IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003065

First-tier Tribunal No: HU/50555/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

4th January 2024

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R N (NIGERIA)
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Nick Wain, a Senior Home Office Presenting Officer
For the Respondent: Mr Matthew Moriarty of Counsel, instructed by Thompson & Co Solicitors.

Heard at Field House on 22 December 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant has been granted anonymity, and is to be referred to in these proceedings by the initials R N. No- one shall publish or reveal any information, including the name or address of the claimant, her children, or any member of her family which is likely to lead members of the public to identify her or any of her family members.

Failure to comply with this order could amount to a contempt of court.

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 11 February 2021 to refuse to revoke a deportation order made against her on 10 August 2013.

2. The claimant is a citizen of Nigeria. She is a foreign criminal, having been convicted on 13 March 2017 at Inner London Crown Court of two counts of sexual assault, and sentenced to three years' imprisonment.

3. There was a previous decision on a deportation appeal by First-tier Judge Ross, promulgated on 13 March 2019, on which the claimant was appeal rights exhausted on 19 June 2019.

4. **Anonymity.** The First-tier Tribunal did not anonymise the claimant and her family members in this appeal, despite the difficult circumstances in relation to one of the claimant's children. The Judge used the claimant's full name at the head of the decision, and her date of birth and one child's name several times in the body of the decision. The other two children are referred to by initials, but given that the date of the claimant's marriage is inserted, the full name of her husband, and the children's dates of birth, it would not be difficult to work out who they were.

5. Failure to anonymise where children are involved is contrary both to rule 13(1) of the First-tier Tribunal (Immigration and Asylum Chamber) Rules 2014 (as amended) and to *Presidential Guidance Note No 2 of 2022: Anonymity Orders and Directions regarding the use of documents and information in the First-tier Tribunal (Immigration and Asylum Chamber),* in particular at [32].

6. **I have made an Upper Tribunal anonymity direction.**

7. For the reasons set out in this decision, I have come to the conclusion that the Secretary of State's appeal must be dismissed.

Procedural matters

8. **Vulnerable claimant.** The claimant is a vulnerable person and is entitled to be treated appropriately, in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance. She has had mental health difficulties for a number of years and at least one suicide attempt. No oral evidence was given today and no adjustments for her vulnerability were required.

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

Background

10. The claimant entered the UK, on her account, in 1997 on a false passport. In 1998, she made an asylum claim, and then married her husband. She left the

UK and re-entered as a visitor in October 1999. On 4 April 2000, her asylum claim and her spouse leave to remain application were both refused. The claimant did not embark for Nigeria.

11. The claimant remained in the UK where she and her partner had three children who were all still very young: they all missed their mother and were badly affected by her absence, according to the claimant's sister-in-law who gave evidence on her behalf, in particular Child B, who was actively suicidal. Judge Ross did not accept that it was necessarily in the best interests of the four children for the claimant to remain in the UK 'because the nature of the offence indicates that she does not possess the characteristics of a good parent'.

12. Following a number of applications, on 2 June 2011 the claimant was granted indefinite leave to remain outside the Rules. On 31 March 2017, she was convicted of two offences of sexual assault on a female, which occurred in the context of her religion, undertaken with another (male) person. The offences involved a joint sexual assault on the pastor's wife in a pseudo-religious context at the church where she was a prophetess. There was no sexual involvement with children, and in particular, not her own children.

13. A stage 1 deportation letter was served and the claimant made private and family life submissions.

14. On 10 August 2018, the Secretary of State made a deportation order and refused the human rights claim. The refusal of her human rights claim attracted an in country right of appeal on which the claimant was appeal rights exhausted on 19 June 2019. The decision of First-tier Judge Ross on 28 February 2019 is the *Devaseelan* starting point for the present appeal.

15. Efforts to enforce removal were frustrated by further submissions and the claimant being disruptive in the detention centre. A rule 35 report and several applications for judicial review followed. The stay granted in those proceedings was lifted on 22 July 2020. The claimant did not embark for Nigeria.

16. On 24 December 2020, the claimant's solicitors made further submissions, based on the serious deterioration in the health of one of the claimant's daughters, supported by medical and social worker evidence. The claimant's representations relied on the decision of the Court of Appeal in *HA and RA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176 (handed down on 4 September 2020).

17. Those submissions were the subject of the 11 February 2021 refusal decision which is in issue in these proceedings.

First-tier Tribunal

18. On 7 June 2023, the First-tier Tribunal allowed the claimant's appeal. The panel noted that Judge Ross in 2019 had not been satisfied that the claimant was in a subsisting relationship with her husband and found that her removal

would not have unduly harsh consequences for the children and that it might not be in their best interests for the claimant to be permitted to remain in the UK, given the nature of her offences. The claimant is no longer married to her former husband.

