IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002046

First-tier Tribunal Nos: HU/01656/2021
HU/51010/2022
IA/01579/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9th February 2024

Before

THE HONOURABLE MRS JUSTICE STEYN DBE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE FRANCES

Between

DENNIS ONYI WILLIAMS
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim, instructed by BWF Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 24 January 2024

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, we shall refer to the parties as they were before the First-tier Tribunal. The Appellant is a citizen of Nigeria born on 23 August 1984. The Respondent appeals against the decision of First-tier Tribunal Judge Oscroft ('the judge') promulgated on 3 May 2023, allowing the Appellant's appeals against the refusal to revoke his deportation order and the refusal of entry clearance on human rights grounds.

2. The Appellant's relevant immigration history is as follows. The Appellant claimed to have entered the UK illegally in 2005 under a false name and a six month visa organised by his uncle. He remained in the UK and was encountered

by police in April 2010 attempting to marry a Dutch national. On 24 June 2011, the Appellant pleaded guilty on the day of trial and was convicted of two offences, wrongful possession of an identity document and intentionally or recklessly assisting unlawful immigration. He was sentenced to twelve months' imprisonment on the first count and fifteen months' imprisonment on the second count, to run concurrently. On about 27 June 2011, a deportation order was signed and the Appellant was deported on 21 July 2011. He has remained outside the UK since that time.

3. On 22 December 2019, the Appellant married a British citizen in Nigeria and his British citizen child was born in September 2020. On 24 November 2020, the Appellant applied for entry clearance. This was refused on 18 February 2021. On 7 April 2021, he applied for revocation of the deportation order. This application was refused on 17 January 2022.

4. The Respondent also considered the application for entry clearance in refusing to revoke the deportation order and, although the Respondent was satisfied that the eligibility requirements were met, the application for entry clearance was refused under paragraph 322(5) and 320(11) of the Immigration Rules on the basis that the Appellant was an illegal entrant subject to deportation and therefore his exclusion from the UK was conducive to the public good.

5. The Appellant's appeals came before the First-tier Tribunal on 7 March 2023. The appeal against revocation of the deportation order and the refusal of entry clearance were linked and the judge dealt with both issues at the appeal hearing. The Appellant gave evidence and the judge found him to be a credible witness.

The Judge's Findings

6. The judge made the following relevant findings:

> "120. I place greatest weight on the indefinite banishment consideration in my application of the unduly harsh test in both 'stay' and 'go' scenarios. The Respondent relies on the existence of the order and his propensity to re-offend, based on the qualification to his contrition referred to above, to justify its continuing maintenance. I have found his offences whilst serious were based on a discrete set of circumstances which are extremely unlikely to be repeated, and that, on the basis of the facts before me, there is very low propensity to re-offend.
>
> 121. I do not think the rigours of s.117C(3)&(5) require me to exclude from consideration of this element of the public interest test, that on the Respondent's approach, there is no realistic prospect of the wife and child ever being able to reside in the UK where they have established lives, employment, community and family, with the Appellant, in a 'stay' scenario in circumstances in which (apart from his previous conduct) the Appellant satisfies all other requirements for a spousal visa. Mr Biggs posed the powerful rhetorical question: If not now, when? I find that a compelling feature of the unduly harsh analysis. The survival of this family unit would undoubtedly be further compromised and undermined if further years pass. The Respondent has not identified a public interest factor which goes beyond the circumstances

of the original offence, which would be served by the Appellant's continued exclusion from his wife and child in this country. The child's age is relevant here. In the 'stay' scenario this would mean nearly all of her childhood. That is bleak.

122. Likewise, in a 'go' scenario, I find that the harsh effects of requiring the wife and child to leave behind their lives here to join the Appellant in Nigeria or Turkey are compounded in this particular appeal by the consideration that, on the Respondent's approach, there is no realistic scenario in which they would likely be able to return to the country of their citizenship with the Appellant. In the absence of a propensity to reoffend, what material public interest consideration changes over and above the fact a deportation order was made and executed in 2011, if another ten years pass? The 'go' scenario in this appeal represents a final exit from the UK for the family unit to remain physically together. That is quite unlike a 'pre-term' order revocation appeal, where the public interest in exclusion for a period has not yet been served. The child's age is relevant here. In the 'go' scenario that means leaving the UK for nearly all of her childhood and preventing her from developing her own experiences and private life here. That is bleak."

...

"131. If I am incorrect and there is any requirement or room for further balancing of the mandatory considerations in s.117B(1)-(5) and s.117C(1)&(2), then the effect of my other findings as set out above at [88]-[102] are that the cogency of the public interest in maintaining the deportation order are diminished, and the arguments in support of the facilitation of the family life are strengthened.

