IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004619

First-tier Tribunal Nos: HU/51288/2021
IA/04094/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12 August 2024

Before

UPPER TRIBUNAL JUDGE OWENS

Between

The Secretary of State for the Home Department

Appellant

and

Fola Akinleye Folarin
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Bates, Senior Presenting Officer
For the Respondent: Ms King, Counsel, instructed by Qualified Legal Solicitors

Heard at Cardiff Civil Justice Centre on 11 July 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Rhys-Davies, dated 17 November 2022, allowing Mr Folarin's appeal against the decision to refuse his human rights claim.

Background

2. Mr Folarin is a Nigerian national. He entered the United Kingdom as a visitor on 19 August 2004 and overstayed his visa. He then obtained a passport in the name of a third party. He attempted to use the fake passport to leave the United Kingdom but was stopped at the airport. As a result of his actions, on 24 June 2005 he was convicted in the name of the third party of attempting to obtain a service by deception and use of a false instrument. He was sentenced to thirteen months' imprisonment. The Secretary of State initiated deportation proceedings and a deportation order was signed on 21 October 2025. Mr Folarin was deported from the United Kingdom in the name of the third party on 15 February 2006.

3. Mr Folarin then applied for a multientry visa in his own name on an uncertain date. This was granted on 11 April 2007. He re-entered the United Kingdom in 2008 in defiance of the deportation order. He then made an application for a residence card on the basis of his marriage to an EEA national. This was refused and his appeal dismissed. In 2012 he entered into a relationship with Ms Mimi Ssali, a British citizen, who already had a daughter A, from a previous relationship. Ms Ssali gave birth to twins by Mr Folarin in 2013. He then made an application on the basis of his family and private life, which was refused with no right of appeal. After unsuccessful judicial review proceedings, the appellant was removed to Nigeria on 24 August 2017 and has remained there ever since.

4. On 4 March 2020 Mr Folarin made an application to revoke the deportation order. On 29 March 2021 the Secretary of State refused to revoke the deportation order and refused his human rights claim. This is the decision against which Mr Folarin's appeal lies. There appear to have been numerous delays in this matter being heard in the first place and then coming before the Upper Tribunal after permission was granted, which is regrettable.

The Law

5. Section 117C provides as follows:

> **"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."

The First-Tier Decision and Reasons

6. At the outset of the appeal before the First-tier Tribunal, both the Secretary of State and Mr Folarin's representatives agreed that the applicable provision was Section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The judge heard evidence from the sponsor as well as four other witnesses, including the Reverend Colin Sutton (parish priest for Mr Folarin's family and Mr Folarin when he was in the United Kingdom); Mr Suberu-Arotiba (a friend of the family); A (the appellant's stepdaughter) and a Mr Oredola, (another friend of Mr Folarin). No challenge was made to the evidence of the sponsor or any of the witnesses or to any of the supporting documents as to the existence and nature of the claimed family relationship. During the hearing the Secretary of State conceded that there existed family life between Mr Folarin and his wife and children for Article 8 ECHR purposes and the judge found that this concession was properly made.

7. The respondent also accepted that the family could not reasonably be expected to leave the United Kingdom and relocate to Nigeria.

8. The judge went on to consider Section 117B of the 2002 Act and carried out a general proportionality exercise balancing the public interest in maintaining the deportation order and denying Mr Folarin entry to the United Kingdom against Mr Folarin and his family's rights to respect for private life and family life. The judge took into account various factors including Mr Folarin's poor immigration history, the public interest in maintaining effective immigration control, Mr Folarin's criminal history, including his subsequent conduct and balanced these against the family life Mr Folarin had with his children and the minor children's best interests as a primary consideration. The judge found that all three children's wellbeing was being adversely affected by being separated from their father. The oldest child had received counselling. Having considered all of these factors in the round, including the passage of time since the conviction that led to the deportation and the absence of any further offending the judge found that the balance of proportionality fell in favour of Mr Folarin and the continuation of the deportation order, seventeen years after it was made, was a disproportionate interference with the Mr Folarin's Article 8 ECHR right to respect for family life. The appeal was allowed on that basis.

