Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07596/2020
UI-2021-000425

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 March 2022	**On 23 June 2022**

Before

THE HON. MRS JUSTICE ELLENBOGEN,
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MF
(ANONYMITY DIRECTION MADE)

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify MF or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Ms U Miszkiel, Counsel, instructed by Chipstiso Associates LLP

DECISION AND REASONS

Introduction

1. For ease of reference, we shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more the Respondent and MF the Appellant.

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge McMahon ("the judge"), promulgated on 26 August 2021. By that decision, the judge allowed the Appellant's appeal against the Respondent's decision, dated 28 September 2020, refusing his human rights claim, which had been made in the context of deportation proceedings.

3. The Appellant is a citizen of Nigeria, born in 1982. He arrived in the United Kingdom in May 2011 as a Tier 1 post-study migrant. He subsequently obtained two extensions of leave on the basis of Article 8 rights. In January 2020, the Appellant was convicted of conspiracy to dishonestly make false representations in order to make gain for himself or another or to cause loss to another or expose another to risk. In February of that year, he was sentenced to 24 months' imprisonment. This initiated deportation proceedings under section 32(5) of the UK Borders Act 2007. In response to notification of a decision to deport, a human rights claim was made, based on private and family life under Article 8. In respect of the former, it was said (in brief terms) that he had established himself in the United Kingdom. As to the latter (which formed the central thrust of his representations), reliance was placed on his relationship with a British citizen, Miss H, and his parental relationship with their two British children.

4. Following the Respondent's refusal of the human rights claim, the Appellant exercised his right of appeal.

The decision of the First-tier Tribunal

5. The judge began his decision with a summary of the relevant procedural background and noted the evidence presented to him. This included oral evidence from the Appellant, Miss H, and her parents, in addition to a variety of documentary materials. Importantly, these included two reports from Ms Susan Pagella, a psychotherapist with a specialism in the assessment of minor children. The judge concluded that Ms Pagella was "clearly an expert in her field", was aware of her duties as an expert, had been provided with all relevant documentation, and had produced "two detailed, informed, considered and balanced reports about the best interests of the Appellant's children", to which "appropriate weight" was to be accorded: [11].

6. The judge then directed himself to the relevant legal framework, including paragraphs A398-400 of the Immigration Rules, section 117C of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002

Act"), and section 55 of the Borders, Citizenship and Immigration Act 2009: [14]-[18].

7. A detailed consideration of the evidence was set out at [21]-[58]. These were prefaced with the observation that the majority of the relevant factual matrix in the case was not in dispute. Having considered the circumstances surrounding the Appellant's offending at some length, the judge turned to his connections with Nigeria, finding that his parents and a number of siblings continued to reside in that country and that he came from a "wealthy family". The next matter to be addressed was the Appellant's children, who were aged 7 and 8 years old at the time. The judge assessed a range of evidential sources, including Miss H, Ms Pagella's reports, the children's school, and various medical professionals (in respect of the younger child).

8. In respect of Miss H's evidence, the significant impact on the children during the Appellant's imprisonment was noted, with particular reference to the eldest, who had become "very angry, withdrawn and was having nightmares." The incarceration had "massively affected" her son. On the Appellant's release, both children had settled, with the greatest change been seen in the elder. This evidence was supported by that from the school, which confirmed the particular detriment suffered by him. Several passages from Ms Pagella's reports were then quoted, going to the issues of separation and a possible relocation of the family unit to Nigeria. In the words of the expert, the former scenario would have "extensive repercussions regarding [the children's] psychological, emotional and social development and future educational attainment to their long-term 'all-round' detriment", whilst a move to Nigeria would be "little short of catastrophic."

9. The judge had regard to the younger child's medical condition, nephrocalcinosis (a rare disease related to the kidneys), which required regular monitoring and medication.

10. The assessment of the evidence ended with a consideration of Miss H's own circumstances. She had a close relationship with her parents. She had a medical condition which required further investigation.

11. The judge then placed the assessed evidence into the legal framework under a sub-heading of "Application of the Law to My Findings". Having referred to the public interest in the deportation of foreign criminals, he then addressed the private life exception contained within section 117C(4) of the 2002 Act. On a simple analysis of the chronology, the judge found that the Appellant had not spent more than half of his life lawfully in the United Kingdom and therefore could not satisfy the exception: [64]-[65].