19. The First-tier Tribunal had 'no hesitation in finding that the offences committed by the [claimant] were very serious in nature'. The panel did not consider that either Exception 1 or Exception 2 in section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) were made out.

20. From [52], the Tribunal considered the 'very compelling circumstances' test in section 117C(6). They noted the evidence that the three children had been subject to a child protection order following repeated claims by Child B over the period 2015-2017 (before she went to prison) regarding emotional and physical abuse by the claimant. Social Services had been involved. Ms Nwachuku, the Home Office Presenting Officer did not cross-examine the claimant about the allegations that she abused her children, emotionally or physically, nor did she make any submissions on those allegations or the child protection plan.

21. The panel did not consider that very compelling circumstances were made out for two of the children, but considered Child B separately because of her history of autism, complex needs and suicide attempts. They noted the evidence that Child B has 'extreme social anxiety and intrusive thoughts that have led her to have numerous attempts of self-injurious behaviours and in-patient stays on mental health wards over the past 4 years'. The panel took into account the evidence of Dr Oladimeji Kareem, Dr Pushpika Singappuli, specialist registrar, Dr Tobias Zundel, consultant psychiatrist, Ms Nicola Brown, Managing Director of Solid Steps, Cerys Symonds, social worker at Lambeth Children's Social Services, Sarah Edwards, independent social worker. None of that evidence was before Judge Ross in 2019.

22. Having set out the evidence at length, and set out Child B's history of self-harm at [85]-[86] the Tribunal noted that she had transferred to adult care in September 2020. The Tribunal's consideration of the medical evidence and background regarding Child B concluded at [88]-[96], the Tribunal concluded that it was appropriate to depart from Judge Ross' decision for the following reasons:

> "92. …Nevertheless, the points regarding the allegations of abuse against B were not put to the [claimant] in cross-examination and, moreover, we find that the evidence before us now shows that since her release from immigration detention in January 2020, the [claimant] has played an active role in supporting B's care with none of the expert reports raising concerns about their relationship. In fact, the experts all endorse the relationship. We therefore find that since her release from detention, the [claimant] has been a caring and supporting mother to B, regardless of whatever problems existed between them in the past. We also find that the relationship of dependency between the [claimant] and her vulnerable daughter demonstrates that they enjoy family life for the purposes of Article 8 ECHR, *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 considered.

> 93. We do not close our eyes to the seriousness of the [claimant's] criminal offences with all of the aggravating factors that they entailed. We attach significant weight to it. There is, however, no evidence before us to demonstrate that the [claimant] is likely to reoffend. …
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> 94. …[The claimant] does acknowledge her offending in her witness statement (at paragraphs 17 and 18 [SB/43]) and we find that we can also attach significant weight to the professional view of the probation officer. We are therefore satisfied that the [claimant] is cognisant of, and sorry for, her offending and we accept that she is unlikely to reoffend.
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> 95. Having considered all the evidence in the round, while acknowledging the seriousness of the [claimant's] offence, we are persuaded that there are very compelling circumstances to this case in the light of B's mental health issues and history of self-harm and suicide attempts, and the detrimental impact her mother's deportation would have on her. We accept that the [claimant] is best placed to provide B with the emotional support that she clearly needs.
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> 96. We therefore find that, in accordance with s.117C(6), the very compelling circumstances to the case means that the public interest does not weigh in favour of the [claimant's] deportation to Nigeria as a foreign criminal. The decision to deport her therefore amounts to disproportionate interference with her and B's right to a family life under Article 8 ECHR and the [claimant] therefore meets an exception for deportation under s.33(2)(a) of the 2007 Act."

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

Permission to appeal

24. The grounds of appeal argue that the First-tier Judge failed properly to apply the principles enunciated by the Supreme Court in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22 at [53]-[58] and that it was unclear from the decision how much weight had been impermissibly placed on the likelihood of the claimant reoffending. *HA (Iraq)* had held that 'at the highest this factor should carry little or no material weight to the proportionality balance'. The grounds continued:

> "The panel appears to have downplayed the seriousness of the offence when assessing the overall circumstances. This is a serious offence that has been committed by the [claimant] and not engage with the [Secretary of State's] argument regarding whether the [claimant] is remorseful as claimed as per [29] and [30]. The panel acknowledged at [44] that: 'it was difficult to conclude otherwise that the [claimant] had not committed a serious offence. The factors in relation to [Child B's] mental's health issues does not outweigh the significant public interest in this case and therefore does not satisfy the requirements of the very compelling circumstances test. The panel's assessment contains a material error of law in their approach."

