IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006441
First-tier Tribunal No:
HU/54171/2021
IA/10102/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 April 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Dai Van Bui
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr P. Blackwood, Counsel, instructed by Qualified Legal Solicitors Ltd
For the Respondent: Ms S. Rushforth, Senior Home Office Presenting Officer

Heard at Field House on 19 April 2023

DECISION AND REASONS

1. This appeal concerns the application of the structured deportation provisions contained in section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Put simply, the essential issue is whether it was an error of law for the First-tier Tribunal to consider what were, broadly speaking, some relevant issues against the wrong criteria.

2. For the reasons set out below, on the facts of this case, the judge's approach involved the making of an error of law, such that his decision must be set aside, and the case must be remitted to the First-tier Tribunal to be heard by a different judge.

Factual background

3. First-tier Tribunal Judge S. Taylor ("the judge") heard an appeal brought by the appellant, a citizen of Vietnam born on 25 December 1969, against a decision of the Secretary of State dated 21 July 2021 to refuse his human rights claim. He made the claim in an attempt to resist deportation, which he faces because he is a "foreign criminal", as defined in section 32(1) of the UK Borders Act 2007 and section 117D(1) of the 2002 Act. He attracts that status because on 3 February 2009 in the Crown Court at Manchester Minshull Street he was sentenced to 14 months' imprisonment for an offence arising from his presentation of a fraudulent Norwegian passport upon arrival in the UK.

4. In the years that followed his conviction, the appellant claimed asylum and later absconded without exercising the right of appeal he enjoyed against the refusal of his claim. He next came to the attention of the Secretary of State in July 2015 when he applied for leave to remain on the basis of his relationship with his British partner, Tuyet Thi Hoang ("the sponsor") and her four adult British children. That application was refused on 30 June 2016 and certified under section 94B of the 2002 Act, with the consequence that the appellant could be removed from the UK notwithstanding the fact he otherwise enjoyed an in-country right of appeal against the decision. The appellant again absconded. In April 2021, he challenged the certification of his human rights claim under section 94B pursuant to *Kyarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42. In response, the Secretary of State sought further representations from the appellant and, in the course of the decision under challenge, withdrew the section 94B certificate. The Secretary of State refused to revoke the deportation order and refused the appellant's human rights claim. The appellant appealed against that decision, which was the decision under appeal before the judge.

5. In his decision, which was signed on the day of the hearing, the judge summarised the appellant's immigration history, the factual background, and the decision of the Secretary of State. He summarised the evidence including the oral evidence from the appellant, the sponsor, and one of the sponsor's daughters. The numbering appears to have gone awry in the judge's decision (the paragraph sequence is 22, 23, 24, 23, 22, 24, 25), which I have sought to address by referring to the location of a relevant paragraph using page numbers etc.

6. At para. 24 on page 8 (that is, the second para. 24) the judge commenced his operative analysis. He began with the Immigration Rules concerning deportation. He found that the appellant could not succeed under para. 399(a) because the sponsor's children were over the age of 18. As to para. 399(b), the appellant's relationship with the sponsor was formed at a time when he was in the United Kingdom unlawfully. He could not succeed under para. 399A because he had never been lawfully resident in the UK.

7. At the second para. 23, the judge referred to "the statutory tests at s.117B and s.117C". The appellant could not succeed under section 117C(4), Exception 1 (private life), because he had not been lawfully resident for more than half of his life. The judge said that the only exception that was in principle available to the appellant was under section 117C(5), Exception 2 (family life), concerning whether the impact of his deportation would be "unduly harsh" on the sponsor. In his analysis of that issue in the second para. 24, the judge made a number of observations and findings which lie at the heart of the reasons I set out below for

finding that the decision involved the making of an error of law. I will summarise the relevant extracts from the judge's decision in due course.

8. At para. 25 the judge also addressed the appellant's case that, upon return to Vietnam, he would be without a *Ho Khau* registration document, and thereby unable to secure accommodation or employment. The judge said that the *Ho Khau* system was being phased out and is generally not enforced. The appellant would enjoy the prospect of remitted support from the sponsor and her children. He had no medical conditions that would prevent him from working. He spoke the language and was a citizen of the country.

9. The appellant now appeals against the judge's decision to the Upper Tribunal with the permission of First-tier Tribunal Judge Barker.

