IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001930
First-tier Tribunal No:
HU/55416/2021
HU/015922022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 01 November 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OO
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Hussain (remote) instructed by SIMO Law Firm
For the Respondent: Ms Z Young, a Senior Home Office Presenting Officer.

Heard at Bradford Magistrates Court on 26 October 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Suffield-Thompson ('the Judge') who in a decision promulgated on 2 May 2023 allowed OO's appeal against the refusal of his application for leave on

human rights grounds relied upon by him as an exception to the order for his deportation from the United Kingdom.

2. The point being taken by the Secretary of State is that the Judge has materially erred in law by failing to properly apply the Devaseelan principles and, in particular, is taking as the starting point an earlier decision of the First-tier Tribunal despite it having been set aside by the Upper Tribunal and the appeal subsequently being dismissed.
3. It is not disputed OO is a citizen of Nigeria born on 16 December 1980. It is not disputed on 2 August 2017 a deportation order was made under section 32 (5) of the UK Borders Act 2007. It is not disputed that OO has family life in the UK with his British wife and their two young children.
4. In relation to the procedural history, it is not disputed on 19 April 2017 at Leeds Crown Court OO was convicted of Affray and sentenced to 15 months imprisonment. So far as previous proceedings are concerned the Judge writes:

> 10. On 2 August 2017, a Deportation order was signed against the Appellant which was served upon him on 5 August 2017 alongside a decision to deport notice granting an in country right of appeal. On 18 August 2017, the Appellant lodged an appeal against the decision to deport him. A Case Management review was heard on 28 September 2017 with permission to proceed. The Appellant's appeal was allowed at the First Tier Hearing on 5 January 2018 on HR grounds only. The Home Office sought permission to appeal to the First Tier on 10 January 2018 which was granted by the First Tier 8 February 2018. An error was found by the Upper Tribunal on 21 August 2018, and they remitted the case, and the appeal was dismissed 14 January 2019 with the Appellant becoming Appeals Rights Exhausted 29 January 2019.
> 11. However, it was then later noted that the Appellant had applied for PTA to the Court of Appeal on 25 January 2019. On 18 April 2019, the Appellant's permission to appeal to the Court of Appeal via Tribunal, was refused. On 16 May 2019 the Appellant again sought permission to appeal to the Court of Appeal this was refused on 13 November 2019 and the Appellant became Appeal Rights Exhausted on 26 November 2019.

5. Although I accept that at [10], as submitted by Mr Hussain, the Judge was aware of the existence of the Upper Tribunal decision, I find that in itself is not sufficient. The Judge's findings commence at [44].
6. At [48] under the heading 'Previous Tribunal Decisions' the Judge writes:

> 48. I deal first with the previous decision in this appeal. I remind myself of the case of Devaseelan [2002] and the principles set out in that case. The first determination and the Upper Tribunal's findings are, I accept my starting point. However, in this type of appeal, particularly where children are involved, the passage of time is a key factor, as is the conduct of the Appellant since his releases from custody and evidence of rehabilitation. The previous court found that his rights outweighed the public interest despite the seriousness of his conviction, and it is open to this Tribunal to find that there has been no change in his circumstances (other than that he has another child due to be born this year) justifying a differing view.

7. The comment by the Judge that the previous court found that OO's rights outweighed the public interest despite the seriousness of his conviction, and that "it is open to this Tribunal to find that there has been no change in his circumstances, (other than that he has another child due to be born this year), justifying a different view", is a clear reference to the first decision of the First-Tier Tribunal which was set aside, and does not accurately reflect the findings of the Upper Tribunal which dismissed the appeal. I find merit in Ms Young's submission that this indicates that the Judge not only took an incorrect starting point for determining the merits of the appeal, namely the first decision, but also cast doubts upon whether the Judge properly factored into the decision-

making process the findings of the Upper Tribunal, and how the evidence now available warranted departing from the same.