12. As to the family life exception under section 117C(5) of the 2002 Act, the judge identified the two possibilities which had to be addressed, namely a relocation by the entire family unit Nigeria (the "go scenario") and a separation (the "stay scenario"): [68].

13. There then followed a specific self-direction to the leading authorities on the unduly harsh test: KO (Nigeria) [2018] UKSC 53; [2019] Imm AR 400 and HA (Iraq) [2020] EWCA Civ 1176; [2021] Imm AR 59. By now well-known passages from the judgment of Underhill LJ were quoted, along with important observations from Peter Jackson LJ about the nature of emotional harm done to children:[69]-[71].

14. On the basis of five considerations predicated on the prior assessment of the evidence, the judge concluded that it would be unduly harsh for the entire family to relocate to Nigeria: [72]. He also concluded that it would be unduly harsh on the children and Miss H if they were to be separated from one another: [73].

15. As to the "stay scenario", the judge reiterated the expert opinion of Ms Pagella on the very strong bond between the children and the Appellant and the likely effects of separation: [75]-[76].

16. Bringing his analysis together, at [77], the judge concluded as follows:

> "The facts in this appeal lead me to find that the Appellant's deportation would cause undue harshness to both Miss [H] and their children. The scale of the emotional harm and the distress that would be caused, whether by separation from the Appellant, on their mother or the likely consequences for the family of relocating as a whole to Nigeria, reaches the elevated threshold required under the statutory exception."

17. The appeal was duly allowed.

The grounds of appeal and grant of permission

18. In view of our analysis and conclusions on the error of law issue, below, it is appropriate to set out the Respondent's grounds of appeal in full:

> "The Judge of the First-tier Tribunal has made a material error of law in the Determination.
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> The appellant made himself liable for automatic deportation when he received a 24 month prison sentence in 2020.
>
> The [judge] finds that it would be unduly harsh for the family to re-locate as a unit to Nigeria, even though this would prevent separation. The appellant agrees he comes from a wealthy family and was privately educated, so it is likely the family would avail themselves of the same for the children and use private rather than public healthcare facilities.
>
> The respondent does not agree it would be [unduly harsh] for the family to move to Nigeria, but if the wife and children do not want to, that is entirely their decision, the respondent is not forcing them to do so, but it is an option.
>
> Other options the [judge] considers is (*sic*) the children going to Nigeria with the Appellant and the mother remaining in UK, or, the appellant going to Nigeria and the rest of his family remaining in the UK. Here, the [judge] finds

> that neither option is suitable as each entail separation from one parent and deprive them of developing bonds. It is respectfully submitted that these outcomes are inevitable in any deportation case and could therefore be considered harsh, but not unduly so. Likewise separation will stop physical contact, but again this will always be so.
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> Although HA (Iraq) stressed that the unduly harsh bar should not be set as high as that of showing [very compelling circumstances], there nonetheless needs to be something that elevates the harshness to consider it unduly so. In this instance, that is not made out. Being separated from one parent or the other and losing hands on contact, is surely what happens in every case where one parent is removed and the other stays. It is submitted that this does not demonstrate to the required level that Exception 2 is met, so that the [judge] has erred in allowing the appeal."

19. By a decision dated 27 September 2021, First-tier Tribunal Judge Grant granted permission to appeal. Given what we say about this later in our decision, it is also appropriate to set her reasons out in full:

> "The Grounds submit that the Judge has arguably erred in law in the assessment of undue harshness and in finding that it will be unduly harsh for the family to relocate to Nigeria with the appellant privately educated in Nigeria and comes from a wealthy family alternatively, in finding that it will be unduly harsh on the family for the appellant to be deported.
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> It is arguable that the Judge erred in law in failing to articulate and apply the "unduly harsh" test as subsequently explained by the Supreme Court in KO (Nigeria) [2018] UKSC 53. Reid v SSHD [2021] EWCA Civ 1158 applies."

20. In October 2021, the Appellant provided a rule 24 response, rebutting in some detail the Respondent's grounds of appeal.

The hearing

21. Just prior to the start of the hearing, Ms Cunha provided us with a skeleton argument on behalf of the Respondent. We appreciate the work put into this and do not seek to criticise her personally for its very late service.