Issues on appeal

10. There are five grounds of appeal. First, the judge erred by applying the Immigration Rules, rather than adopting the structured approach contained in section 117C of the 2002 Act. Secondly, the judge impermissibly calibrated "unduly harsh" by reference to the public interest in the deportation of foreign criminals, contrary to *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 and *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22. Thirdly, the judge failed to conduct proper proportionality assessment addressing all material factors. Fourthly, the judge failed to engage with the appellant's expert evidence concerning the *Ho Khau* registration system. Fifthly, the judge impermissibly disregarded the impact of the appellant's deportation on the sponsor's adult children, and disregarded relevant evidence of the same, simply because they were over the age of 18.

11. Mr Blackwood expanded upon the grounds of appeal and handed up a helpful speaking note.

12. Resisting the appeal, Ms Rushforth submitted that the judge had dealt adequately with all material issues. Some of his findings were brief, but there was sufficient. Properly understood, the grounds amount to a disagreement of fact and weight. It was nothing to the point that the judge had applied the Immigration Rules *in addition* to Part 5A of the 2002 Act; his analysis demonstrates that he had applied the statute in any event.

Relevant legal principles

13. Section 117C(1) of the 2002 Act provides that the deportation of "foreign criminals" is in the public interest for the purposes of determining the proportionality of deportation under Article 8(2) of the European Convention on Human Rights ("the ECHR"). The appellant satisfies the definition of foreign criminal for the purposes of this section because he is not a British citizen and has been convicted of an offence which led to a period of imprisonment of at least 12 months: see section 117D(2) of the 2002 Act. The remainder of the section provides:

> "(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the

> public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (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.
>
> (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.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

14. As for what amounts to an error of law, para. 9 of *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 summarises common errors of law in this jurisdiction. They include making a material misdirection of law (under which grounds one to three are pleaded) and failing to consider material matters (grounds four and five).

Judge's application of Part 5A involved a material misdirection of law

15. It will be convenient to take grounds one to three and five together.

16. Ground two is without merit. The judge correctly calibrated the "due" amount of harshness by reference to the fixed public interest in the deportation of foreign criminals in the course of applying the "elevated standard" represented by the term. That approach was consistent with section 117C(1) and *KO (Nigeria)*, at para. 21:

> "… the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level**. The relevant context is that set by section 117C(1) , that is the public interest in the deportation of foreign criminals**." (emphasis added)

17. See also *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, which held at para. 31 that the above remarks were:

> "… in the context of the public interest in the deportation of foreign criminals and the greater degree of harshness which is connoted by the requirement of 'unduly harsh'."

18. In relation to ground one, while Mr Blackwood is correct to submit that it is not necessary to apply the deportation provisions of the Immigration Rules, in my judgment it is unlikely, in principle and without more, to be a material misdirection to apply the rules alongside Part 5A. The judge's discussion of the Immigration Rules was unnecessary (see *CI (Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 2027 at para. 21) and 'beat the air', but, in and of itself, the application of the rules alongside the primary legislation would not be a material misdirection, provided the primary legislation is correctly applied.

19. However, it appears that the judge's consideration of the rules may have infected his application of section 117C(5), for the judge adopted concepts adverse to the appellant that are found only in the rules in his analysis of the statutory framework, in particular the impact of the appellant's relationship with the sponsor having commenced when the appellant was resident unlawfully. See the following extract from the second para. 24:

> "There is no dispute that the relationship began while the appellant was subject to a deportation order and had no leave to remain in the UK. It had been argued that the parties had been together for eight years, but that had only been made possible because the appellant had absconded from bail on two occasions, once in 2009 and again in 2016. The relationship was not only formed while the appellant was in the UK illegally but continued while the appellant had no leave."

20. In his written and oral submissions, Mr Blackwood submitted that those factors were not relevant to an assessment of whether the appellant's deportation would be "unduly harsh" on the sponsor. I agree. Those factors feature in para. 399(b)(i) of the rules and not section 117(5). Such considerations may have been relevant to the overall assessment of proportionality under section 117C(6) if, on a proper application of section 117C(5), the appellant had not established that he met the exception. The additional factors relied upon by the judge should have performed no part of the quite separate assessment of whether the appellant's deportation would be "unduly harsh" for the sponsor. The judge's application of the "unduly harsh" was therefore in error. It took into account immaterial considerations and was a misdirection in law.

