IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006690

First-tier Tribunal No: HU/52009/2021
IA/08050/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3 July 2024

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

TF
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Read, counsel instructed by Hazelhurst Solicitors
For the Respondent: Ms Newton, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 21 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant or any member of his family, likely to lead members of the public to identify the appellant and/or his family members. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Galloway which was promulgated on 26 May 2022.

2. However, for ease of reference hereafter the parties will be referred to as they were before the First-tier Tribunal.

3. Permission to appeal was granted by First-tier Tribunal Judge S Aziz on 6 July 2022.

Anonymity

4. An anonymity direction was made previously owing to the risk of harm or distress being caused to the appellant's minor children and is maintained for the same reasons.

Factual Background

5. The appellant is a national of Mozambique now aged forty-five. He entered the United Kingdom irregularly via the Republic of Ireland in the year 2000. In 2019, the appellant applied for leave to remain in the United Kingdom on human rights grounds. During 2020, the appellant was convicted of fraud and sentenced to two years' imprisonment. The appellant made a human rights claim in response to being informed of his liability to deportation. That application was refused by way of a decision dated 5 May 2021, which is the subject of this appeal.

The decision of the First-tier Tribunal

6. The First-tier Tribunal judge concluded that the impact of the appellant's deportation on his minor children would be 'beyond unduly harsh' and that there were very compelling circumstances over and above the exceptions to deportation.

The appeal to the Upper Tribunal

7. The grounds of appeal concern the judge's findings in relation to undue harshness and are reproduced here.

- The SSHD respectfully contends that the FTTJ has materially erred in inadequately reasoning their finding that the child 'J' 'is autistic' **[30]**. The FTTJ points to no medical diagnosis, no evidence from the school that 'J' attends and the ISW report is inadequate to establish this. The burden of proof was upon the Appellant and the SSHD would contend (with regard to 'TK'(Burundi)) that it was reasonable to expect a clear, formal diagnosis of ASD for a British child in the UK. The FTTJ pointing to no reliable medical evidence to support what amounted to a medical diagnosis by the FTTJ.
- Having seemingly made a diagnosis that 'J' is autistic the FTTJ has failed to assess where on the spectrum disorder 'J' lies and therefore the extent to which the Appellant's deportation may impact 'J'. The FTTJ seemingly is of the view that any finding of autism is sufficient to render deportation 'unduly harsh'; the SSHD contends that each case must turn on its own facts and the mere fact of being on the autism spectrum (were that to be proved) is insufficient to find 'undue harshness' without a case specific assessment of impact weighed against both objective and subjective evidence.
- Absent the impact upon 'J' the FTTJ has failed to given any reasoning to support their finding of undue harshness with regard to 'T'.
- The FTTJ's finding **[35-37**] that s117C(6) is satisfied it predicated upon their erroneous assessment of s117C(5) and is therefore contaminated by the inadequate reasoning

disclosed above. The SSHD contends that the wider proportionality assessment is flawed.

8. The grounds further state that the respondent is content for the finding on the parental relationship at [**31**] to be preserved as well as the finding at [**34**] that paragraph 399 of the Rules is not met due to a lack of lawful residence.

9. Permission to appeal was granted on the basis sought.

10. No Rule 24 response was filed in advance of the hearing.

The error of law hearing

11. The matter comes before the Upper Tribunal to determine whether the decision contains an error of law and, if it is so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was attended by representatives for both parties as above. A bundle was submitted by the Secretary of State containing, inter alia, the core documents in the appeal, including the appellant's and respondent's bundles before the First-tier Tribunal.

12. At the commencement of the hearing, Mr Read stated that he wished to rely on a Rule 24 response as well as a bundle of documents accompanied by a Rule 15(2)A application. This required the matter to be put back in the list as neither of these documents had found their way to the Upper Tribunal or the respondent. Thereafter, both representatives made submissions and the conclusions below reflect those arguments and submissions where necessary.

Discussion

13. There was no medical evidence before the judge to support the finding made at [33] that child J 'suffers from autism or other similar diagnosis.' The report of the independent social worker dating from 2022, which was before the judge made it clear that the assessment for either ASD or ADHD was ongoing. On the basis of this report and the view of J's mother, the judge concluded that J was autistic and had 'additional needs.' Yet there was no medical evidence before the judge which confirmed a diagnosis or set out what J's additional needs were and how they were being met by the appellant's presence in the United Kingdom.

14. The judge did not provide adequate reasons for concluding that the effect on J of the removal of the appellant would be unduly harsh. The reader of the decision is none the wiser as to what J's additional needs are or what the high level of support he is likely to need into adolescence and adulthood as the social worker suggested.

15. In summary, I am satisfied that the judge materially erred in allowing the appeal in circumstances where there was no evidence of a formal diagnosis of ASD as well as an absence of evidence as to the extent of the child's symptoms and how this would affect the child if the appellant were to be removed

16. Having found there to be inadequacy of reasoning, I have carefully considered whether these errors are material. In considering materiality, out of pragmatism, I took into account the documents in the Rule 15(2)A bundle which gave the impression that there was a formal diagnosis of ASD. Yet these documents were dated, incomplete, poorly photocopied and did not address child J's circumstances in any real detail. The judge's findings on J's circumstances were

the basis for the findings that Exception 2 was met as well as that there were very compelling circumstances over and above the Exceptions. It follows that the decision contained material errors of law.

17. In view of the Secretary of State's acceptance in the grounds that the appellant had a genuine and subsisting relationship with his minor children, applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I carefully considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statements.

18. I sought the views of the representatives and both were of the view that the matter should be remitted for a de novo hearing. I took into consideration the history of this case, the nature and extent of the findings to be made as well as the fact that the nature of the errors of law in this case meant that the respondent was deprived of an adequate consideration of this deportation appeal.

19. I further consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and therefore remit the appeal to the First-tier Tribunal.

20. While both parties were content for a de novo remittal, in retrospect I considered it fair for the appellant to benefit from the respondent's concession that he had a genuine and subsisting relationship with his children.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside except for the finding that the appellant has a genuine and subsisting relationship with his minor children.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard by any judge except First-tier Tribunal Judge Galloway.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 June 2024