Disciplining the Troublesome Offspring of Section 19 of the Immigration Act 2014: The Supreme Court in *KO (Nigeria)*

*Jonathan Collinson**

At a glance

In *KO (Nigeria)*, the Supreme Court have given an authoritative interpretation of s 19 of the Immigration Act 2014. This had been required because of an unusually high degree of judicial disagreement at the Upper Tribunal and Court of Appeal as to the proper interpretation of the removal and deportation provisions in that Act. Two different strands of interpretation emerged simultaneously – a weight interpretation and an exception interpretation – which the author explored in a previous volume of this journal. The Supreme Court have now authoritatively endorsed an approach to s 19, Immigration Act 2014 based on the creation in the Act of defined exceptions to deportation and removal. This article explains the judgment in *KO (Nigeria)* and argues that it leaves significant tensions unresolved between the legislation on deportation and removal on one side, and the statutory commitment to the best interest of the child on the other.

Introduction

The Immigration Act 2014 sought, through s 19, to limit judicial discretion in making decisions about the removal and deportation of foreign nationals from the UK when this is resisted on the basis of interference with the right to family and private life under Article 8 of the European Convention on Human Rights (ECHR). At first glance, the statutory scheme appeared clear. Although the removal of those without leave to remain, and the deportation of foreign national offenders is (according to the statute) generally to be considered to be in the public interest, this presumption would not apply in cases which fell within closely defined statutory exceptions. These exceptions were designed, according to the government, to codify the Article 8 ECHR case law[1] and in so doing 'give a policy steer to the courts and tribunals' whilst

* With thanks to Professor Roger Brownsword for comments on the draft, and for the comments and suggestions of the anonymous reviewer. All errors remain mine.

[1] Home Office, 'Immigration Bill: European Convention on Human Rights Memorandum by the Home Office' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249270/Immigration_Bill_-_ECHR_memo.pdf> accessed 9 May 2018

limiting questions as to the proportionality of individual decisions with human rights obligations to the application of pre-determined rules.[2]

Despite the government having drafted s 19, Immigration Act 2014 so as to use structural devices which indicated the creation of exceptions to deportation and removal, and even used the word 'Exception' within the statute itself to reinforce this impression, the government's lawyers argued in a series of cases before the Upper Tribunal and Court of Appeal for an entirely different interpretation. The government's lawyers argued that s 19, Immigration Act 2014 did not – despite appearances – create a scheme of statutory exceptions, instead it maintained the existing mode of decision-making based on judicial balancing of the public interest in removal or deportation against the family or private life claims of those whose removal or deportation was being sought. What the Immigration Act 2014 achieved, they argued, was simply to place Parliament's thumb on the scales so as to ensure that sufficient (i.e. lots of) weight was given to the public interest. Almost inevitably, some judges accepted these submissions and made their decisions on that basis, whilst others dismissed them and adopted a plain reading of the statutory text instead. A schism in the case law therefore emerged and in a review of these decisions published previously in this journal,[3] I suggested that these disparate cases had become the 'troublesome offspring' of s 19, Immigration Act 2014.

In October 2018 the Supreme Court sought to gather up the troublesome offspring, and in the case of *KO (Nigeria)*,[4] impose some kind of discipline. This article is therefore about the judgment in *KO (Nigeria)*. In section 1, I briefly recount the background to the Immigration Act 2014 and the competing and conflicting strands of case law previously identified. In section 2, the decision in *KO (Nigeria)* is introduced and I explain how and why the Supreme Court came to adopt an interpretation of s 19 of the Immigration Act 2014 that is based around statutory exceptions. I also examine the appeals of 'KO' and 'NS', whose individual appeals to the Supreme Court were dismissed as part of the *KO (Nigeria)* judgment, so as to identify what, if any, guidance is provided as to what effects of removal or deportation of a person may be considered to be 'unreasonable' or 'unduly harsh', and therefore qualify for relief from deportation under the statutory exceptions. In section 3, I lay out three unresolved tensions in

[2] Robert Thomas, 'Agency Rulemaking, Rule-Type, and Immigration Administration' [2013] Public Law 135, 147

[3] Jonathan Collinson, 'The Troublesome Offspring of Section 19 of the Immigration Act 2014' (2017) 31 Journal of Immigration, Asylum and Nationality Law 244

[4] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [14]

the *KO (Nigeria)* decision and in s 19 of the Immigration Act 2014. All of these revolve around the duty to safeguard and promote the welfare of children which is found in s 55 of the Borders, Citizenship and Immigration Act 2009 (BCIA). I argue that the statutory scheme is in unresolved tension with the best interests of the child.

1. Previously…: The Background to Section 19 of the Immigration Act 2014

Since 2010, the various Conservative and Conservative-led administrations have sought to implement a 'restrictive'[5] policy agenda with respect to migration. Its headline promise to reduce net-migration to 'tens of thousands' (a promise it made at Parliamentary elections in 2010,[6] 2015,[7] and 2017)[8] has been supported by the creation of a 'hostile environment' of internal immigration checks and the denial of public and private services to those unable to readily evidence their immigration or nationality status.[9] Access to legal redress for incorrect immigration decisions has also been restricted, or sought to have been restricted, by way of the

[5] Robert Ford, Will Jennings and Will Somerville, 'Public Opinion, Responsiveness and Constraint: Britain's Three Immigration Policy Regimes' (2015) 41 Journal of Ethnic and Migration Studies 1391, 1401

[6] The Guardian, 'Tories would limit immigration to 'tens of thousands' a year, says Cameron' (11 January 2010) <https://www.theguardian.com/uk/2010/jan/11/david-cameron-limit-immigration> accessed 21 May 2017

[7] Nicholas Watt, 'Opposition mocks Tory renewal of failed migration target' (*The Guardian*, 3 March 2015) <https://www.theguardian.com/uk-news/2015/mar/03/opposition-mocks-tory-renewal-of-failed-migration-target> accessed 21 May 2017

[8] Anushka Asthana, 'Conservatives to retain 'tens of thousands' immigration pledge' (*The Guardian*, 8 May 2017) <https://www.theguardian.com/politics/2017/may/08/conservatives-to-keep-tens-of-thousands-immigration-pledge> accessed 21 May 2017

[9] Joe Crawford, Sharon Leahy and Kim McKee, 'The Immigration Act and the "Right to Rent": Exploring Governing Tensions Within and Beyond the State' (2016) 10 People, Place and Policy 114

Kanena Dorling, 'Growing Up In A Hostile Environment: The Rights of Undocumented Migrant Children in the UK' <http://www.childrenslegalcentre.com/wp-content/uploads/2013/11/Hostile_Environment_Full_Report_Final.pdf> accessed 7 September 2017

