IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000097

First-tier Tribunal Nos:
HU/08281/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 3rd of May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

B. K. R.
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Ms S Panaliotopoulou of Counsel instructed by Erfolg Solicitors

Heard at Field House on 19 February 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Respondent is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Respondent, likely to lead members of the public to identify the Respondent. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Clarke promulgated on 21 November 2023 allowing on human rights grounds an appeal against a decision dated 23 October 2020.

2. Although before me the Secretary of State is the appellant and BKR is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to BKR as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a citizen of Kenya born on 21 October 1995.

4. The Appellant's immigration history is set out in the documents on file and summarised at paragraph 4-9 of the decision of the First-tier Tribunal. It is known to the parties, and it is unnecessary to repeat it here. Similarly, the Appellant's offending history is summarised at paragraph 10-13 of the decision of the First-tier Tribunal. In short, the Appellant entered the UK in 2011 as a child with indefinite leave to remain, but became the subject of a deportation order consequent to offences of arson, stalking, and harassment, following the breakdown of a relationship.

5. The Appellant had made representations on human rights grounds prior to the making of the deportation order on 23 October 2020. He appealed on human rights grounds.

6. The appeal was allowed by a decision of First-tier Tribunal Judge Clarke promulgated on 21 November 2023. Notwithstanding that it was acknowledged that "*the public interest in the Appellant's deportation is very strong*" (paragraph 120), the First-tier Tribunal placed very particular emphasis on the Appellant's mental health in allowing the appeal: the Judge found "*that the Appellant's mental health meets the elevated the threshold of "very compelling circumstances"*" (paragraph 127) – see further paragraphs 128-135.

7. The Respondent applied for permission to appeal to the Upper Tribunal which was granted by First-tier Tribunal Judge Monaghan on 2 January 2024.

Consideration of the 'error of law' challenge

8. In granting permission to appeal Judge Monaghan observed that the Respondent's Grounds of Appeal included factual errors in the introduction, which he attributed to "a copy and paste error", further noting that such error was not repeated in the body of the Grounds themselves.

9. A written response filed on behalf of the Appellant ('Skeleton Argument for the Error of Law Hearing', 12 February 2024, drafted by Ms Pangiotopoulou) makes further criticisms in respect of what is said to be factual inaccuracies in the Grounds - some of which Mr Lindsay accepted as valid.

10. It is my own observation that significant sections of the Grounds read as little more than a re-putting of the Respondent's case on the merits.

11. Nonetheless, and necessarily having had regard to the helpful submissions of both representatives, I am persuaded that there are two identifiable material errors of law made out by the Respondent.

12. I find that the First-tier Tribunal erred in its approach to the burden of proof in respect of the availability of medical support in Kenya for the Appellant's mental health condition.

13. The Appellant's treatment regime in the UK was set out at paragraph 47 of the Decision by way of quotation from his treating psychiatric specialist. This was repeated at paragraph 94, and further emphasised at paragraphs 95 and 96. The medical evidence showed that the Appellant was supported in three ways – "*medication, psychological therapy and care co-ordination*", and the Judge found that "*the Appellant has considerable support from his psychiatrist and the mental health team*" (paragraph 95).

14. Paragraph 97 begins with the Judge accepting that the Appellant does not have close family in Kenya, and as such "*will not have the same support from his family and the mental health team that he has here in the United Kingdom*".

15. Whilst the availability of support from his family may not be wholly irrelevant to his ability to access professional mental health support, it is not a matter expressly referenced in the quotations from the medical evidence relied upon by the First-tier Tribunal, and it is to be noted that the care coordination appears to be initiated by the professionals – "*…*

Finally, he is contacted as required by members of our team to support him and provide care coordination…" (as quoted at paragraph 96).

16. The Judge then says this (still at paragraph 97):

> "*I have considered the Respondent's CPIN and it is quite clear that there is treatment and care for mental health in Kenya. However, the fact is that the CPIN does not indicate that the "considerable treatment regime" as described by Dr Rashid which is clinically necessary for the Appellant would be available to him in Kenya.*"

17. This assessment by the Judge was then taken forward immediately into an evaluation of 'very significant obstacles' to integration under paragraph 276ADE(1)(vi).

18. In circumstances where the Judge accepted that there was treatment and care for mental health in Kenya, the burden was not on the Secretary of State by way of the CPIN or otherwise to demonstrate that such care would meet the needs of the Appellant – irrespective of whether that would be by way of exact replication of the treatment regime he enjoys in the UK, or something lesser but nonetheless adequate. Rather, the burden was on the Appellant to demonstrate that treatment would be so inadequate that it would hinder his ability to integrate to an extent to amount to a 'very significant obstacle'.

19. In the circumstances the Judge's observation – "*the fact is that the CPIN does not indicate that the "considerable treatment regime"… would be available to him in Kenya*" - is demonstrative of reversing the burden of proof: it shows that the Judge expected the Respondent to provide evidence to show that the Appellant's treatment needs could not be met rather than requiring the Appellant to provide such evidence in support of any argument on 'very significant obstacles'.

20. This was an error of law. It was plainly material to the overall outcome of the appeal: see paragraphs 127 and 134-135. The error is significantly material to require that the decision in the appeal be set aside.

21. I am also satisfied that there was a material error in considering the risks identified in the OASys material.

22. Paragraph 123 of the Decision is in these terms:

> "*In terms of rehabilitation, I rely on the most up-to-date OASYs report dated 18th July 2023. The Offender Manager in considering the risk of serious reoffending assessed the Appellant as posing a "low risk" RSR score of 0.94% over the next 2 years (AB Page 96).*"

23. However, this does not adequately reflect the risk assessment. Risk assessments in OASys reports are a product of two factors: the risk of offending, and the risk to the public in the event of offending. Although the risk of serious offending was assessed as identified by the Judge, the Judge's analysis disregards the identification of a medium risk of serious harm to others: e.g. see OASys assessment at page 149 of the Appellant's bundle before the First-tier Tribunal.

24. In my judgement the failure to have full regard to the risk assessment in the OASys report was a material error in the overall consideration of public interest – and therefore a material error in the ultimate balancing exercise undertaken.

25. For the reasons given the Decision of the First-tier Tribunal must be set aside. The remaking of the decision in the appeal will require revisiting significant aspects of the evidence and in the circumstances it is unrealistic to attempt to preserve any findings of fact. The appropriate forum is the First-tier Tribunal.

Notice of Decision

26. The decision of the First-tier Tribunal contained material errors of law and is set aside.

27. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge G. Clarke, with all issues at large.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

28 April 2024