132. Finally, the Court of Appeal in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662; [2017] 1 WLR 207 held the words "circumstances, over and above those described in Exceptions 1 and 2", which are used in section 117C(6) are to be read into section 117C(3). They do not prevent a person facing deportation from relying on matters falling within the scope of the Exceptions to establish "very compelling circumstances" at the second stage of the analysis: see JZ (Zambia) v Secretary of State for the Home Department [2016] EWCA Civ 116, [28]-[30]; NA (Pakistan, [19]-[21] and [29]- [32].

133. Jackson LJ in NA (Pakistan), discussed the case of a "medium" offender at [32] (cited with approval in CI (Nigeria) v SSHD at [93]):

> "... if all he could advance in support of his article 8 claim was a 'near miss' case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. He would need to have a far stronger case than that by reference to the interests protected by article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in

> conjunction with other factors relevant to article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in CI order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation."

134. I adopt this construction of s.117C to make an alternative finding. To the extent that the impact on the wife and child is not 'unduly harsh' and is a near miss of that threshold in Exception 2, I find that the real harm they have already endured and would continue to endure, taken together with the fact that the order was executed over twelve years ago, and all the findings above regarding the public interest in s.117B(1)-(5) and s.117C(1)&(2) at [88]-[102], are relevant considerations in the Article 8 balancing exercise, to conclude that this is one of those rare cases in which there are compelling circumstances in this appeal to outweigh the public interest in deportation."

…

"140. I take into account that the Appellant entered the UK in 2005 (or possibly 2007) on the basis of incorrect identity documents on a visitor visa and then subsequently overstayed the leave he did have, until he was encountered in the commission of the offences in 2010 which became the subject of the deportation order. That unlawful entry and period of overstaying did not of itself result in a criminal conviction, but it was conduct which undermines the public interest in maintaining immigration control and it was serious.

141. However, given the passage of time (sixteen years minimum and eighteen maximum) since those events, given the relative immaturity of the Appellant at that time, and given the extended course of history since then, including his marriage to a British citizen and the birth of his British citizen child all the subject of my findings above, which I incorporate herein, I find that the fact that he otherwise satisfies the provisions of the rules, means that it would be disproportionate interference with the Article 8 rights of the family to refuse entry clearance and I therefore allow this appeal."

Grounds of Appeal

7. The Respondent appealed, firstly on the grounds that the judge had made a material misdirection in-law and/or given inadequate reasons in relation to the unduly harsh test. It was submitted that the evidence did not support the judge's conclusions and that the judge had failed to apply the extremely demanding test set out in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) at [27] which states:

> "By way of self-direction, we are mindful that '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 antithesis of pleasant or

> comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

8. The Respondent submits that there was little evidence to substantiate the judge's findings at [121] and [122] given the Appellant accepted, at [58], that realistically the continuance of the deportation order was not going to affect his child because he speaks to her on Facetime and she has not known any different.

9. Secondly, the Respondent submitted the judge failed to have regard to the public interest consideration in his finding at [120], which was not adequately explained and was speculative. It was submitted that paragraph 390(iii) of the Immigration Rules continues to apply in the Appellant's case 'in the interests of the community, including the maintenance of effective immigration control'.

10. Permission was granted by Upper Tribunal Judge Macleman on the 1 September 2023 for the following reasons:

> "4. The Judge clearly went to great pains to get this decision right. It is perhaps easy to see that on a broad approach to proportionality the case might go in the appellant's favour. However, the grounds raise a debate on whether, if the rigours of section 117C apply, the tribunal identified anything at that level.
>
> 5. At paragraph 134 the tribunal construed Section 117C so as to reach an alternative finding of very compelling circumstances to outweigh the public interest in deportation. That is not directly challenged in the grounds, but may also have come under consideration."

Respondent's Submissions

11. Mr Clarke relied on the grounds of appeal and addressed ground 2 first, which, in his submission, impugned the judge's approach to the index offence. It was the Respondent's case that there was no evidence that the Appellant has addressed his offending behaviour. The judge's finding at [63], [94-96] and [98] were inconsistent with the sentencing remarks of the Crown Court Judge (CCJ). In those remarks, the CCJ considered the Appellant's use of a false identity document in order to enter into a sham marriage with a Miss B. It was the CCJ's view that Miss B was a victim in this case and had been manipulated by the Appellant. Further, the Appellant had used his false identity in order to mislead the authorities that he was cohabiting with Miss B. The judge accepted the Appellant's evidence that Miss B was his girlfriend, which demonstrated that the judge had failed to engage with the sentencing remarks of the CCJ. This finding fed into the underlying decision and the weight to be attached to the public interest because there was no evidence before the judge that the Appellant had addressed his offending behaviour.