Ines Hasselberg, 'Coerced to Leave: Punishment and the Surveillance of Foreign-National Offenders in the UK' (2014) 12 Surveillance & Society 471

withdrawal of legal aid,[10] increasing application fees for appealing immigration decisions,[11] and reducing the availability and effectiveness of appeals to an independent Tribunal.[12]

An additional goal of the government has been to restrict the ability of foreign nationals – and foreign national offenders in particular – to use their right to family life under art 8 of the European Convention on Human Rights (ECHR) as a means by which to resist deportation or removal from the UK. The government clearly believed that deportation law had not given enough attention to the public interest in deporting foreign national offenders. This was the central thrust of Theresa May's Conservative Party conference speech in 2011, when she was still Home Secretary:

> We all know the stories about the Human Rights Act. The violent drug dealer who cannot be sent home because his daughter – for whom he pays no maintenance – lives here. The robber who cannot be removed because he has a girlfriend. […] we will change the immigration rules to ensure that the misinterpretation of Article Eight of the ECHR – the right to a family life – no longer prevents the deportation of people who shouldn't be here. […] The meaning of Article Eight [ECHR] should no longer be perverted. So I will write it into our immigration rules that when foreign nationals are convicted of a criminal offence or breach our immigration laws: when they should be removed, they will be removed.[13]

When Theresa May believed that those changes to the Immigration Rules – created in 2012 – were being 'ignored'[14] by the courts, she resorted to statute, the Immigration Act 2014, in order that primary legislation:

---

[10] Frances Meyler & Sarah Woodhouse, 'Changing the Immigration Rules and Withdrawing the 'Currency' of Legal Aid: The Impact of LASPO 2012 on Migrants and Their Families' (2013)35 J Social Welfare and Family Law 55

[11] Jonathan Collinson, 'Immigration Tribunal Fees as a Barrier to Access to Justice and Substantive Human Rights Protection for Children' [2017] Public Law 1

[12] Peter Jorro, 'The Enhanced Non-Suspensive Appeals Regime in Immigration Cases' (2016) 30 Journal of Immigration, Asylum and Nationality Law 111

[13] politics.co.uk, 'Theresa May Speech in Full' (*politics.co.uk*, 4 October 2011) <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full> accessed 9 April 2018

[14] Simon Walters and Glen Owen, "Judges "sabotaged' MPs' bid to deport rapists and thugs… but Theresa May vows to crush judges' revolt by rushing through tough new laws' (*Daily Mail*, 17 February 2013) <http://www.dailymail.co.uk/news/article-2279842/Theresa-May-Home-Secretary-vows-crush-judges-revolt-rushing-tough-new-laws.html> accessed 27 July 2018

> …will specify that foreign nationals who commit serious crimes shall, except in extraordinary circumstances, be deported. Once this primary legislation has been enacted, it is surely inconceivable that judges in this country will maintain that it is they, rather than Parliament, who are entitled to decide how to balance the foreigner's right to family life against our nation's right to protect itself.[15]

The primary legislation enacted as a consequence was the Immigration Act 2014. In s19 of the Act (which inserted new provisions into the Nationality, Immigration and Asylum Act (NIAA) 2002) Parliament sought to circumscribe the decisions of courts when they were asked to determine the art 8 ECHR appeals of foreign nationals who face removal or deportation. After setting out some factors which affect the weight of the public interest in removal decisions (ability to speak English, to be financially self-sustaining, and that their private life or relationship with a partner was developed whilst their immigration status was 'precarious' or absent),[16] the Act provides that:

> 117B(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

The Immigration Act 2014 further states that in the case of a foreign national offender who has been sentenced to less than four years imprisonment, 'the public interest requires [the foreign national offender's] deportation unless Exception 1 or Exception 2 applies.'[17] These exceptions are also closely defined by statute (where 'C' is the foreign national offender):

---

[15] Simon Walters and Glen Owen, "Judges "sabotaged' MPs' bid to deport rapists and thugs… but Theresa May vows to crush judges' revolt by rushing through tough new laws' (*Daily Mail*, 17 February 2013) <http://www.dailymail.co.uk/news/article-2279842/Theresa-May-Home-Secretary-vows-crush-judges-revolt-rushing-tough-new-laws.html> accessed 27 July 2018

[16] Nationality, Immigration and Asylum Act 2002, s117B(1)-(5)

[17] Nationality, Immigration and Asylum Act 2002, s117C(3)

117C(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

117C(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.[18]

Where the foreign national offender has been sentenced to a period of imprisonment of four years or more, statute states that 'the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.'[19]

Using a well-worn principle of analysis – namely, "if it looks like a duck and talks like a duck, it is probably a duck" – I previously argued in this journal[20] that s 19 Immigration Act 2014 *looked* like it set up an exception to removal or deportation, that it *talked* like an exception, and therefore it was probably a scheme of statutory exceptions to deportation or removal. By this I mean that the internal structure of s 19 Immigration Act 2014 looks like it set up exceptions to deportation and removal because it separated out the general presumption that removal for the purposes of immigration control (s117B(1) NIAA) and the deportation of foreign national offenders (s117C(1)) is in the public interest, from rules which excluded or exempted certain individuals to whom that presumption was not to apply. In addition, s 19 Immigration Act 2014 talked like it set up exceptions because it in fact described these exempting rules as being an 'Exception' (as the recitation of the relevant provisions above attests to).

The problem that arose, however, was that there followed a series of case law at the Upper Tribunal and Court of Appeal which articulated two competing and conflicting

[18] Nationality, Immigration and Asylum Act 2002, s117C(4)-(5)

[19] Nationality, Immigration and Asylum Act 2002, s117C(6)

[20] Jonathan Collinson, 'The Troublesome Offspring of Section 19 of the Immigration Act 2014' (2017) 31 Journal of Immigration, Asylum and Nationality Law 244

interpretations of the relevant passages of statute; which I labelled as being the 'troublesome offspring' of s 19 of the Immigration Act 2014. Whereas *MAB*[21] in the Upper Tribunal endorsed this 'exception approach' to interpreting s19 of the Immigration Act 2014, the Upper Tribunal in *KMO*[22] and Court of Appeal in *MM (Uganda)*[23] pursued a different interpretation which suggested that it did not alter the decision-making framework from the pre-existing art 8 ECHR proportionality exercise, but instead indicated the weight to be given to certain factors. This 'weight interpretation', favoured by the judges in *KMO* and *MM (Uganda),* argued that the:

> ...statutory directions are clear that additional weight should be given in the proportionality exercise to qualifying children[24] (as opposed to other children), about what level of weight must be achieved (either 'unduly harsh' or 'unreasonable') before the imperative to remove/deport is outweighed as being disproportionate, and that all the public interest factors [in s117B of the NIAA] are weighed against the effect of removal/deportation on the child.[25]

