IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002568
On appeal from: HU/00048/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 26th of April 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

YVES SOSTHENE GUIGUI SERI
(NO ANONYMITY ORDER MADE)
Respondent

Representation:

For the Appellant: Mr Tony Melvin, a Senior Home Office Presenting Officer
For the Respondent: Ms Emma Turnbull of Counsel, instructed by Turpin & Miller LLP (Oxford) Solicitors

Heard at Field House on 15 April 2024

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 20 December 2021 to refuse the claimant's human rights claim and to make a deportation order. The claimant is a citizen of Cote d'Ivoire.

2. **Mode of hearing.** The hearing today took place face to face.

© CROWN COPYRIGHT 2024

3. For the reasons set out in this decision, we have come to the conclusion that the Secretary of State's appeal fails and the decision of the First-tier Tribunal is upheld.

Background

4. The claimant arrived in the UK in 2001, age 13, with his older sister, to join his mother who was already an asylum seeker here. They were both added to her claim. In 2005 the claimant was granted indefinite leave to remain and a 'no time limit' stamp in his passport. He was in the UK lawfully throughout, until the deportation decision on 20 December 2021 which has the effect of cancelling his indefinite leave to remain.

5. The claimant is a foreign criminal. He turned 18 in 2006, and between 8 August 2006 and 29 March 2021 was convicted on 9 occasions in relation to 19 offences. He is a persistent offender.

6. The claimant has had relationships with three British citizen women. He had a daughter with each of them: the eldest was born in 2009, the middle daughter in 2010 and the youngest in 2021. All of them are British citizens and each of them lives with their mother. The claimant had been living with the mother of the youngest child when arrested in 2018. His mother, sister, nieces and nephews all live in the UK and he said he had no relatives in Cote d'Ivoire now, not having returned since he and his mother left in 2001.

7. The index offence for the deportation order was a conviction at Maidstone Crown Court for cannabis growing and dealing, for which he was arrested in January 2020. He was sentenced on 29 March 2021 on four charges: possession with intent to supply a Class B drug (cannabis), possession of a bladed article, possession of criminal property (£750) and being concerned in the production of a Class B drug (cannabis).

8. The Sentencing Judge described the circumstances of the offence as follows:

> "[On] 30 January last year [2020] you were stopped in your BMW vehicle. Within that vehicle there was a large quantity of cannabis, already bagged up and, it seems, in position of – capable of supply. …There were all the paraphernalia that one might expect to find with it, including pliers, gloves, scales, phones, including burner phones, which were later downloaded and found to have bulk text messages indicating supply over a period of time between November and January. Also in your vehicle was a kitchen knife in an envelope, that's the subject of matter of count 2; In relation to count 3, the £750, that was found in the rear passenger footwell: further paraphernalia. In total, I'm told that the amount of …was, in fact, 212 grams, with a value of a range between £1,440 and £3,130.
>
> Not surprisingly, the police went back to your home address, and there they found empty plant pots, and all the equipment needed to cultivate cannabis plants. It was, I hesitate to call it a factory, but it was a significant production of cannabis, with all the necessary equipment zip-lock bags,

> pots, and demonstrating that somebody who really knew what they were doing when it came to the cultivation of these plants. There were further notes about the cultivation of plants, and, indeed, mobile phones in relation to it. Also found at your address were a further 623 grams, all in smaller bags, in a bucket, very similar to that which was found in your vehicle, further mobile phones. In total found at your house were 623 grams; in the car, 212 grams; making a total of 835 grams of cannabis, with a value of between £4,930 and £12,250."

9. There is no doubt of the seriousness of this offence. However, the claimant had pleaded guilty promptly and after mitigation and appropriate reductions for the plea, he was sentenced to 18 months' imprisonment, engaging the Secretary of State's duty to deport under section 32(5) of the UK Borders Act 2007, subject to the Exceptions in section 33 of that Act. Section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) also applies to him.

Secretary of State's decision

10. On 28 June 2021, the claimant was served with a stage 1 deportation notice and made a human rights claim. On 20 December 2021, the Secretary of State rejected the claimant's human rights claim and made a deportation order. The claimant relied on his private life in the UK, established over 20 years, including all of his secondary education.

11. The Secretary of State considered both the 'go' and 'stay' scenarios in relation to the claimant's older two daughters, concluding that neither would be unduly harsh for them. As regards the relationship with his second partner, the Secretary of State did not consider that there was any reliable evidence that they were living together before his arrest in January 2020, as he was living in a house which was, effectively, a cannabis farm. The relationship had ended but there was some evidence that the claimant was seeing his daughter.