Grounds of Appeal

9. It is asserted by the Secretary of State that the judge had made a material misdirection in law.

A) The judge conducted a freestanding proportionate exercise in respect of the application to revoke the deportation order which is a clear breach of the guidance in Binaku *(s.*11 TCEA*;* s.117C NIAA*;* para. 399D*)* [2021] UKUT 34 *(*IAC*).*

B) The judge failed to give adequate weight to the fact that Mr Folarin used deception to return to the United Kingdom in breach of the deportation order, that he did not spend the prescribed ten year period outside the United Kingdom before applying to have the deportation order revoked, and that the family life that he relies on was accrued whilst he was living in the United Kingdom unlawfully.

C) The judge erred in having regard solely to the passage of time since the deportation was made. Further, he erred in treating the best interests of the children as a trump card.

Permission to Appeal

10. Permission to appeal was given on the basis that the judge failed to attach weight to the fact that Mr Folarin returned to the United Kingdom in breach of the deportation order.

Rule 24 Response

11. Mr Folarin's representative prepared a skeleton argument dealing with the grounds of appeal. Essentially this argued that the judge had given proper regard to the public interest and had taken into account every negative aspect of the respondent's immigration history with care, that the judge did not err in having regard solely to the passage of time. This was considered as one amongst many factors. The judge did not find that the best interests of the children were a trump card. I will deal with Ms King's arguments in relation to 117C of the 2002 Act in my discussion below.

Submissions

12. Both representatives made submissions which were recorded in the Record of Proceedings.

Discussion and Conclusion

13. At [29] the judge stated the following:

> "It is agreed that Section 117B of the 2002 Act applies, not Section 117C because the appellant has already been deported. His offending, deportation and immigration history are instead relevant to the public interest in maintaining immigration control".

14. Both representatives agreed before me that this was a misdirection in law. Mr Folarin has been convicted of an offence carrying a sentence of thirteen months. He is therefore a "foreign criminal" in accordance with section 117D(2)(c)(i). This means that Section 117C applies to him by virtue of section 117A(2)(b).

15. This is clear from the guidance in Binaku *(s.*11 TCEA*;* s.117C NIAA*;* para. 399D*)* [2021] UKUT 34 *(*IAC) which states as follows:

> "(7) A foreign criminal who has re-entered the United Kingdom in breach of an extant deportation order is subject to the same deportation regime as those who have yet to be removed or who have been removed and are seeking a revocation of a deportation order from abroad. The phrases 'cases concerning the deportation of foreign criminals' in

section 117A(2) and 'a decision to deport a foreign criminal' in section 117C(7) are to be interpreted accordingly.

(8) Paragraph 399D of the Rules has no relevance to the application of the statutory criteria set out in section 117C(4), (5) and (6);

(9) It follows that the structured approach to be undertaken by a tribunal considering an Article 8 appeal in the context of deportation begins and ends with Part 5A of the 2002 Act."

16. Ms King acknowledged that nowhere in the decision has the judge explicitly referred to Section 117C, nor did he expressly direct himself that these provisions applied to Mr Folarin.

17. She argued that instead that any error was immaterial because the judge had, in any event, dealt with all of the relevant considerations at 117C.

18. She submitted that the reference to paragraphs 390 and 391 of the immigration rules at [11a] would incorporate rule A398 and thereby the exceptions in 399, which would have been considered by the judge and therefore that section 117C formed the substance of the judge's reasoning even if not explicitly referenced. She submitted that the judge took a structured approach. He found that the maintenance of effective immigration control is in the public interest, the judge was took into account at [62] that the family life between Mr Folarin and the sponsor was established when his status was precarious and that it was in the best interests of the children to be raised by both parents which could only be in the UK given the respondent's concession about the reasonableness of relocation. The judge directed himself to Section 117B and there would inevitably have been the same outcome had he directed himself to Section 117C.

19. She further argued that the judge had allowed the appeal under GEN.3.2. which refers to "unjustifiably harsh consequences", which she submitted is comparable to the "unduly harsh test". She submitted that when carrying out the Article 8 ECHR balancing exercise, the judge was manifestly aware that there was more weight to be given on the side of public interest because of Mr Folarin's offending and poor immigration history and that for the balance of proportionality to fall on the side of Mr Folarin, weighty factors would need to come into play. The judge was aware that this is not an easy test and there has got to be something significant to weigh in the balance. The judge accepted that the evidence of the witnesses and accepted that they were not lying or exaggerating and his factual findings have not been challenged.