More troublesome still was the Court of Appeal decision in *MA (Pakistan)* in which Elias LJ:

---

[21] *MAB (para 399; 'unduly harsh') USA* [2015] UKUT 00435 (IAC)

[22] *KMO (section 117 - unduly harsh) Nigeria* [2015] UKUT 00543 (IAC)

[23] *MM (Uganda) & Anor v Secretary of State for the Home Department* [2016] EWCA Civ 450

[24] The Immigration Act 2014 set out citizenship or residency requirements for children and partners who would be considered to 'qualify' for statutory consideration in deportation or removal decisions:

> Nationality, Immigration and Asylum Act, s117D(1):
>
> "qualifying child" means a person who is under the age of 18 and who—
> (a) is a British citizen, or
> (b) has lived in the United Kingdom for a continuous period of seven years or more;
>
> "qualifying partner" means a partner who—
> (a) is a British citizen, or
> (b) who is settled in the United Kingdom

[25] Jonathan Collinson, 'The Troublesome Offspring of Section 19 of the Immigration Act 2014' (2017) 31 Journal of Immigration, Asylum and Nationality Law 244, 251

> …concluded by endorsing the weight interpretation, [but] he was clear that he felt constrained to do so because of the preceding decision in *MM (Uganda)* and that 'free from authority, I would favour the ['exception'] argument of the appellants.'[26]

The lack of judicial unanimity, and the apparent absurdity of ignoring all the indications that s 19 of the Immigration Act 2014 set up statutory exceptions to deportation or removal on the basis of the strength of claim to remain in the UK of the child or partner, indicated that the Supreme Court would have to step in to resolve this dispute. The troublesome offspring of s 19 the Immigration Act 2014 needed disciplining. Or, as Lord Carnwath in *KO (Nigeria)* more diplomatically put it, 'It is profoundly unsatisfactory that a set of provisions which was intended to provide clear guidelines to limit the scope for judicial evaluation should have led to such disagreement'.[27]

2. *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53

KO (Nigeria) is particularly significant because it brought together appeals from many of the cases which comprised the troublesome offspring of s 19, Immigration Act 2014. The appeal to the Supreme Court arose from the Upper Tribunal decision in *KMO*[28] and the Court of Appeal judgments in *MM (Uganda)*[29] and *MA (Pakistan)*.[30] These cases represent the dominant strand – the 'weight interpretation' – of judicial treatment of s 19, Immigration Act 2014. Lord Carnwath's judgment, with which the other Supreme Court Justices agreed, majestically cut through the tortured history of each case to get to the relevant central question, to the point at which it is impossible to paraphrase it more succinctly:

> The Appellants' case, in short, is that in determining whether it is "reasonable to expect" a child to leave the UK with a parent (under section 117B(6)), or whether

---

[26] Jonathan Collinson, 'The Troublesome Offspring of Section 19 of the Immigration Act 2014' (2017) 31 Journal of Immigration, Asylum and Nationality Law 244, 250

[27] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [14]

[28] *KMO (section 117 - unduly harsh) Nigeria* [2015] UKUT 00543 (IAC)

[29] *MM (Uganda) & Anor v Secretary of State for the Home Department* [2016] EWCA Civ 450

[30] MA (Pakistan) v *Secretary of State for the Home Department* [2016] EWCA Civ 706; [2016] 1 WLR 5093

> the effect of deportation of the parent on the child would be "unduly harsh" (under section 117C(5)) the tribunal is concerned only with the position of the child, not with the immigration history and conduct of the parents, or any wider public interest factors in favour of removal. By contrast the Secretary of State argues that both provisions require a balancing exercise, weighing any adverse impact on the child against the public interest in proceeding with removal or deportation of the parent.[31]

The question was therefore to decide as between an 'exception interpretation' and 'weight interpretation', and Lord Carnwath determined that s 19 of the Immigration Act 2014 creates statutory exceptions to removal and deportation. I explain in this section how he came to that view. In doing so, *KO (Nigeria)* resolves one of the core problems arising from the Immigration Act 2014, namely that the extant judicial interpretation of s 19, Immigration Act 2014 had strained linguistic defensibility and introduced an unnecessary level of uncertainty into judicial-decision making. The second problem of s 19, Immigration Act 2014 is that the qualifying criteria for the exceptions to removal or deportation – 'unreasonable', 'unduly harsh', and 'very compelling circumstances' – are ill-defined and subjective. Lord Carnwath then had to decide whether an error of law was made in each of the cases being appealed. Through this process, we can potentially identify in what circumstances it appears to be 'unreasonable' for a child to leave the UK, or when deportation of a parent is 'unduly harsh' on a child, and this section conducts that identification work. Although we might be able to deduce certain principles that emerge from Lord Carnwath's reasoning, it falls short of being effective judicial guidance.

Exception or Weight?

Lord Carnwath finds three primary reasons for endorsing an 'exception interpretation' of s 19 of the Immigration Act 2014; (1) the wording of the subsections, (2) the structure of the provisions, and (3) the purpose of consistency, predictability and transparency.

As to the question of whether s 19 Immigration Act 2014 ought to be interpreted as creating exceptions or importing a requirement to weigh factors in a particular manner, Lord Carnwath's first mode of reasoning based on the words used found nothing in the use of the terms 'not be reasonable to expect the child to leave the United Kingdom'[32] nor 'the effect of

[31] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [6]

[32] Nationality, Immigration, and Asylum Act 2002, s117B(6)(b)

C's deportation on the partner or child would be unduly harsh'[33] that 'import[s] a reference to the conduct of the parent' which is to be balanced against the situation of the children or partner.[34] The statute clearly then envisages an assessment – an evaluative exercise[35] – as to the effects of removal or deportation on a child or partner, rather than a judge-led balance between the seriousness of the individual's offending or breach of immigration control, and the interests of children or partners. The standard that is being applied to determine individual cases is therefore the same within each category; those who face removal because they require leave to remain and do not have it, foreign national offenders sentenced to imprisonment of less than four years, and foreign national offenders convicted for more than four years. Within each category, the seriousness of the offence committed is irrelevant to the judicial task, so that decision-makers would not be 'asked to decide whether consequences which are deemed unduly harsh for the son of an insurance fraudster may be acceptably harsh for the son of a drug-dealer.'[36] The seriousness of offending, and thereby the relevant standard against which to assess the effect of the deportation, was determined in advance by Parliament and reflected in the increasing hurdles set for those facing removal, for deportation after a prison sentence of less than four years, and those who were sentenced to more than four years imprisonment.