12. The claimant had spent 16 years and 8 months in the UK, but only 14½ years of that were lawful: the prison sentence was not counted towards lawful residence. His mother and sister were still Cote d'Ivoire citizens.

13. The claimant had worked at Homebase in Penge after leaving school, then for an agency in Dartford, and recently had set up a jewellery business of his own. There was no evidence of friendships outside his family circle and his two ex-partners. There was some evidence of school and mental health difficulties for the claimant's second daughter, but not sufficient to outweigh the public interest in deportation.

14. The same applied to his current partner's claimed anxiety and post-traumatic stress disorder, for which she had never sought medical treatment or support. She had grown closer to the claimant's mother and sister, who could help support her. She was pregnant in 2021 but the claimant had not provided evidence that a child had been born from that

pregnancy. Running a cannabis farm in the house was not conducive to bringing up a young child.

15. The claimant could not bring himself within Exception 1 in section 117C(4) of the 2002 Act as he had not established that there would be very significant obstacles to his reintegration in Cote d'Ivoire if returned.

16. There were no very compelling circumstances engaging section 117C(6) of the 2002 Act. The claimant could access mental health services for his own difficulties on return to Cote d'Ivoire, if needed.

17. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal

18. First-tier Judge Singer allowed the appeal. The Secretary of State accepted at the hearing that the 'go' scenario would be unduly harsh for the claimant, his current partner, and his three daughters by his partners. The evidence, which the Secretary of State did not challenge at the hearing, was that the claimant was able to take home £1500-£1800 a month from his jewellery business.

Section 117C: Exception 1.

19. The Secretary of State conceded in a supplementary decision letter that the claimant had been lawfully resident in the UK for most of his life and was socially and culturally integrated here. The question for the First-tier Tribunal was whether there would be very significant obstacles to his integration in Cote d'Ivoire on return.

20. The Secretary of State did not challenge the claimant's oral evidence that his knowledge of the French language was limited: he could understand it but was not fluent and could neither read nor write the language. The First-tier Judge considered that the claimant's linguistic skills would probably improve over time if he lived in Cote d'Ivoire.

21. At [24] the Judge considered the claimant's 'street wise nature' and his self-employed jewellery business. He would have financial and practical assistance available to him from the Secretary of State's Facilitated Returns Scheme. Having regard to the reasons why his mother left Cote d'Ivoire in 1999, he could not expect help from her in reintegrating, and neither his mother nor his sister was in a position to provide him with practical or financial help.

22. At [29] the First-tier Judge set out why he considered that there would be very significant obstacles to the claimant reintegrating in Cote d'Ivoire. He attached significant weight to the evidence of a country expert, Ms Karen O'Reilly, dated 5 September 2022, particularly her evidence that those without family connections would have no social capital to draw upon and would be in the same situation as if he were internally displaced. Ms O'Reilly considered the claimant to be 'highly unlikely to be able to find

work and support himself if returned'. The First-tier Judge found that the claimant met Exception 1 in section 117C(4).

Section 117C: Exception 2.

23. The First-tier Judge placed weight on the report of the independent social worker, Ms Deborah Orr, dated 3 October 2022, as to the effect of parental loss on children generally. The First-tier Judge considered that the three half-siblings were likely to lose contact with each other if the claimant were removed. None of their mothers had any interest in promoting contact.

24. In February 2023, when the First-tier Tribunal decision was promulgated, the claimant's youngest daughter was 18 months old. Since his release from prison, the claimant had resumed living with his current partner and his youngest daughter, and a second child was on the way. Unfortunately, the claimant confirmed at the hearing before us that the second pregnancy of his current partner had ended in a miscarriage, shortly after the First-tier Tribunal hearing.

25. The First-tier Judge considered that the youngest child was too young for modern means of communication to be sufficient to maintain contact: see *Omotunde (best interests – Zambrano applied – Razgar) Nigeria* [2011] UKUT 247 (IAC). The effect on her would be unduly harsh, as she would not be able to understand or process the detachment from her father, and might be worsened by the distress experienced by her mother as a result of the separation.

26. As regards Exception 2 in section 117C(5), the Home Office Presenting Officer had conceded that the 'go' scenario would be unduly harsh. The Judge found that the 'stay' scenario would be unduly harsh for the claimant's current partner and for his middle and youngest daughters, but not the eldest. Evidence from an independent social worker, Ms Deborah Orr, was to the effect that the middle daughter had been adversely affected by the separation from her father when he was imprisoned and was 'at significant risk of experiencing unduly harsh consequences' from another separation. There was evidence of a suicide attempt.