22. Before summarising the Respondent's challenge to the judge's decision, it is important to note what has not been put forward on her behalf. First, Ms Cunha acknowledged that there was no perversity challenge within the grounds. Second, there was no application to amend the grounds. Third, she accepted that even if such a ground had been before us, it would not have succeeded. Fourth, it could not be said that the judge had failed to consider the evidence before him. Fifth, Ms Cunha acknowledged, as she was in reality bound to, that the grounds were not particularised. Sixth, there has been no challenge to the reliability of the evidence upon which the judge based his conclusions.

23. The Respondent's positive case, as it were, appeared to amount to the following essential points (with reference to the grounds and paragraph 4 of Ms Cunha's skeleton argument): (i) the judge "failed to make findings in respect of a material fact", namely the Appellant's family financial circumstances in Nigeria; (ii) the judge misapplied the unduly harsh test. To her credit, Ms Cunha recognised the "difficult terrain" on which the Respondent's challenge rested, but maintained that the judge's decision disclosed material errors of law.

24. Ms Miszkiel relied on her rule 24 response and submitted simply that there were no errors of law in the judge's decision and that the Respondent's challenge constituted nothing more than a disagreement.

25. At the conclusion of the hearing we announced to the parties our decision that there were indeed no errors of law in the judge's decision and that the Respondent's appeal to the Upper Tribunal would be dismissed.

Discussion and conclusions

26. We begin by acknowledging the need for appropriate restraint before interfering with a decision of the First-tier Tribunal, bearing in mind its task as primary fact-finder on the evidence before it, allocator of weight to relevant factors, and overall evaluator within the applicable legal framework. Decisions are to be read sensibly and holistically, perfection might be an aspiration, but is clearly not a necessity, and there is no requirement for reasons for reasons. Exhortations to this effect have emanated from the Court of Appeal on numerous occasions over the course of time: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095, paragraph 19 of which reads as follows:

> "I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State for the Home Department* at [30]:
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> > "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.""

27. With this context in mind, it is plain to us that the Respondent's challenge in this case is, and always has been, misconceived, and in truth amounts to a poor attempt to configure simple disagreement with an outcome as errors of law.

28. We remind ourselves first of what the judge actually set out in his decision. He considered with obvious care the body of evidence before him, having recognised at the outset that there was little, if any, factual dispute between the parties. It is quite clear that the judge deemed the evidence as a whole to be reliable. He then directed himself, correctly, to the legislative framework and the leading authorities on the central issue of undue harshness, namely KO (Nigeria) and HA (Iraq). These two aspects of the decision-making process were then brought together to form a fact-specific analysis addressing the "go scenario" and the "stay scenario". Reasons were provided for the conclusions in respect of each, and it is abundantly clear that these were predicated on the assessment of the evidence already conducted.

29. We turn to the grounds of appeal. The wording employed is demonstrably that of disagreement. The third paragraph quoted begins by stating, "The respondent does not agree it would be [unduly harsh] for the family to move to Nigeria…" That is as may be, but it fails to accord proper recognition to the fact that the judge reached a contrary conclusion. The next two paragraphs include a submission that a separation would "not be" unduly harsh and assertions that the unduly harsh threshold "was not made out." Given the basic requirement for grounds to identify at least arguable errors of law, and in the absence of any express perversity challenge, what is said in the grounds is, effectively, meaningless.

30. Further, we deem it necessary, and somewhat unfortunate, to have to emphasise the importance of articulating grounds of challenge in clear terms. If it is intended to assert that a conclusion reached by a judge is irrational, this must be stated unambiguously. That is so primarily because of the need for procedural rigour and, as an important aspect thereof, fairness to the other party, who is entitled to know the case being made against it. It is also important for a judge considering an application for permission to appeal and/or the substantive issue to know what the alleged error of law in play actually is.

31. A failure to properly plead perversity as a head of challenge is seen in grounds drafted both by appellants and the Respondent. However, it is at present being too commonly found in applications from the latter and we urge her to reflect on this particular point (in addition to what we have said more generally about the quality of the grounds in this case).

32. The grounds before us do not include a perversity challenge, as properly accepted by Ms Cunha. Even if they had, it would have fallen far short of the elevated threshold required, an outcome again acknowledged by Ms Cunha.