Secondly, the structural device of 'free-standing'[37] statutory exceptions to the presumption that removal or deportation is in the public interest clearly influenced the outcome in *KO (Nigeria)*. Lord Carnwath acknowledged that the distinction is clearly drawn in the Act between the 'general rule' which acts as 'preamble to the more specific rules.'[38] These specific rules – labelled in the deportation sections (s117C NIAA) as 'Exceptions' – are each 'precisely defined'.[39] When the defined criteria of each exception are met, 'they are enough…to remove the public interest in deportation.'[40] In other words, meeting the criteria set out in the statutory

---

[33] Nationality, Immigration, and Asylum Act 2002, s117C(5)

[34] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [17] & [22]

[35] *MAB (para 399; 'unduly harsh') USA* [2015] UKUT 00435 (IAC), [73]

[36] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [32]

[37] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [17]

[38] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [20]

[39] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [21]

[40] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [21]

Exceptions means that the foreign national is excepted from the designation that their removal or deportation is in the public interest. Where there is no public interest in the act of removal or deportation, it should not take place.

Less useful is the third mode of reasoning which Lord Carnwath set out at the start of his judgment as one of the general approaches which he would use to guide his decision.[41] He emphasised the general purpose and context of the legislative exercise and followed the Supreme Court decision in *Hesham Ali*[42] (concerning the July 2012 amendments to the Immigration Rules and which mirror the Immigration Act 2014) which found the government's overall intention to be to 'promote consistency, predictability and transparency'.[43] The exception interpretation endorsed in *KO (Nigeria)* at least fulfils this purpose from the perspective of statutory interpretation. The primary problem with the alternative, weight interpretation was that it required the decision-maker to ignore a 'structural device which appears to be clearly signposted' in the Act,[44] and to 'contort the plain meaning of the words used.'[45] As Elias LJ had commented in *MA (Pakistan)*, the Act appeared to be 'drafted in an extremely convoluted way to achieve so limited an aim [as that achieved by the weight interpretation]. The objective could have been achieved much more clearly and succinctly.'[46] I suggested previously that Parliament's intention to create statutory exceptions to removal or deportation would be frustrated if the plain structure and wording were to be ignored in favour of the executive's preferred, but linguistically indefensible, interpretation.[47]

However, although *KO (Nigeria)* presents a more consistent and transparent interpretation of statute, it is difficult to claim that the statutory scheme in s 19, Immigration Act 2014 is likely to produce consistent or predictable outcomes for individual appellants as a

---

[41] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [12]

[42] *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799

[43] *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799, [21], quoted in *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [12]

[44] Jonathan Collinson, 'The Troublesome Offspring of Section 19 of the Immigration Act 2014' (2017) 31 Journal of Immigration, Asylum and Nationality Law 244, 252

[45] Jonathan Collinson, 'The Troublesome Offspring of Section 19 of the Immigration Act 2014' (2017) 31 Journal of Immigration, Asylum and Nationality Law 244, 253

[46] MA (Pakistan) v *Secretary of State for the Home Department* [2016] EWCA Civ 706; [2016] 1 WLR 5093, [37]

[47] Jonathan Collinson, 'The Troublesome Offspring of Section 19 of the Immigration Act 2014' (2017) 31 Journal of Immigration, Asylum and Nationality Law 244, 253

consequence of the judgment. Decision-makers will continue to face borderline cases in which they have to decide whether the effect of an foreign national offenders deportation on children or partners is 'unduly harsh' or merely harsh,[48] or whether the obstacles to the foreign national offenders reintegration in their country of nationality presents 'very significant obstacles' or merely significant obstacles.[49] These standards are inherently subjective and impervious to comprehensive or objective definition. This is evident in the case law to date where, for example, the 'unduly harsh' effects of deportation on the child have been defined by reference to synonyms rather than substantive content:

> …*"unduly harsh"* does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antitheses of pleasant or comfortable. Furthermore, the addition of the adverb *"unduly"* raises an already elevated standard still higher.[50]

To hang the statutory exceptions to deportation on a test of 'highly bleak' is no more objectively illuminating or transparent a set of standards than the original formulation of 'unduly harsh'.

What is 'Reasonable' or 'Unduly Harsh' for a Child?

As observed above, the evaluative exercise required by the statutory exceptions in s 19, Immigration Act 2014 is inherently subjective. Assessment as to what is not reasonable for a child to endure, or what is unduly harsh on a child, is caught up in a wider debate about what the welfare or best interests of children require. If 'the best interests of the child' can be critiqued for being an 'indeterminate and speculative' principle,[51] then the consideration of what is reasonable or unduly harsh on a child is more so because it requires evaluation beyond simply identifying which outcome from two or more potential options is best for the child.

---

[48] Nationality, Immigration and Asylum Act 2002, s117C(5)

[49] Nationality, Immigration and Asylum Act 2002, s117C(4)(c)

[50] *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 223 (IAC), [46] [emphasis original]

[51] Robert H Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemporary Problems 226, 229

A parallel debate is what level of harm to the best interests of children society is willing to accept as the cost of sanctioning adults; be it in sentencing policy, welfare benefits sanctions, or deportation and removal. Angela Davis makes the point about prisons that:

> On the whole, people tend to take prisons for granted. It is difficult to imagine life without them. At the same time, there is reluctance to face the realities hidden within them[52]

The normalisation of deportation and removal[53] has the same effect. It is increasingly difficult to imagine an immigration system without some form of removal and deportation to enforce it, and so the hidden realities – including that of separated families – become normalised. In turn they become a consequence that decision-makers and the public are reluctant to face. Thus the human suffering created by deportation and removal becomes banal and taken for granted. As Sedley LJ observed in one deportation case, 'this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does.'[54]

KO (Nigeria) continues this march towards the normalisation of the effects of deportation on families. Lord Carnwath, in reviewing the individual case of KO as part of the Supreme Court appeal case of *KO (Nigeria)*, found that when deportation means that 'a close parental relationship…cannot be continued'[55] that is a merely 'undesirable' rather than 'unduly harsh' consequence.[56] We are led to shrug off this consequence as being unremarkable because, after all, this is what deportation does.