12. In relation to ground 1, Mr Clarke submitted the judge had not applied the unduly harsh test and had in fact supplanted an erroneous test. The judge looked at whether the relationship would be sustainable and the 'needs and wants' of the Appellant rather than addressing the question of whether it would be unduly harsh in accordance with the test in MK (Sierra Leone). Mr Clarke accepted that the judge had quoted HA (Iraq) and had correctly directed himself on the unduly harsh test at [107]. He submitted however that the judge had wrongly taken into

account the Appellant's wife's depression when the only evidence of this was in a GP letter which predated the hearing by some 17 months and related to postnatal depression.

13. Mr Clarke again submitted that the judge correctly directed himself in relation to HA (Iraq). However, he submitted there was a material misdirection and a lack of reasoning because the judge focused on the substance of the relationship rather than the unduly harsh test. The judge wrongly made a distinction at [114] because this was an application to revoke the deportation order.

14. In response to a question from the Tribunal about whether the judge was explaining that it would be unduly harsh in respect of the child because she was at a highly significant and formative age, Mr Clarke submitted that at the moment there would be no impact on the Appellant's child. The Appellant may well be able to develop a relationship in the future but this still had to meet that high threshold test. It was the Appellant's own fault he had not addressed his underlying criminality. The judge erred in concluding that the Appellant would be indefinitely banished from the UK. The judge's findings did not disclose anything approaching 'severe or bleak'.

15. Mr Clarke submitted, on the facts of the case, the unduly harsh test was not met. In relation to rehabilitation and whether the Appellant had turned his life around, Mr Clarke accepted this finding may well have been open to the judge. However, he submitted there was a fundamental error in the judge's reasoning. The judge accepted the Appellant's explanation at face value and failed to consider that he had used fraudulent documents to mislead the authorities, which undermined the assessment of rehabilitation. The judge had looked at the Appellant's 'wishes and wants' rather than the actual effect of the deportation order and had wrongly taken into account the wife's previous history of depression.

16. In summary, Mr Clarke referred to [120] and submitted the judge had attached great weight to the Appellant's indefinite banishment from the UK. The finding that the offence was not repeated was predicated on a misunderstanding of the sentencing remarks. The Appellant's particular circumstances required ongoing enforcement, that was the Respondent's case. The judge wrongly focused on the family unit and not the unduly harsh test. Mr Clarke submitted that if the judge's conclusion that the Appellant would be indefinitely banished from the UK was wrong then, on the remaining factors, the judge could not have found the Appellant's deportation was unduly harsh.

Appellant's Submissions

17. Mr Karim referred to Joseph [2022] UKUT 218 (IAC) and Volpi and Volpi [2022] EWCA Civ 464 and submitted that the Upper Tribunal should be reluctant to disturb the findings of the First-tier Tribunal unless they were plainly wrong and amounted to findings which no reasonable judge could reach. Mr Karim submitted that this was a textbook decision. The judge had 'left no stone unturned'. The Respondent's grounds were disagreements with the judge's findings bordering on an irrationality challenge, which is a high threshold. The Respondent's submissions fell far short of meeting that threshold in this case.

18. In relation to ground 1, Mr Karim submitted that the case law in relation to revocation was slightly different. The judge acknowledged the offences were committed in 2010 and the deportation order was made in 2011. It was accepted that 10 years had passed since the deportation order and the judge recognised that there was no automatic right to revocation.

19. There was an agreement between both Mr Clarke and Mr Karim that the relevant tests to be applied were set out in Section 117C of the Nationality, Immigration and Asylum Act 2002. Mr Karim referred to the relevant paragraphs of the judge's decision setting out the two leading authorities on revocation of a deportation order and the applicable statutory provisions. He pointed out that Mr Clarke had indeed accepted on several occasions that the judge had correctly directed himself on the law. It was the Respondent's case that having done so the judge had not applied it. Mr Karim submitted there was no clear evidence of perversity in this case.

20. Mr Karim submitted the Appellant, after rigorous cross-examination, was accepted as a credible witness and the Respondent had not challenged this finding. The judge had directed himself on all the leading authorities on the unduly harsh test and considered the scenarios of 'stay' and 'go'. At [107] the judge stated that 'unduly harsh denotes something severe or bleak' and applied the test set out in MK (Sierra Leone). The judge had engaged with the evidence and made findings of facts. At [134], the judge found that there were compelling circumstances applying NA (Pakistan). This finding was not challenged in the grounds of appeal as noted by Upper Tribunal Judge Macleman in the grant of permission.