33. To the extent that the grounds even begin to suggest that the judge misdirected himself as to the nature of the unduly harsh test, we have no hesitation in rejecting this. It is plain from the face of his decision that the judge applied the test in the manner authoritatively established by KO (Nigeria) and HA (Iraq). The paragraphs in HA (Iraq) referred to by the judge at [69] are those dealing specifically with the correct approach to the test, emphasising the importance of the focus on the child (or children) in question. Nothing in the judge's subsequent analysis indicates that he then failed to put into effect the same test correctly identified previously. Indeed, in his summary at [77], the judge referred to the "elevated threshold" required by the exception contained in section 117C(5) of the 2002 Act.

34. The judge clearly did not base his conclusions on the "stay scenario" solely on the fact that deportation would involve a separation, as appears to be suggested in the grounds. Rather, a fact-specific, child-focused analysis was conducted, based on a large body of reliable evidence. As with other aspects of the Respondent's challenge, there has been no apparent regard to what the judge has actually said and done.

35. Thus, in respect of the grounds of appeal as drafted and unamended, we conclude that they are without merit. Two matters of concern arise from this conclusion. First, we find it difficult to understand why it was thought appropriate to put them forward in the first instance. On any view, they did not begin to identify any arguable errors of law. Second, following the grant of permission there does not appear to have been any review of the merits of the challenge and/or any thought given to an application to amend the grounds (for the avoidance of any doubt, we are certainly not suggesting that there were any alternative grounds open to the Respondent). Ms Cunha was left with the unenviable task of having to defend very poorly drafted grounds at what we accept was relatively short notice.

36. All of this does not represent a particularly satisfactory state of affairs.

37. We now return to the grant of permission. The first paragraph quoted earlier in our decision attempts to introduce a basis of challenge not set out in the grounds of appeal, namely that the judge had in some way failed to take account of the fact that the Appellant came from a wealthy family in Nigeria.

38. It is clear from the decision in AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC), an important decision on procedure of which Judge Grant should have been aware, that the introduction of new grounds to a challenge mounted by the Respondent should be a rare occurrence. Paragraph 3 of the judicial headnote states that:

> "(3) Permission to appeal to the Upper Tribunal should be granted on a ground that was not advanced by an applicant for permission, only if:
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> (a) the judge is satisfied that the ground he or she has identified is one which has a strong prospect of success:

(i) for the original appellant; or

(ii) for the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United Kingdom's international Treaty obligations; or

(b) (possibly) the ground relates to an issue of general importance, which the Upper Tribunal needs to address."

39. On any view, the requirements under (3)(a)(ii) or (3)(b) were not satisfied by the new argument raised in the grant.

40. Further, for reasons set out earlier, it was unarguable that the judge had erred by "failing to articulate and apply" the unduly harsh test. Judge Grant's reference to Reid added nothing to the Respondent's challenge. The Court of Appeal's judgment in no way undermines the correctness of HA (Iraq). Nor, if this was what had been intended, was there any utility in making factual comparisons between that case and the present: such an approach is apt to lead to a distraction from the question of whether there are any legal errors in a decision. Indeed, if anything, Reid tended against a grant of permission, emphasising as it does the point that findings reached by the First-tier Tribunal should not lightly be interfered with: see paragraph 54.

41. In all the circumstances, we are bound to say that permission should not have been granted, whether on the basis of the grounds of appeal as drafted, or on the additional argument raised by Judge Grant.

42. For the sake of completeness, we reject the additional argument in any event. It is clear from a sensible reading of the judge's decision that he was well-aware of the Appellant's familial circumstances in Nigeria: [40] and [63]. We do not accept that he implicitly failed to have any regard to that consideration when reaching his overall conclusions. Further, it is clear that the judge placed particular reliance on the evidence from Ms Pagella (in addition to other sources) when assessing the "go scenario". The evidence as a whole fully supported the overall conclusions reached.

Anonymity

43. The First-tier Tribunal made an anonymity direction without providing reasons for so doing. Given the importance of open justice, we asked both representatives for their submissions on whether we should make an order. Ms Miszkiel emphasised the fact that two minors are in this case, that one of them suffered from a medical condition, as did Miss H. There was, it was submitted, a risk of emotional harm to the children if the Appellant were to be identified. Ms Cunha supported this position.

44. Having considered the matter with care, we have concluded that an anonymity direction is appropriate on the facts of this case, having

particular regard to the fact not simply of the children's minority, but also of the younger child's health condition.

Notice of Decision

45. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision shall stand.

46. The appeal to the Upper Tribunal is accordingly dismissed.

Signed: H Norton-Taylor Date: 25 April 2022

Upper Tribunal Judge Norton-Taylor