Simple 'economic disadvantage' is also found in *KO (Nigeria)* to not amount to an unduly harsh impact of deportation on children. In the case of the appellant KO, it was accepted that KO's wife was able to be the main bread-winner for the family only because of KO's role as the main care-giver to their children. However, the fact that the family could access welfare

---

[52] Angela Y Davis, *Are Prisons Obsolete?* (Seven Stories Press, 2003), 12

[53] Alice Bloch and Liza Schuster, 'At the Extremes of Exclusion: Deportation, Detention and Dispersal' (2005) 28 Ethnic and Racial Studies 491

[54] *AD Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348, [2011] Imm AR 542, [27]

[55] *KMO (section 117 - unduly harsh) Nigeria* [2015] UKUT 00543 (IAC), [45] quoted in *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [34]

[56] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [35]

benefits after KOs deportation was found to be relevant to deciding that KOs deportation was not unduly harsh on his children.[57] *KO (Nigeria)* therefore tacitly endorsed the finding that in the situation of the 'complete fracture of…family relationships'[58] and where a family must subsist on benefits, there is 'Nothing out of the ordinary'[59] to distinguish the effects of deportation on the child as being unduly harsh, rather than merely (and therefore acceptably) harsh.[60]

Future appellants would be well advised that only destitution – or at least an income below what is available through mainstream welfare benefits[61] – appears to rise to the level of unduly harsh. Worth noting, however, is that the courts have appeared to consider economic disadvantage on the basis of absolute income levels alone. This ignores, and therefore opens potential space to argue, that the knock-on social effects of economic disadvantage for families separated by immigration enforcement are unduly harsh in some instances. A review of the American literature on the effects of deportation on the family of the deportee found that:

> Family members are often forced to take on new roles to make ends meet: the remaining caregiver(s) must often work longer hours, leaving little time for contact with children; older children often become primary caregivers of younger siblings and/ or must work to support the family, impacting school performance and retention[62]

A similar finding was found in the UK context regarding families separated by the income rules on entry clearance as a spouse.[63] Where reduced family income impacts children beyond

---

[57] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [33]

[58] *KMO (section 117 - unduly harsh) Nigeria* [2015] UKUT 00543 (IAC), [43] quoted in *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [33]

[59] *KMO (section 117 - unduly harsh) Nigeria* [2015] UKUT 00543 (IAC), [44] quoted in *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [33]

[60] *KMO (section 117 - unduly harsh) Nigeria* [2015] UKUT 00543 (IAC), [44] quoted in *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [33]

[61] Which is capped at £20,000pa for a family with children; Gov.uk, 'Benefit Cap' <https://www.gov.uk/benefit-cap/benefit-cap-amounts> accessed 5 November 2018

[62] Regina Day Langhout and others, 'Statement on the Effects of Deportation and Forced Separation on Immigrants, Their Families, and Communities' (2018) 62 American Journal of Community Psychology 3, 4

[63] Saira Grant and others, 'Family Friendly? The Impact on Children of the Family Migration Rules: A Review of the Financial Requirements'

the proverbial tightening of belts, so as to have a knock-on effect on school performance and attendance because of additional home-based responsibilities, this more direct impact on a child might conceivably be considered unduly harsh.

Another appellant in *KO (Nigeria)* whose appeal was ultimately dismissed by the Supreme Court was NS. With respect to NS, the question was about when it is 'reasonable' to expect a child to leave the UK due to the removal of a parent, rather than whether the deportation of a foreign national offender parent is unduly harsh. Because Lord Carnwath dismissed the appeal, we can usefully look to NS to help determine what kind factors might make it unreasonable for a child to be required to leave the UK. We should presume that the statutory test of whether it is reasonable to expect the child to leave the UK to be a lower standard than that of an effect of unduly harsh. However, none of the children of NS knew of life outside the UK, and one of the children 'particularly, has been in the United Kingdom for more than ten years and that this represents the greater part of a young life', so that it was found to be in the children's best interests to remain in the UK.[64] The Immigration Judge had also found in the initial decision that the children could 'adapt to Sri Lanka' and that their parents would be able to 'do well for the children in Sri Lanka just as they have in the United Kingdom'.[65] This suggests that, firstly, the condition of reasonableness is not the same as the principle of best interests (a point that I return to in the next section), and secondly, that emotional or social ties to the UK, and lack of ties elsewhere, may not be sufficient to make leaving the UK unreasonable. Instead, the reasonableness of the children leaving the UK appears to have been determined here by the absence of some kind of material lacking in the country of destination. What kind of material lacking may be sufficient is not yet clear, but might conceivably relate to physical safety, education or health (where there are specific needs of the child which cannot be met in the country of destination), or significant economic insecurity.

KO (Nigeria) provides much needed clarity as to how decision-makers ought to approach the statutory exceptions to deportation. Those facing removal or deportation will fit into one of three broad categories (removal, deportation having been sentenced to imprisonment of less than four years, and deportation after a sentence of four years or more) and the standard by

---

<https://www.childrenscommissioner.gov.uk/sites/default/files/publications/CCO-Family-Friendly-Report-090915.pdf> accessed 7 June 2017, 53-4

[64] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [49]

[65] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [49]

which the effect of their removal or deportation on a partner or child will apply uniformly within each category. What *KO (Nigeria)* does not give is any form of authoritative guidance as to how to distinguish between 'unreasonable', 'unduly harsh', or 'very compelling circumstances', although, one may start piecing together clues as to where at least this panel of the Supreme Court might draw those lines.

3. Unresolved Tensions

There remain, however, considerable unresolved tensions in the way that deportation and removal decisions are to be made under s 19 of the Immigration Act 2014. In particular, the statute is not consistent with the best interests of the child. This manifests itself in three interrelated ways. Firstly, the principle that the child should not be blamed for the conduct of their parents appears inconsistent with a statutory scheme which permits a series of escalating negative impacts on the child which are *a priori* set by the severity of the misconduct of their parent. Secondly, the requirement to consider the impact of the child in the context of whether their parent(s) would have an independent leave to remain is inconsistent with the same aspect of the best interests of the child. Finally, the construction of the statutory hurdle of 'reasonable' (let alone 'unduly harsh' or 'very compelling circumstances') appears to be set higher than what is in the best interests of the child, yet there are no reasons given (or discussion engaged in) as to why the s 55 duty in the BCIA to the best interests of the child may be set aside in this case.

The Best Interests of the Child: Blaming the child for matters for which he or she is not responsible

At the start of his judgment, Lord Carnwath sets out the general principles by which he sought to be guided in making his decision. Among them that:

> …the presumption, in the absence of clear language to the contrary, that the provisions are intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" (see *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690, para 10 per Lord Hodge).[66]

[66] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [15]

The courts have found consistently that s 55 of the Borders, Citizenship and Immigration Act 2008 (BCIA) and the case law (particularly *ZH (Tanzania)*[67] and *Zoumbas*[68]) 'survived' as applicable principles of law after the changes wrought by the Immigration Act 2014.[69] With respect to s 55 BCIA, Mr Justice McCloskey (then President of the Upper Tribunal) is emphatic:

> …in all cases where section 55 of the 2009 Act applies, the requirement to perform the twofold statutory duties is unaffected by the statutory reforms made by the Immigration Act 2014 and, in particular, the insertion of the new Part 5A into the Nationality, Immigration and Asylum Act 2002. There has been no amendment of section 55 of the 2009 Act. It continues to apply with full vigour. It has not been modified in any way by the most recent flurry of statutory activity… Both regimes will have to be given full effect by the Secretary of State in appropriate cases.[70]