20. I am in agreement with the Secretary of State that there has been a clear misdirection of law. The judge has manifestly misdirected himself by referring to Section 117B, instead of Section 117C. Section 117C contains factors that must be taken into consideration on a statutory basis, in respect of foreign criminals. I also agree with Mr Bates that GEN.3.2. does not equate to the "unduly harsh test". The test of "unjustifiably harsh consequences" is clearly a relevant consideration in a non-deportation case, whereas the "unduly harsh" test is specific to foreign offenders and has its own definition and threshold. In order to succeed on his human rights appeal, Mr Folarin would have needed to demonstrate that either Exception 1 or Exception 2 of the exceptions at Section 117C applied to him. Although the judge recorded at [62] that the test of "reasonableness" was met, this is a much lower test than that of "unduly harsh". At no point did the judge make explicit findings that it would be "unduly harsh"

for the British citizen children to remain in the United Kingdom without their father or for them to travel to Nigeria with their mother as a family unit. Further the test of "unjustifiably harsh consequences" does not equate to the test of "very compelling circumstances over and above the Exceptions".

21. I do not agree with Ms King that this error is not material. It is not possible to state with certainty that if the judge had not made this error that there would have inevitably been the same outcome. It may be that another judge would have allowed the appeal but it cannot be said that on the materials before the Tribunal, any rational Tribunal must have come to the same decision. I agree with Mr Bates that the prism through which the judge viewed the proportionality exercise also infected what weight he gave to various factors.

22. The judge also failed to consider whether it would be unduly harsh to maintain the status quo after Mr Folarin had been removed from the United Kingdom in 2017.

23. I am therefore satisfied that there has been a material error of law such that the appeal should be set aside. It seems to me that the entire proportionality exercise must take place again through the prism of Section 117C and I indicated this to the parties. Mr Folarin will need to demonstrate either that one of the Exceptions applies to him or that there are very compassionate circumstances over and above the exceptions.

Change of Circumstances

24. Very sadly, during the course of this appeal, the sponsor's oldest daughter, A, who was part of the sponsor and Mr Folarin's family, has died in tragic circumstances. Understandably the family are devastated by the loss of A and this has impacted on their family. No doubt this will form part of the consideration of Article 8 ECHR at the remitted hearing.

Disposal

25. Both parties were in agreement that this matter should be remitted to the First-tier Tribunal as new factual findings would need to be made given the passage of time since the original appeal was heard in 2020 and given the events that have taken place since then. The appeal can be swiftly dealt with at Newport. In view of the level of factual findings and the need for the swift disposal of this appeal, it is in the interests of justice for this appeal to be remitted to the First-tier Tribunal to be heard again de novo with two very important findings preserved.

Preserved Findings

26. During the appeal before the First-tier Tribunal, despite the Secretary of State's position at the review stage, it was conceded by the Presenting Officer that family life existed between Mr Folarin, his wife and children in the United Kingdom. Mr Bates indicated that he was happy for it to be recorded that there was a concession before the First-tier Tribunal and that the assertion that family life existed was not challenged by the Secretary of State in the grounds of appeal against the decision of the First-tier Tribunal. He indicated that he was content for this finding to be preserved. I also preserve the finding that as at the date of the previous hearing Mr Folarin not only had family life with his wife and two biological children, but with his stepdaughter A, who is now sadly deceased. Neither representative submitted that the passing of the sponsor's daughter

would constitute a “new matter” but would rather constitute a change in the family unit.

Notice of Decision

(1) The making of the decision of the First-tier Tribunal involved the making of an error of law.

(2) The decision is set aside in its entirety apart from the preserved finding that the family life exists between Mr Folarin, his sponsor in the United Kingdom, his two biological children and at the date of the previous hearing, the now deceased daughter of his wife.

(3) The appeal is remitted to the First-tier Tribunal to be heard de novo by a judge other than First-tier Tribunal Judge Rhys- Davies**.**

Listing instructions

(4) The appeal is to be listed on the first available date at Newport with a time estimate of three hours. Arrangements will need to be made for Mr Folarin to appear via video link, as appropriate.

(5) There is some urgency in listing this appeal due to the considerable delays that have taken place in listing it already and the current distressing family circumstances.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 August 2024