27. As regards the youngest daughter, her relationship with her father could not be maintained by modern means of communication: she was simply too young: see *Omotunde (best interests – Zambrano applied -Razgar) Nigeria* [2011] UKUT 247 (IAC) at [28]. Exception 2 was also met.

Section 117C(6) – "very compelling circumstances"

28. The First-tier Judge did not need to find that there were very compelling circumstances engaging section 117C(6), as the claimant is a medium offender and both Exceptions were met.

29. The Judge gave himself a proper self-direction at [32]-[33] and allowed the appeal on Article 8 ECHR grounds by reference both to Exception 1 and Exception 2.

30. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

31. Permission to appeal to the Upper Tribunal was granted in the following terms:

> "1. Whether the obstacles to the appellant's integration in Cote D'Ivoire were "very significant" involved a high legal test, but was ultimately a question of fact and degree. Judge Singer at [29-30] concluded that they were, agreeing with an expert who opined that he would be at high risk of being homeless and destitute, with no capacity to participate in society. *Ground 1 counters that the tribunal has not considered why the appellant might not continue his profession as a self-employed jeweller, using his resettlement grant to establish himself.* Judge Dixon, refusing permission, said that the grounds are mainly re-argument and unhelpful recital of case law, and that Judges do not have to consider every aspect. *However, this ground raises a debate on whether the tribunal failed to take account of a material matter.*
>
> 2. Judge Singer concluded that Exception 2 to deportation was also met, the consequences being unduly harsh on the appellant's partner, N, and on two of his children, S and E. Ground 2, on N, asserts at [6] that the tribunal gave "no consideration" to what those consequences would be, which is wrong - the consideration is thorough and detailed – and that no consideration was given to available support from social services – which is also wrong - see [39] & [41]. Ground 3, on S and E, founds only on the high threshold.
>
> 3. Although permission is granted, grounds 2 and 3 do not make such a clear and specific challenge as ground 1. "
>
> [*Emphasis added*]

32. It will be seen that the focus of the grant of permission is that the First-tier Judge might have failed to take account of the claimant's potential to earn money from his self-employed jewellery business if he were to be returned to Cote d'Ivoire.

Rule 24 Reply

33. The claimant filed a Rule 24 Reply, noting that the First-tier Judge had considered the question of the jewellery business and at [24], going on to summarise Ms O'Reilly's assessment of his employability in the context of his lacking 'highly sought-after qualifications or professional experience', and noting that the most prevalent unskilled work in Cote d'Ivoire was in farming and fishing, of which the applicant had no experience. Ms

O'Reilly was aware of the jewellery business and mentioned it in her report.

34. The claimant relied on dicta of Lord Justice Brooke in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [13]:

> "[A judge] should give his reasons in sufficient detail to show the [appellate Tribunal] the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on [a Judge], in giving his reasons, to deal with every argument presented by [an advocate] in support of his case. It is sufficient if what he says shows the parties and, if need be, the [appellate Tribunal], the basis on which he has acted, and if it be that the [Judge] has not dealt with some particular argument but it can be seen that there are grounds on which he would have been entitled to reject it, [the appellate Tribunal] should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion."

35. The claimant contended that the First-tier Judge's reasoning met, and arguably surpassed, the minimum requirements for adequate reasons enunciated in *R (Iran).*

36. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

37. Mr Melvin, as is his practice, helpfully prepared and served a skeleton argument before the hearing. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. We had access to all of the documents before the First-tier Tribunal. We reserved our decision, which we now give.

Legal framework

38. Section 32 of the UK Borders Act 2007 imposes on the Secretary of State a duty to make a deportation order for a foreign criminal who is convicted in the UK of an offence for which he is sentenced to a period of imprisonment of more than 12 months: section 32(1), 32(2) and 32(5).

39. Section 32(4) provides that the deportation of such a foreign criminal is conducive to the public good for the purpose of section 3(5)(a) of the Immigration Act 1971.

40. Section 33(1) provides that if any of the Exceptions in subsections 33(2)-(6) apply, sections 32(4) and (5) do not apply. The only Exception applicable to this claimant is Exception 1 in subsection 32(2):

> "33(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—
> (a) a person's Convention rights, or
> (b) the United Kingdom's obligations under the Refugee Convention."

41. Section 32(7) provides that:

> "32(7) The application of an Exception—
> (a) does not prevent the making of a deportation order;
> (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
>
> but section 32(4) applies despite the application of Exception 1 or 4."

42. The effect of all that is that the presumption that the claimant's removal is conducive to the public good applies even if he can show that his ECHR Convention rights would be breached by removal, but there is no requirement for the Secretary of State to make a deportation order. He may still do so: deportation is then regulated by section 117C and its Exceptions.