21. In relation to ground 2, Mr Karim referred to [98] and submitted that the judge's findings at [120] were open to him. The Appellant had entered into a legitimate marriage with a British citizen and there was no challenge to the genuineness of this relationship by the Respondent. The fact that the Appellant had remained in the UK illegally was not relevant because the Appellant had applied to enter the UK lawfully, having made the application for entry clearance and revocation of the deportation order. The Appellant's offence was unlikely to be repeated because the underlying cause no longer existed in this case. The Appellant was in a genuine relationship and had made an application to enter the UK under the Immigration Rules.

22. Mr Karim submitted the judge expressly referred to the CCJ's sentencing remarks at [94] stating that he had read them with care. The judge was not undermining the offence or misrepresenting the sentencing remarks. His finding that the offence was unlikely to be repeated was open to him on the evidence before him and he gave adequate reasons for finding the Appellant was not at risk of reoffending.

23. Mr Karim submitted the judge acknowledged at [134] that this was a rare case and that the threshold was high. The Appellant's relationship with his British citizen wife was a significant part of his claim and the judge had assessed that relationship in the context of the real world, dealing with the consequences if the Appellant was absent from the family unit. These were relevant considerations and the judge's reliance on rehabilitation was not misplaced. The Appellant had entered a guilty plea, the offence was 13 years ago and the Appellant had committed no further offences. This was a relevant and significant factor in finding that risk of reoffending was low.

24. In summary, Mr Karim submitted the Respondent disagrees with the judge's findings and has failed to show that the judge's conclusions were irrational. This was a high threshold and, in any event, the judge's alternative finding of compelling circumstances was not challenged.

25. In response, Mr Clarke submitted that the judge's findings at [88] to [102] were flawed and therefore this affected the judge's finding at [134]. In that respect the balancing act carried out in accordance with NA (Pakistan) was infected by the error contained in ground 2.

Conclusion and Reasons

26. We are not persuaded by the Respondent's argument that the judge failed to apply the high threshold test in considering whether the consequences of the Appellant's continued deportation was unduly harsh. Mr Clarke accepted on numerous occasions in his oral submissions that the judge had properly directed himself in law in respect of that test and Mr Karim pointed out that the judge had referred to all relevant case law and set it out at length in the decision. On a fair reading of this decision, it cannot be said that the judge failed to properly direct himself on the unduly harsh test.

27. Nor are we persuaded by Mr Clarke's submission that, although the judge set out the correct test, the judge failed to apply it to his findings of fact. It is quite clear from the judge's language at [121] and [122] and his self direction at [107] that the judge applied the test in MK (Sierra Leone).

28. Insofar as the Respondent makes an irrationality challenge, the judge considers the real life situation and the effect on the Appellant, his wife and his child if the deportation order was not revoked. The judge was entitled to take into account that the Appellant's continued exclusion from the UK would have severe consequences for the family unit, such that the relationship may not survive the long distance and continued separation. The judge properly took into account the best interests of the child. The fact that the Appellant would not be able to enter the UK would mean that his child would grow up without her father being part of the family unit.

29. There is nothing in Mr Clarke's submission which undermines the judge's finding of 'indefinite banishment'. The Appellant had remained outside the UK for more than 10 years. The judge applied the correct statutory provisions to the current situation and properly directed himself on the relevant test. It was not suggested by Mr Clarke that the judge had failed to take into account relevant circumstances or taken into account irrelevant circumstances. We agree with Mr Karim that the determination is very full, well-reasoned and has 'left no stone unturned'. The judge's finding that the Appellant's continued deportation would be unduly harsh was open to the judge on the evidence before him. There was no error of law in respect of ground 1.

30. Ground 2 has little merit. The judge clearly considered the CCJ's sentencing remarks at [94] and took them into account in assessing the Appellant's credibility. The judge found the Appellant to be credible and this finding was not challenged by the Respondent. We are satisfied the judge did not misrepresent the sentencing remarks at [98].

31. We are persuaded by Mr Karim's argument that in assessing whether the Appellant is likely to reoffend, the judge properly considered whether the circumstances of the previous offence would be likely to present themselves again. The Appellant is now in a genuine relationship, a fact not challenged by the Respondent, and has applied to enter the UK lawfully. In addition, there was no evidence that the Appellant had committed any further offences since his conviction in 2011. We conclude that the judge's findings at [98] and [120] were open to him on the evidence before him.

32. We do not find that this conclusion and the judge's finding on 'indefinite banishment' disclose an error of law in respect of the weight attached to the public interest. There is no merit in the submission that the Respondent had challenged the judge's finding that there were 'very compelling circumstances over and above the exceptions' following NA (Pakistan).

33. Accordingly, we find there was no material error of law in the judge's decision promulgated on the 3 May 2023 and we dismiss the Respondent's appeal.

Notice of decision

The respondent's appeal is dismissed

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 February 2024