Although Lord Carnwath recognises the continued applicability of s 55 BCIA, he does not address a fundamental conflict between the principle that the 'child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent' and a statutory scheme which permits a series of escalating negative impacts on the child which are *a priori* set by the severity of the misconduct of their parent. Where a parent of a child is subject to removal ('A person may be removed from the United Kingdom under the authority of the Secretary of State or an immigration officer if the person requires leave to enter or remain in the United Kingdom but does not have it')[71] then it must be unreasonable to expect the child to leave the UK before that child meets the statutory exception[72] and thus free from the prospect of constructive removal and/or loss of contact with one or other parent. Where the parent of a child has been sentenced to a period of imprisonment of less than four years, or is a 'persistent

---

[67] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166

[68] *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2014] 1 All ER 638

[69] *Kaur (children's best interests / public interest interface)* [2017] UKUT 14 (IAC), [30]

[70] *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 223 (IAC), [22] (emphasis original)

[71] Immigration and Asylum Act 1999, s10(1)

[72] Nationality, Immigration and Asylum Act 2002, s117B(6)

offender', then the effect on the child must be 'unduly harsh'.[73] Where the parent has been sentenced to four years imprisonment or more, then there must be 'very compelling circumstances'[74] before the best interests of the child are secured.

The more 'blameworthy' the parent's behaviour was, the greater must be the impact on the child before the child's best interests can outweigh the public interest in deportation. The questions posed by the Immigration Act 2014 – is it unreasonable for the child to leave the UK, is deportation unduly harsh on the child, or are there very compelling circumstances – are therefore not as child-centric as Lord Carnwath suggests because they appear to require the child to be blamed for the conduct of their parents, in contravention of the prevailing interpretations of the section 55 duty which Lord Carnwath explicitly refers to as a relevant 'general principle'.[75]

The critique of Lord Carnwath's decision in this respect is that he provides no further clarity as to what it means, as a practically useful principle of law, to not blame the child for the conduct of their parents in immigration decisions. To draw out this critique, we must start with what it means to 'blame' someone. To blame someone is to say that they are responsible for some wrong. To blame someone fairly therefore requires that they possessed the moral competence to be able to act in a way which avoided the blameworthy behaviour. If they were unable to prevent or avoid the action, they cannot be reasonably blamed for that action.[76] Thus the child of a criminal offender cannot be said to be blameworthy of the criminal act that the offending parent has committed because they cannot have prevented their parent's offending and could not have avoided it taking place because it was not the child's own actions; the child is not responsible for the wrong (be it an immigration or criminal wrong) that causes their parent to face removal or deportation. Rosalind English argued that the logical consequence of the principle that the child should not be blamed for the conduct of their parent is that therefore

---

[73] Nationality, Immigration and Asylum Act 2002, s117C(5)

[74] Nationality, Immigration and Asylum Act 2002, s117C(6)

[75] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [15]

[76] JER Squires, 'Blame' (1968) 18 The Philosophical Quarterly 54

Edward Sankowski, 'Blame and Autonomy' (1992) 29 American Philosophical Quarterly 291

Garrath Williams, 'Blame and Responsibility' (2003) 6 Ethical Theory and Moral Practice 427

Matthew Talbert, 'Moral Competence, Moral Blame, and Protest' (2012) 16 The Journal of Ethics 89

there can be no public interest consideration against which the best interests of the child can be weighed against. No balancing exercise under Article 8 ECHR remains possible:

> So in other words a determination that takes into account the usual principles of Article 8 jurisprudence amounts to a verdict on the children which "blames" them for their parents bad behaviour. The objection to this line of reasoning is that it evacuates the balancing act of any content by first taking away the usual factors by which we measure whether one case is deserving and the other not and then substituting for these measures a mechanical test – the question: "is this in the child's best interests"?[77]

However, this runs contrary to how Lady Hale in *ZH (Tanzania)*[78] first set out the idea that the child should not be blamed. Lady Hale does not set out an absolute test, as English supposes, that the best interests of the child will always prevail. Instead, the best interests of the child are still explicitly made subject to a balance:

> …the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations.[79]

On the other hand, Laws LJ appears to go too far in the opposite direction to English. In reviewing the statement that the child should not be blamed for the moral failure of their parent he exclaimed, 'Of course not; but **t**hat is not to say, as sometimes it is perhaps taken to say, that in a child case the importance of immigration control is in any way lessened.'[80] However, if the public interest is entirely unaltered, then to say that the child is not being blamed for the parent's actions becomes a mere platitude with no legal substance or consequence. This cannot be

---

[77] Rosalind English, 'Analysis: Children's "Best Interests" and the Problem of Balance' (*UK Human Rights Blog*, 2 February 2011) <http://ukhumanrightsblog.com/2011/02/02/analysis-childrens-best-interests-prevail-in-immigration-decisions/> accessed 13 October 2015

[78] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166

[79] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, [33]

[80] *In the matter of LB, CB (a child) and JB (a child)* [2014] EWCA Civ 1693, [15]

This part of Lord Justice Laws' judgment appeared entirely in bold type in the original.

correct either. It is a principle which has been endorsed by the Supreme Court in both *ZH (Tanzania)* and in *Zoumbas*,[81] and given further authority by Lord Carnwath in *KO (Nigeria)*.[82] In all of these cases it is presupposed by the Supreme Court Justices that it has some substantive legal meaning and effect, contra the implication of Laws LJ.

This first critique of the decision in *KO (Nigeria)* is therefore that it leaves us none the wiser as to what it can rationally mean to not 'blame' a child for the conduct of their parents in immigration matters. How can one rationally reconcile the general principle that the child should not be blamed for the conduct of their parent's, with the endorsement of a statutory schema which appears to do precisely that? Clearly the public policy side of the balance is not evacuated of content, as English suggested, but not to blame the child for the conduct of their parent appears to remain a general legal principle rather than an empty claim as implied by Laws LJ. The failure of *KO (Nigeria)* to resolve this ongoing tension – or even to acknowledge its existence – in UK immigration law is a missed opportunity.

The Best Interests of the Child: What is relevant as the context of the decision?

In removal decisions, the courts have struggled with whether the best interests of the child ought to be determined in isolation, or in the context of their parents having no independent leave to remain. This problem overlaps with the one described above because it emerges as a consequence of the principle that the child ought not to be blamed for the conduct of their parents in immigration decisions which affect the child. The courts have found the problem easier to state than to resolve.