21. That leads to ground 3, whereby Mr Blackwood submitted that the judge failed to conduct an overall proportionality assessment, as he should have done pursuant to section 117C(6) (see *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 at paras 25 to 27). The judge appeared to be live to the need to conduct an overall proportionality assessment. At para. 25, he said:

> "I find no exceptional circumstances which would require separate consideration into resulting unjustifiable harshness for the appellant or sponsor as defined in the case of R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11."

22. The above language was apt to mislead. *Agyarko* did not concern foreign criminals, and the "unjustifiable harshness" test concerns the granting of leave outside the rules on Article 8 grounds generally, rather than the requirements of Article 8 concerning the deportation of criminals. The main difficulty with the judge's exceptional circumstances analysis, assuming that by conducting it he

meant to perform an assessment of "very compelling circumstances" for the purposes of section 117C(6), is that many of the factors that would be relevant to it had already impermissibly featured in the judge's "unduly harsh" assessment. Those factors included the circumstances under which the appellant's relationship with the appellant commenced, the length of their relationship being elongated through the appellant's absconding, and the fact that the passage of time since the appellant's offence counted for little: see para. 10 of Mr Blackwood's speaking note. The judge considered some of the correct factors, albeit at the wrong stage of the analysis.

23. Any assessment of "very compelling circumstances" should also take into account the extent to which an appellant meets the substantive requirements of either exception, even if he is incapable of meeting all requirements of one of the exceptions. The judge did not adopt that approach in relation to exception 1. At the second para. 23, he said "the three limbs of section 117C(4) are additive, so as [the appellant] is unable to satisfy the first limb[,] he cannot satisfy the whole subsection…" The judge should have expressly addressed whether, notwithstanding the fact that the appellant had not been lawfully resident in the UK, he was (i) socially and culturally integrated in the United Kingdom, and (ii) whether he would face very significant obstacles to his integration in Vietnam. Again, it appears that the judge addressed some of those factors in any event, at para. 25: see the discussion of the appellant's inability to speak English and his claims not to have a *Ho Khau.* But the overall analysis under this heading was confused. In light of the judge's earlier confusion, it is difficult to be confident that he was, in fact, applying the correct statutory test.

24. Further, the appellant's relationship with the sponsor's adult children (and whether those relationships engaged Article 8) were factors the judge should have considered. It was wrong to dismiss the impact of their relationship with the appellant in the brisk manner adopted by the judge at the second para. 24. While the adult children were not "qualifying children" for the purposes of section 117C(5), it was still necessary to engage with the impact, if any, of their relationship with the appellant in the course of the broader section 117C(6) assessment.

25. For these reasons, I find that the appeal succeeds on grounds 1, 3 and 5. The judge failed to conduct a proper analysis of the exceptions to deportation, and section 117C(6).

Reasoning concerning the appellant's *Ho Khau* insufficient

26. The judge's treatment of the expert evidence of the appellant's case based on his claimed inability to procure a *Ho Khau* document was insufficient. While on the face of the decision, the judge's analysis was open to him, he did not refer to the expert's rebuttal report. He simply referred to the "expert report". It is not clear whether the judge was aware of the addendum expert's report dated 18 January 2022, or whether he was aware of it and thought that it was of no relevance. The reference to "expert report" in the singular suggests that the judge overlooked one of the reports. It is most likely that he overlooked the second report because, at para. 13, the judge referred to Dr Tran's report referring to the appellant's prospects of securing "decent" employment. Those opinions were a feature of Dr Tran's first report. Even if the judge was aware of Dr Tran's addendum report, he did not give any reasons for dismissing its conclusions, which engaged with, and sought to rebut, the country evidence

relied upon by the Secretary of State in the refusal letter. I find this analysis was insufficient.

Setting the decision aside

27. The above errors are such that the decision of the judge must be set aside. I do not consider that it is possible or appropriate to seek to isolate and preserve any individual "untainted" findings of fact reached by the judge. I set the decision aside in its entirety.

28. The nature and extent of the fact-finding that must be conducted for the decision to be remade is such that I consider that the case must be remitted to the First-tier Tribunal, to be heard by a different judge.

Notice of Decision

The appeal is allowed.

The decision of Judge S. Taylor involved the making of an error of law such that it must be set aside with no findings of fact preserved.

The appeal is remitted to the First-tier Tribunal to be heard by a judge other than Judge S. Taylor.

Upper Tribunal Judge Stephen Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 April 2023