25. It is unclear what is intended to be the excerpt from [44], as the quotation marks are opened before 'it was difficult' but not repeated to end the quotation. The words apparently cited do not appear in [44] of the First-tier Tribunal decision which records a concession by Mr Moriarty in the following terms:

> "44. …Mr Moriarty did not seek to argue that the [claimant] has not committed a serious offence, and it is difficult to conclude otherwise. …"

The purported quotation in the grounds of appeal misrepresents a matter which was not in issue before the First-tier Tribunal because Mr Moriarty had conceded that the claimant had, indeed, committed a serious offence.

26. On 22 August 2023, Upper Tribunal Judge Rimington granted permission to appeal on the following grounds:

> "All grounds are arguable. As the First-tier Tribunal found none of the exceptions applied and in the light of the First-tier Tribunal's findings, it is arguable that it failed to properly address the principles of *HA (Iraq)* [2022] UKSC 22 in relation to very compelling circumstances."

Rule 24 Reply

27. In a document sent to the Upper Tribunal on 14 December 2023, Mr Moriarty for the claimant purported to provide a Rule 24 Reply. It was of course significantly out of time and no application for extension of time was made, nor any explanation for the delay.

28. I have treated that document as Mr Moriarty's skeleton argument today, and I have had regard to the arguments therein made.

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

Upper Tribunal hearing

30. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.

31. For the Secretary of State, Mr Wain relied on the Secretary of State's grounds of appeal and argued that at [10(e)] the First-tier Tribunal erred in referring to the Court of Appeal judgment in *HA (Iraq)* not the Supreme Court decision. That is a bad point:

32. Mr Wain contended that at [29]-[30] of its decision the First-tier Tribunal had placed too much weight on rehabilitation and not considered all of the *Üner* factors, which records the submissions made by Ms Nwachuku on behalf of the Secretary of State.

33. I did not consider it necessary to call on Mr Moriarty in reply, particularly as I had a very recent skeleton argument (the 'Rule 24 Reply') to assist me. In that document, he contends at [11]-[13] that the Secretary of State's grounds of appeal are in reality a perversity challenge based on his disagreement with the First-tier Tribunal's careful and expert judicial findings, which were entirely open to them on the specific facts and that, in addition to giving proper consideration to the range of documentary evidence from both parties, the First-tier Tribunal had the benefit of hearing extensive oral evidence form a

range of witnesses over a 2-day substantive hearing, and detailed oral submissions.

Conclusions

34. There is no merit in the Secretary of State's challenge to the First-tier Tribunal decision. The point about *HA (Iraq)* is a bad one: the Secretary of State has confused a summary at [10] of the claimant's December 2020 further submissions with reasoning by the First-tier Tribunal. On 24 December 2020, it was no error to rely on the Court of Appeal judgment as the Supreme Court decision was not handed down until 20 July 2022.

35. Nor is it right to say that the First-tier Tribunal did not consider all of the evidence or give proper weight to the seriousness of the index offence: see [93] and [95] of their decision. I have already noted that the Secretary of State's reference to [44] in the grounds of appeal miscites the First-tier Tribunal decision and fails to note that the claimant's Counsel conceded at the hearing that the claimant had committed a serious offence. That is the context of the Tribunal's observation in [44] that it 'is difficult to conclude otherwise'.

36. At the end of the day, the finding that in relation to Child B, the very compelling circumstances test in section 117C(6) was met was a finding of fact which it was open to the panel to reach, having regard to all the new medical and social worker evidence, and the probation officer's consideration that the claimant was unlikely to re-offend. An appellate Court or Tribunal may not interfere with a finding of fact by the fact- finding Tribunal which has heard argument and oral evidence, unless such a finding is 'rationally insupportable': see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justice Males and Lord Justice Snowden agreed.

37. As regards *Üner,* the factors to be considered are set out at [51] in the opinion of Lord Hamblen JSC in the Supreme Court's consideration of *HA (Iraq).* Lord Hamblen gave the judgment of the court, Lord Reed PSC, Lord Leggatt JSC, Lord Stephens JSC and Lord Lloyd-Jones JSC concurring. Among the factors specified are

    - The nature and seriousness of the offence committed by the applicant; …

    - The time elapsed since the offence and the applicant's conduct during that period;

    - whether there are children of the marriage, and if so, their age; and …

    - the best interests and wellbeing of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be

expelled’

38. The First-tier Tribunal’s decision considers all of those factors. It was unarguably open to the Tribunal to find that it was appropriate to depart from Judge Ross’ decision in 2019, because of a change in circumstances: given the intense vulnerability of Child B, and the revived and very important relationship between her and the claimant, the Tribunal was entitled to conclude, for the reasons it gave, that this claimant had brought herself within section 117C(6) of the 2002 Act and had established a convention-based exception under section 33(2)(a) of the UK Borders Act 2007.

39. The Secretary of State’s appeal is dismissed.

Notice of Decision

40. For the foregoing reasons, my decision is as follows:

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

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 22 December 2023