43. Section 117C, so far as relevant, provides that:

> **"117C Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (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.*
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."
>
> [*Emphasis added*]

44. It has been established, following *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22 (20 July 2022) that medium offenders such as this claimant may rely on 117C(6) if they can show very compelling circumstances over and above Exceptions 1 and 2, which will require a full Article 8 ECHR proportionality assessment, with due weight given to the public interest.

45. Conversely, where a medium offender such as this claimant can bring themselves within one of the Exceptions, no additional Article 8 reasoning is needed.

46. We remind ourselves of the guidance on interference with findings of fact in *Volpi v Volpi* [2022] EWCA Civ 464 at [2] in the judgment of Lord Justice Lewison (with whom Lord Justices Males and Snowden agreed):

> "2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract. "

47. At [66], after criticising the grounds of appeal in the *Volpi* case for seeking to retry the case afresh, being selective about evidence ('island hopping'), seeking to persuade the appellate court to reattribute weight to different

strands of evidence and go behind the evaluation of the reliability of witness evidence by the trial Judge who had seen and heard the witnesses, and failing to engage with the substance of the trial judge's findings, at [66] Lord Justice said this:

> "66. I re-emphasise the point that it is not for an appeal court to come to an independent conclusion as a result of its own consideration of the evidence. Whether we would have reached the same conclusion as the judge is not the point; although I am far from saying that I would not have done. …. In my judgment the judge was entitled to reach the conclusion that he did. I would dismiss the appeal."

Discussion

48. In this appeal, the First-tier Judge found as a fact that there would be 'very significant obstacles' to reintegration for the claimant in Cote d'Ivoire, and also, that his removal would be 'unduly harsh' for his current partner and his two younger daughters, who would be remaining in the UK without him (the 'stay' scenario).

49. The Secretary of State's challenges to the factual findings in this appeal are based on an assertion that the Ms O'Reilly the country expert, and the Judge, overlooked the claimant's ability to set up and run a jewellery business in Cote d'Ivoire, with the help of the financial and practical support provided by the Secretary of State's Facilitated Returns Scheme.

50. The highest the Secretary of State put his case before the First-tier Tribunal was that the claimant could be presumed to have social relationships in Cote d'Ivoire which had continued over the 20 years he had been away, that he would have retained contact with his culture because of his mother and sister in the UK, and that his limited educational skills and work experience would assist him to secure employment and live independently. Visits could be facilitated from the UK-based family and relationships maintained using modern means of communication.

51. The First-tier Judge noted that the circumstances of the claimant's mother's escape from Cote d'Ivoire had been accepted as entitling her to refugee status. She, and his sister, could not be expected to visit him in Cote d'Ivoire. The Judge accepted the evidence that the claimant's youngest daughter, who is still not three years old, would not understand her father's absence or be able to communicate properly by electronic means. The middle daughter had significant mental health difficulties, as did his current partner.

52. The First-tier Judge placed significant weight on the evidence of Ms O'Reilly, whose opinion focused on the lack of local social support which the applicant would have while re-establishing himself in Cote d'Ivoire. Contrary to the grounds of appeal, Ms O'Reilly and the First-tier Judge were aware of, and mentioned, the jewellery business the claimant is

running but did not consider that, with a very limited level of French and no local contacts, that would enable him to integrate successfully.

53. We remind ourselves that the Secretary of State conceded that the Exception 2 ‘go’ scenario would be unduly harsh for the claimant’s present partner and his three daughters. The Judge’s conclusion that that there would be very significant obstacles to reintegration (Exception 1), and that the ‘stay’ scenario would be unduly harsh for the claimant’s partner and two of his daughters (Exception 2), are findings of fact.

54. In order for the Secretary of State to show that the First-tier Judge erred in the application of section 117C, he must show that the decisions on Exception 1 and Exception 2 are unsustainable and irrational. That standard is not reached here: there was evidence to support the Judge’s conclusions, and he was entitled to decide on the weight to be given to the expert evidence of Ms O’Reilly (as to country) and Ms Orr (the independent social worker).

55. An appellate court may interfere with the First-tier Tribunal’s findings of fact and credibility only where they are “rationally insupportable”, and this also applies to the Judge’s assessment of expert evidence: see the *Volpi* restatement of the relevant principles.

56. In this case, the First-tier Judge’s decision is properly, intelligibly and adequately reasoned, in a l6-page detailed and careful consideration of the evidence. We are not satisfied that the Judge reached a conclusion to which no reasonable judge could have come, nor that it was rationally insupportable

57. We therefore dismiss the Secretary of State’s appeal.

Notice of Decision

58. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law
We do not set aside the decision but order that it shall stand.

Judith Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 22 April 2024