8. I accept that Devaseelan does not say that the previous findings are determinative. They cannot be a straitjacket for a future judge, quite the contrary. It is settled law that a previous determination is a starting point and that another Judge is entitled to depart from those findings if there is sufficient evidence available to warrant such a conclusion.
9. The findings of the Upper Tribunal in the decision promulgated on 14 January 2019 can be summarised as follows:

    a. The appellant has not been lawfully resident in the UK for most of his life [10].
    b. The evidence did not establish the existence of very significant obstacles to integration by the appellant back into Nigerian society [11].
    c. This is a family splitting case with the appellant's wife and children remaining in the UK with the question being whether it will be unduly harsh for the family members to remain in the UK without the appellant [13].
    d. It was not made out the impact upon the appellant's wife with whom he has a genuine subsisting relationship, whilst harsh, will be unduly harsh. Upon the appellant's deportation she shall become a single parent caring for two young children with the evidence failing to adequately analyse the impact upon the appellant's wife of having to rearrange her employment and/or social arrangements in light of this fact, sufficient to establish that even if difficult or harsh the impact upon the wife will be unduly harsh. The Independent Social Worker (ISW) described the caring arrangements as shared caring arrangements between the appellant and his wife [15].
    e. It is accepted the appellant has a genuine subsisting parental relationship with his children and that whilst he was imprisoned the children experienced difficulties as expressed in the social worker's report and if the appellant is removed similar issues may arise. [16].
    f. It was not made out that as a result of deportation there will be a loss of the children's home environment, support of their mother, or entitlement to other areas of support. Whilst in reality the only contact the children could be by indirect means unless they are able to visit their father in Nigeria the evidence did not establish the impact on the children will be unduly harsh [16].
    g. The appellant had not shown on the basis of the evidence that he was entitled to rely upon Exception 2 in opposing his deportation from the United Kingdom.
    h. The appellant had not established very compelling circumstances sufficient to outweigh the public interest in his deportation as a result of his offending [22].

10. The Tribunal also comment upon the seriousness of the offending which involving a crime of violence.
11. The Upper Tribunal decision was upheld by the Court of Appeal.
12. The Judge records at [49] not underestimating the importance the public interest but states at [52] "in terms of the range of criminal offences I find that this is at the lower end of the scale, as the sentence he received demonstrates".
13. It may be that when one takes account of the whole range of criminal offences, and available sentencing provisions, it is a simple exercise to establish where OO's conviction would fall within that scale. The Judge's observations may be correct, but it was not open to the Judge to go behind the conviction and the comments of the sentencing judge which clearly demonstrate the violent nature of this event and the fear and impact it has had upon the victim.

14. Considering the Exceptions found in the Immigration Rules and section 117C of the Nationality, Immigration and Asylum Act 2002, in relation to significant obstacles the Judge finds there are no very significant obstacles to 00 resetting in Nigeria and that he could not meet Exception 1. That decision is not challenged as it is in accordance with the finding of the Upper Tribunal.
15. In relation to the appellant's wife, the Judge finds that Exception 2 is met as the appellant is in a genuine subsisting relationship with the qualifying partner and it will be unduly harsh for her to live in Nigeria or to remain in the UK alone as it would effectively end their marriage [63].
16. It is not disputed that it will be unduly harsh for OO's wife to return to Nigeria she is a refugee from that country. The problem is that the finding it will be unduly harsh for her to remain in the UK without the appellant is contrary to the decision of the Upper Tribunal that this had not been proved on the evidence. The Judge's reasoning appears to be limited to a simple claim that removal of her husband would effectively end their marriage. There is nothing to show why that would result in unduly harsh consequences. In that respect the breach of the Devaseelan principle and failure to provide adequate reasons for why a finding was justified in the alternative is made out by Ms Young.
17. In relation to the children, the Judge at [72] records the history of the family dynamics which are as they also were before the Upper Tribunal. The Judge finds that 00 has been and still is the primary carer of the two children. That is contrary to the finding of the Upper Tribunal which found that care of the children is shared between 00 and his wife. There appears to be no engagement with the earlier finding or proper explanation for why, when the factual situation appears to be the same, a different decision was justified.
18. The Judge referred to an ISW report at [74] which appears to be from the same source as the report before the Upper Tribunal. The content of the report in relation to the family dynamics and relationships appears to be very similar to or the same as that considered by the Upper Tribunal, the only difference being time that had passed since the early decision was made. The Judge refers to the conclusion of the ISW before concluding at [32]:

> 32. I am aware of the case law but in this case I find that the effects on the children will be more extreme than for others as though only is see their primary carer because their mother is a refugee she cannot take them to visit their father in Nigeria so it will be effectively ending the face-to-face relationship with the Appellant and his children and that is more than "unduly harsh" in the findings of this Tribunal.

19. The point about OO being the primary carer of the children is commented upon above. The Judge's finding is contrary to the finding of the Upper Tribunal that it would not be unduly harsh for the children to remain in the UK if their father was deported. The Judge appears to have arrived at a contradictory decision on what, effective, are the same material facts. The failure of the Judge to appear to have taken the Upper Tribunal as a starting point for determining the merits of the appeal and then to discuss in detail how departing from those findings is warranted is what has given rise to problems in relation to the sustainability of this decision.
20. The Judge considers section 117 B from [83] of the decision under challenge in which the Judge refers to the appellant entering the UK legally as the spouse of his wife so having complied with the UK Immigration Rules to enter which, arguably, ignores the full extent of the appellant's immigration history. At [84] the Judge states the importance the public interest is not underestimating and goes on to refer to significant emotional and psychological damage to the children if the family unit was destroyed when there is no reference in the determination to any expert evidence indicating such psychological or psychiatric consequences. It may be that that is referring to the opinion of the

Independent Social Worker if so it is not adequately reasoned or explained in the body of the determination. Using language such that removal of the appellant will be “catastrophic for the children” is also not properly explained in the determination. It was accepted by the Upper Tribunal that it will be harsh for the children and for the wife if OO was removed but not unduly harsh.

21. It is accepted the best interests of the children will be to remain in a family with both parents presents, but the best interests are not the determinative factor. The Judge concludes at [85] that the public interest is outweighed but we still come back to the issue that in reaching that point the Judge’s starting point is contrary to the Devaseelan principles as was the manner in which the evidence was analysed without reference to the correct earlier decision.
22. I note the submission by Mr Hussain that any error made is not material as the Judge clearly assessed the evidence that was before the First-tier Tribunal and came to a conclusion on the basis of that evidence. The problem with that submission is as part of the assessment of the evidence the Judge should have included and incorporated the earlier judicial findings which have been preserved and upheld by the Court of Appeal.
23. Having given the matter careful consideration I find that the Secretary of State has established on the fact that the Judge has materially erred in law on the basis a failure to properly apply the Devaseelan principles in light of the earlier determination.
24. I find such an error to be material as it is not certain that had the Judge undertaken the exercise properly the result would have been the same. The evidence from the ISW and the factual matrix is very similar if not identical to that considered by the Upper Tribunal, bar the passage of time which in itself does not justify the decision.
25. I set aside the decision of the Judge. The procedural irregularity in failing to determine the decision in accordance with the Devaseelan principles means the Secretary of State has not had the opportunity of having the case properly considered, giving rise to an issue of unfairness. As extensive consideration of all the outstanding issues is required, from the correct starting point, I find it is appropriate in the circumstances to state that there shall be no preserved findings and to remit the appeal to the First-tier Tribunal sitting at Bradford to be heard afresh by a judge other than Judge Suffield-Thompson.

Notice of Decision

26. The First-tier Tribunal has been shown to have materially erred in law. I set that decision aside. The appeal shall be remitted to the First-tier Tribunal sitting at Bradford to be heard de novo by a judge other than Judge Suffield-Thompson.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 October 2023