On the one hand, if the sole question for determination is whether it is reasonable for the child to remain in the UK then only two possible futures for the child ought to be considered; that they remain in the UK, or are removed. Either the child's parents will be removed as well or they will be granted leave to remain in order to maintain the child's best interests (as there is an established principle in UK law that it is in the best interests of children to be brought up by their natural parents).[83] Neither outcome will result in the child being separated from their parent, and so the question as to whether it is reasonable to require the child to leave the UK comes down principally to a question of which of 'here' or 'there' best supports the child's best

[81] *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2014] Imm AR 479, [10]

[82] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [15]

[83] *Re D (Care: Natural Parent Presumption)* [1999] 1 FLR 135 CA

interests. Kalverboer *et al*. suggest the following list of factors as relevant to the determination of the best interests of the child in migration procedures:

- Adequate physical care
- Safe immediate physical environment
- Affective atmosphere
- Supportive, flexible parenting structure
- Adequate example set by parents
- Interest in the child
- Continuity in upbringing and care, future perspective
- Safe wider physical environment
- Respect
- Social network
- Education
- Contact with peers and friends
- Adequate examples set by the community
- Stability in life circumstances, future perspective[84]

To this list, one might add the quality of healthcare, and the child's own views and opinions.[85]

On the other hand, if the child's best interests are first and foremost in having the care and protection of their parents, as UK family law presumes, then it is contextually relevant to the enquiry as to whether it is reasonable for the child to be removed from the UK whether or not the parents have their own freestanding Article 8 ECHR claim to remain in the UK, or whether absent the child they would be removed. Confronted with this question in *PD (Sri Lanka)*, the Upper Tribunal found that:

---

[84] Margrite Kalverboer and others, 'The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures' (2017) 25 International Journal of Children's Rights 114, 126

[85] Committee on the Rights of the Children, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)' <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vEAXPu5AtSWvliDPBvwUDNUfn%2fyTqF7YxZy%2bkauw11KClJiE%2buI1sW0TSbyFK1MxqSP2oMlMyVrOBPKcB3Yl%2fMB> accessed 17 March 2017

> In circumstances where the claims of several family members coincide, it would be artificial and unrealistic to determine them on their individual merits, in a rigid sequence and in insulated packages, without reference to the other claims.[86]

Lord Carnwath in *KO (Nigeria)* comes to the same conclusion, finding that:

> …it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them.[87]

However, the Upper Tribunal in *PD (Sri Lanka)* were alive to the inherent conflict between this contextual approach to the question of reasonableness and the prevailing authority on the best interests of the child:

> …we must weigh the third Appellant's best interests, as we have assessed them, which have the status of a primary consideration. The main countervailing factor is that the first and second Appellants have no legal right to remain in the United Kingdom. Their immigration status is that of unlawful over-stayers. This is a factor of undeniable weight. However, it has been frequently stated that a child's best interests should not be compromised on account of the misdemeanours of its parents.[88]

Lord Carnwath describes the weighing of the best interests of the child against the immigration misdemeanours of the parent as only 'indirectly material'.[89] But this clearly underplays the work that the investigation of the parent's independent removability is doing in framing the decision-making process. When the question of the reasonableness of the child being 'here' or 'there' begins with determining whether the parents should be assumed to be 'here' or 'there', then only if there are best interests factors which require the child to remain

---

[86] *PD and Others (Article 8 - conjoined family claims) Sri Lanka* [2016] [2016] UKUT 00108 (IAC), [21]

[87] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [18]

[88] *PD and Others (Article 8 - conjoined family claims) Sri Lanka* [2016] [2016] UKUT 00108 (IAC), [41]

[89] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [18]

'here' in the UK *and* which would otherwise outweigh their best interests in being brought up by their parents 'there', would it be unreasonable to expect the child to depart the UK. The effect is to deflect again the judicial gaze of enquiry away from the person of the child and the question as to whether or not it is unreasonable for them to leave the UK. The judicial gaze is returned instead onto a balancing between the public interest in removing the parent and the best interests of the child. In a context in which firm border control is the political and judicial mantra of the moment, it is a balance that is weighted against the child from the start.

As well as the consequentialist objection to the approach adopted by Lord Carnwath in *KO (Nigeria)*, two further objections are based in established principles. The first is that to balance the best interests of the child against the immigration misdemeanours of the child's parents inevitably results in violation of the principle that 'a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent'.[90] For this principle to mean anything must require that the consideration of the reasonableness of the child leaving the UK must not be affected by the immigration history of their parents. However, whether or not their parents would likely to be able to establish an independent, freestanding Article 8 ECHR claim to remain in the UK is intimately connected to their immigration history. The public interest in removal is greater, by order of statute, where the adult established their private life claim to remain in the UK when they were in the UK unlawfully or with only precarious leave to remain.[91] An adult appellant against removal will therefore have a stronger claim to remain independently in the UK if they are free from immigration misdemeanours such as unlawful entry or overstaying, and have stronger claims to remain the shorter any such periods of presence without leave were. When the strength of the parent's independent claim to leave to remain is then the contextual starting point against which the best interests of the child is determined, as proposed in *KO (Nigeria)*, then the outcome of the child's case is (at least in part) dependent upon whether their parent is guilty of immigration misdemeanours. As this is the outcome of Lord Carnwath's decision in *KO (Nigeria)*, it is hard to characterise as anything other than causing the child to be blamed for the conduct of their parent.

This objection to the judgment in *KO (Nigeria)* again rests on the lack of engagement in the judgment with this inherent tension, rather than a presupposition that the best interests of

---

[90] *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690, [10]

Cited in*: KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [14]

[91] Nationality, Immigration and Asylum Act 2002, s117B(4) & (5)

the child ought to be the sole, defining consideration. However, as outlined above, to ensure that a child is not blamed for the misconduct of their parent appears to be fundamentally violated by the approach in *KO (Nigeria)* to place the child's best interests claim in the context of their parent's independent claim to leave to remain. After adopting as a general principle that the child ought not to be blamed in this manner, it should have been incumbent on Lord Carnwath to explain how he reconciled in his own mind the principle and the consequences of his judgment when they so clearly diverge. On the other hand, if the principle that the child ought not to be blamed for the misconduct of their parents in immigration decisions is a merely rhetorical device, rather than a legal principle with substantive consequence for decision-making, again, Lord Carnwath neither makes this distinction clear nor engages with its justification. It is this lack of clarity in the judgment in *KO (Nigeria)* that remains problematic for ensuring that the best interests of the child in immigration decisions is actually understood by the Secretary of State, and appellate decision-makers.

The second relevant principle against which this aspect of *KO (Nigeria)* can be critiqued is that the focus on border control as the starting point of the enquiry (i.e. whether or not the parent should be removed as the starting point for determining the reasonableness of the child leaving the UK) is evidence of what Dembour describes a 'problematic logical inversion'[92] in the determination of the human rights of migrants. In the context of the European Court of Human Rights, but which appears to equally apply to the Supreme Court in *KO (Nigeria)*, Dembour argues that:

> …the Court conceives of the rights guaranteed in the Convention as exceptions which temper the general principle of state sovereignty regarding migration control, rather than the Court conceiving the state control prerogative as tempering human rights norms…[93]

The insistence of Lord Carnwath in *KO (Nigeria)* to contextualise the reasonableness of the child leaving the UK means that the initial decision-making focus remains on the parents and the migration control agenda. Only if the child's best interests in remaining 'here' outweigh

[92] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP, 2015), 4

[93] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP, 2015), 4

to go with their parents 'there' is the principle of state sovereignty over migration control tempered by the human rights of the child.

