps 2012.

19. The appellant himself said that before he started his present time in custody he had used to see L every fourth night; since then he spoke to her every fourth night. He thought it would break L's heart and his if he were sent back to Nigeria. As for the conduct for which he had been sent to prison, he had been prescribed medication which had eventually improved his state of mind, since when he hadn't repeated it.

20. The judge did not make any detailed findings about the level of contact between the appellant and L: though she did express understandable concerns (at paragraph 63) about the lack of any evidence going to L's welfare. I am not going to depart from her conclusion that there was a genuine and subsisting relationship between them; but to reach a decision on whether separating them by sending the appellant back to Nigeria would be unduly harsh for L, I need to make my own findings about their level of contact in the past.

21. I accept the evidence that L (and K) had come to stay with their father's side of the family until 2013 at latest. In view of the appellant's mother and sister's evidence, I do not accept that they used to stay with him all week-end, though I do accept that he used to take them out from his mother's. On the basis of Samantha's evidence (see **17**) I accept that L at least used to go and stay there every other week-end. I am prepared to accept that he has had some phone contact with L from prison and detention; but without any phone records, usually available from places of detention where calls need to be made through the centre's system, I am not prepared to accept that it has been as regular as every fourth night, as the appellant maintained.

22. Besides the lack of evidence from independent sources such as L's school, GP or a child psychologist, there is, and was before the judge nothing from her either. In the case of a younger child, that would have been no surprise; but a 12-year old who was very much devoted to her father might perhaps have sent him the occasional card, given her mother's attitude to their continuing relationship; or have added a few words of her own to what Samantha said. Samantha acknowledged the financial support she had had from the appellant for L, though he can have been in no position to provide any since 2013.

23. The appellant was till shortly before the hearing represented by solicitors (who wrote in on 30 October to say they were representing him once again), and counsel appeared for him before the judge. There is however no recent independent evidence of any contact he may have had with L, or of the likely effect on her of only being able to continue it remotely, as in fact has been the case for at least the last year, since his present time in custody began.

24. As already noted, the appellant cannot qualify for consideration under paragraph 399A, since, though he may have been here for most of his life, only three years of his stay were lawful. Paragraph 399A (a) is in a sense the other side of the *ratio* in *Maslov v. Austria* - 1638/03 [2008] ECHR 546: see paragraph 75

> "… for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion."

25. This appellant does not come within that category. Unless he comes within paragraph 399 (a), because the effect of his removal on L will be unduly harsh, then (see paragraph 398)

> "… the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

26. As to the effect on L, Mr Norton referred me to the recent decision in *KMO* (section 117 - unduly harsh) [2015] UKUT 543 (IAC), disagreeing with an earlier one in *MAB* (para 399; "unduly harsh") [2015] UKUT 435 (IAC). Since *KMO* is more in favour of the appellant, I need say little more than that I prefer it. The effect of *KMO* is set out in the judicial head-note as follows:

> "… the word "unduly" in the phrase "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh."

27. This is hardly surprising, and clearly right, though no doubt it had to be said in 'reported' form because of *MAB*. Turning back to the seriousness of this appellant's offences, while those set out at **5** do show that, as someone who drove whilst disqualified on two separate occasions, one of

them very soon after he had been dealt with for failing to provide a specimen, he was to that extent already in 2007 - 08 'a persistent offender who shows a particular disregard for the law', those of really significant concern are dealt with at **7 – 9**.

28. The sentencing judge went through the appellant's history, which resulted in his having to deal with him for "… what appears to be a fifth breach of a court imposed order", and took "a very serious view" of his offending. Put shortly, the appellant seems to have persistently harassed Christine in her own home from 2010 till 2014, since when his remand in custody, followed by the sentence of imprisonment, and his present immigration detention made that no longer possible. Whether or not he meant her any serious harm, she must have been frightened, for K as well as herself, as the sentencing judge pointed out. If anyone ever was 'a persistent offender who shows a particular disregard for the law', it was this appellant during that time.

29. The appellant's explanation is that he was having difficulty in seeing K; but of course his own behaviour must have made whatever arrangements there were, or whatever he was trying to achieve, very much more difficult over the time in question. As the sentencing judge pointed out, he had solicitors acting for him on that problem, and must have known very well he should take it up through them. If it had been a question of one isolated occasion, when his wish to see K had got the better of his judgment, then it might have been different; but these were five separate occasions over four years. If the appellant's state of mind was to blame, then he had been prescribed medication which later dealt with it; but I do not think he can escape the responsibility for his own actions in that way, since the remedy was literally in his own hands.

30. That is the background against which the effect of the appellant's removal on L has to be considered. Looking at the evidence about her, she used to see him regularly at his mother's at week-ends till 2013; but she has not seen him since he was remanded in custody in 2014. That was her mother's decision; and it is not my business to approve or disapprove of it. Since then, I accept that L has had some phone contact with her father, though not as much as he says.

31. As I pointed out at **22**, there is not only no evidence from independent sources about the likely effect of the appellant's removal on L, but nothing about him from her either. Naturally his mother and sister have supported him, and gave evidence in person before the judge to do so. However, L's mother Samantha was best placed to deal with the effect on her: while her position may have made it hard for her to appear in person, either before the judge or me, to do so, the lack of any oral evidence from her on either occasion leaves me to rely on what she said in her letter (see **17**).

32. Samantha says the appellant's removal would have "a huge impact" on L, and break her and his relationship for good. She does not deal, as she might have been asked to in oral evidence, with the current part, if any,

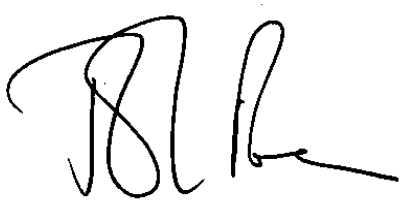
that the appellant plays in L's life; or with how L would cope, not just with his absence, unseen in detention in this country, but far away in Nigeria. There is no mention of any family visits they might make there, or of what IT skills L (like most young people nowadays) might have to help her keep in touch with her father there.

33. In the end, I am left with general assertions about the effect that the appellant's removal would have on L. I have no doubt it would have some effect, even though she does not see him as things have stood for the past year or more. However, girls of 12 are at a period of rapid change in their lives, when their mothers and school-friends may be the most important people for them. This is not of course to run down the part played by fathers of pre-teen girls, but simply to set it in context. If this appellant were innocent of any crime, then I should be sorry to see him parted from L, perhaps till she was grown-up, and able to travel to see him on her own. However, in the context of this case as it is, I could not consider that consequence of his own activities unduly harsh, either for him or for her.

34. Given the way that the appellant's case has been presented, both before the judge and before me, it does not seem to me that this conclusion leaves much room for 'very compelling circumstances over and above those described in paragraphs 399 and 399A'. The appellant himself referred to the length of time he has been in this country, 19 years out of his 32 by the date of the decision under appeal. That does not give him any independent claim to leave to remain under the Rules; nor, without any leave for more than three years out of that time, does it bring him within the principle in *Maslov*. It does not seem to me that his long residence can amount to 'very compelling circumstances' in that sense. It follows that the decision is re-made by dismissing his appeal.

Home Office appeal allowed

Decision re-made: appellant's appeal dismissed



(a judge of the Upper Tribunal)