In contrast, what is implied to be a de-contextualised approach which focusses on the child, and the child alone, is anything but. To determine whether it is reasonable for the child to leave the UK by reference only to the child's best interests is highly contextual as (following the best interests checklist from Kalverboer *et al.*)[94] it should be based in the child's experiences of 'here' and 'there'. It is not a de-contextualised approach, rather it is one which is concerned principally with the child's context, and not the context of the state's immigration control agenda. What an approach based solely on the child's experiences of deportation does not do is make the child's best interests a secondary consideration which must overcome the state's interests in migration control. It is this change of perspective – to reverse the problematic logical inversion – which the Supreme Court in *KO (Nigeria)* appears to be struggling to reconcile itself to as a necessary condition of giving full effect to the best interests of the child.

I have argued here that this failure to reconcile itself fully to a truly child-first-and-only interpretation of s 19 of the Immigration Act 2014 means that the child's best interests remain subject to determination, in a way that is more direct than is appreciated by the Supreme Court, with reference to the immigration misdemeanours of their parents. This means that the balance remains set against the child in the determination of whether it is reasonable for them to leave the UK, and that they are still being blamed for the (mis)conduct of their parents.

The Best Interests of the Child v Reasonableness

This final point is intimately connected to the others. If the s 55 BCIA duty applies to deportation and removal decisions, and if the s 55 BCIA duty requires the courts to be concerned with the best interests of children – both points which Lord Carnwath accepts as relevant 'general principles'[95] – then what is the difference between the 'best interests of the child' and 'reasonableness'? From *KO (Nigeria)* it appears that it is reasonable for a child to leave the UK, even when that is not in the best interests of that child. In deciding the appeal of NS, Lord Carnwath finds that the children's:

[94] Margrite Kalverboer and others, 'The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures' (2017) 25 International Journal of Children's Rights 114, 126

[95] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [15]

> …best interests would have been for the whole family to remain here. But in a context where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable.[96]

The effect of requiring the decision to consider whether it is reasonable to expect the child to leave the UK in the context of the disposal of the parent's case is clearly stark. When the assessment is on the child's situation alone, it is not reasonable for the child to leave the UK. However, when the assessment is taken against a background which assumes the parents will be removed, the outcome as to what is reasonable for the child substantively alters.

Lord Carnwath at no point engages with the question as to why the s 55 duty to promote and safeguard the child's welfare may be put aside so as to produce an outcome which, even if believed to be 'reasonable', is not in the child's best interests. Recall that the children's best interests in NS in remaining in the UK were not based simply on the fact that their parents were here, but because none of the children knew of life outside the UK, and that one of the children had been in the UK for over ten years at a stage of adolescent development which the court had found particularly important for their future development, especially in being able to successfully establish their own private and family life as a young adult.[97] The failure to present reasons for this departure from the principle of best interests is a new tension which is unnecessarily introduced by *KO (Nigeria)*.

This judgment also appears to further widen the gulf between the protection of the best interests of British and EEA-national children on one hand, and non-EEA-national children on the other. Although *Sanade*[98] may no longer provide a blanket presumption that it is unreasonable to require a British or EEA-national child to leave the EU,[99] a higher level of protection for their best interests persists as not all foreign national offender parents can possibly constitute 'a genuine, present and sufficiently serious threat to the requirements of

---

[96] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [51]

[97] *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [49-50]

[98] *Sanade (British children – Zambrano – Dereci)* [2012] UKUT 48, [2012] Imm AR 597

[99] Positive treatment of this aspect of *Secretary of State for the Home Department v VM (Jamaica)* [2017] EWCA Civ 255, [65] was given in *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53, [44]

public policy or of public security',[100] so as to permit the public interest in deportation to outweigh the principle of EU law at stake. The best interests of British and EEA-national children remain more valuable than the best interests of non-EEA-national children in removal and deportation decisions.

Conclusion

The Supreme Court in *KO (Nigeria)* have intervened to discipline the troublesome offspring of s 19 of the Immigration Act 2014. The judgment confirms that the dominant strand of interpretation at the Upper Tribunal and Court of Appeal is incorrect, namely that s 19 does not simply put Parliament's thumb on the balancing scale in removal and deportation decisions. Instead the Supreme Court have found that it was Parliament's intention to create free-standing, statutory exceptions to removal and deportation, indicated by its deliberate use of words and structural devices.

This makes UK removal and deportation easier to understand. Three categories are created on the basis of the reason for removal or deportation; removal for lack of leave to enter or remain (s 117B(6) NIAA), deportation having been sentenced to a period of imprisonment of less than four years or is a persistent offender (s 117C(3)-(5) NIAA), or deportation as a consequence of imprisonment of four years or more (s 117C (6) NIAA). Within each category, the assessment as to what is 'reasonable', 'unduly harsh', or amounts to 'very compelling circumstances' in order to meet the requirements of the exception is the same across the category to which it relates. The focus of the assessment is therefore solely on the person of the qualifying partner or child, and the relative strength of the public interest within the categories are not directly relevant to the determination.

This has the virtue of clarity, and of ostensibly being a child-centric determination. However, it leaves a number of tensions remaining within UK law, principally around the application of the best interests of the child through s 55 BCIA. Although Lord Carnwath in *KO (Nigeria)* acknowledges the importance of not blaming the child for the misconduct of their parent in immigration decisions as a fundamental aspect of the best interests of the child, the creation of an escalating set of provisions where the negative effects on the child must increase in relation to the seriousness of the misconduct of the parent (albeit in broad categories rather than in direct proportion), seems to violate this principle. Secondly, the conduct of the parent is constructed as indirectly relevant to the consideration of what is 'reasonable' for the child to

[100] *Secretary of State for the Home Department v VM (Jamaica)* [2017] EWCA Civ 255, [65]

endure as a consequence of the removal of parent(s) because the decision as to the child's future is framed in the context of the removability of the parents. Lastly, the standard of 'reasonable' is set at a level above that of the best interests of the child, but with no critical engagement or explanation as to why this might be.

Although *KO (Nigeria)* is a victory for the plain reading of Parliament's intention through statute, and a defeat of the executive's hope to effectively re-write primary legislation through litigation, the statute itself remains considerably problematic.

Jonathan Collinson
Lecturer in Law, University of Huddersfield