IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-03537
First-tier Tribunal No:
HU/01918/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 November 2024

Before

UPPER TRIBUNAL JUDGE RUDDICK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KJ
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Hart, Qore Legal
For the Respondent: Mrs Nolan, Senior Home Office Presenting Officer

Heard at Field House on 31 October 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Pickering allowing Mr J's appeal against her decision to refuse to revoke a deportation order against him signed on 3 December 2012.

2. An anonymity order was made in the First-tier Tribunal. I have considered whether it is appropriate to continue that order, taking into account *Guidance Note 2022 No.2: Anonymity Orders and Hearings in Private*. I am satisfied that it is appropriate to make such an order, because it is in the best interests of the appellant's children and because both the appellant and his partner are recognised refugees.

3. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr J as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal

Background

4. The appellant is a citizen of Nigeria currently lawfully resident in France, where he has been recognised as a refugee. The appellant's partner is resident in the UK, where she holds Indefinite Leave to Remain as a refugee. The couple have three British children, born in the UK in April 2011, February 2014 and April 2019. The children live with their mother in the UK.

5. The appellant first came to the attention of the respondent on 16 August 2010, when he was arrested at Heathrow Airport attempting to leave the UK for Nigeria on another person's passport. On 26 August 2010, he was convicted at Isleworth Crown Court of knowingly possessing a false/improperly obtained/another person's ID document. He was sentenced to 12 months' imprisonment, of which he served six months. He was then detained under immigration powers until 11 March 2011.

6. The respondent notified the appellant of his liability to deportation on 12 November 2010. The appellant then made various applications to the respondent, including for a certificate of approval allowing him to marry a different woman from his current partner, an asylum and human rights claim and an application for ILR as an unmarried partner. All of his applications were refused, and on 3 December 2012, the respondent signed the deportation that the appellant has now applied to revoke. The appellant appealed unsuccessfully against the respondent's decision to make a deportation order, two further applications for leave to remain and one further appeal were unsuccessful, and on 28 July 2015, the appellant was deported to Nigeria.

7. On 22 October 2020, the appellant applied for a visit visa to the UK, in order to visit his partner and children. On 3 November 2020, the respondent refused that application, at least partly because of the outstanding deportation order.

8. On 11 June 2021, the appellant applied for revocation of the deportation order, on 9 May 2022, he sent a Pre-Action Protocol letter challenging the delay, and on 14 June 2022, the respondent made the decision that is the subject of this appeal. The respondent accepted that the appellant and his partner had three children together, and that they had visited him in France, but she noted that there had been no evidence that, prior to his deportation, he had had a genuine and subsisting relationship with the children or had supported them financially. The decision was silent on whether it was accepted that the appellant now had a genuine and subsisting relationship with his children, concentrating instead on the impact on the children of continuing separation. The children's mother had continued to support them "both emotionally and financially" since the

appellant's removal, and the two older children were attending primary school. There was no evidence that the appellant's presence in the UK was needed "to prevent his children being ill-treated, their health or development being impaired, or their care being other than safe and effective as they continue to reside with their mother." Alternatively, the family could join the appellant in France, where the appellant was "well settled".

9. Also weighing against the revocation of the deportation order was that the appellant's offence had been a serious one, and he had "continued to show a pattern of dishonesty" between his conviction and his removal by making an asylum claim that he later withdrew and failing during that period to inform the respondent of his ongoing relationship with his current partner and the birth of his second child.

The appeal before the First-tier Tribunal

10. The appellant appealed against the respondent's decision and lodged a 262-page bundle of evidence. The respondent conducted a review an upheld the decision. Like the RFRL, the Review focussed on the effects of family separation and did not specifically address the question of whether there was a genuine and subsisting parental relationship between the appellant and his children. The respondent noted the contents of the witness statements and the family photographs, and again accepted that the appellant's partner and children had spent time with him in France. However, neither the photographs nor the passport stamps provided sufficient details of the family visits or showed why the appellant and P could not continue to conduct their relationship "in the Appellants absence." The respondent continued to maintain that the children were being cared for and supported by their mother, who had always been their primary carer, and that they were not at risk of suffering any "ill treatment" in their father's absence. The appellant's financial support to his children was noted, but it was also taken as evidence that the appellant was "fully integrated and established in France, with a clear stream of income". The appellant's family could choose to join him in France and establish their family life together there.

11. On 23 May 2024, the appeal came before Judge Pickering for hearing. The Judge recorded that the appellant's partner was unable to attend the hearing due to childcare difficulties and that the appellant had tried unsuccessfully to obtain permission to give evidence from France. She recorded that there was "no challenge to the factual basis of the appellant's case" [2], which was set out as follows:

> "3. The appellant was convicted on 26 August 2010 in the Crown Court sitting at Isleworth Crown Court of an identity document offence which resulted in him being sentenced to a period of 12 months imprisonment. A deportation order was signed in December 2012 and the appellant was […] deported on 28 July 2015.
>
> 4. The appellant is residing in France where he is a recognised refugee.

> 5. The appellant's partner is [P]. She was recognised as refugee in the UK. She was granted leave until 30 May 2022 and now has indefinite leave to remain (ILR).
>
> 6. The appellant and [P] have three children together. [C1] (13 years old), [C2] (10 years old) and [C3] (4 years old). They are British Citizens.
>
> 7. [P] and the three children have established a life in the UK."

12. At [14], the Judge recorded that the parties submitted that she should direct herself to paragraphs 390-392 of the immigration rules. At [15], she recorded:

> "The factual matrix as set out at paragraphs 3-7 are accepted. In response questions, Mr Kizeikov [on behalf of the respondent] confirmed that there was no dispute that the appellant and [P] are in a genuine and subsisting relationship. However it was not accepted that the appellant has a genuine and subsisting relationship with his children."

13. The Judge heard submissions from both parties and reserved her decision.

The challenged decision

14. In a decision promulgated on 17 June 2024, the Judge allowed the appellant' s appeal.

15. The Judge's findings are set out at [17-24]. She began by noting that although her references to the evidence were "inevitably selective", she had considered all of the evidence in the round and applied the civil standard [17]. She accepted that the appellant had a genuine and subsisting relationship with his children, which had been "formed and maintained through visits to France, telephone calls and other modern means of communication."[18] At [19], she found that the appellant's 2010 conviction had been his only one, accepting "the appellant's evidence on this point" and noting that if there had been any other convictions in the UK or France, the respondent would have "been in a position to identify these". She accepted the respondent's "contrition and remorse". At [20], she noted that [P] had not given oral evidence, but nonetheless accepted her evidence that it would be preferable for the family to live together, and that travelling was becoming "more expensive and onerous" now that the children were in school. In accepting P's evidence in spite of her lack of attendance, the Judge described it as "unremarkable". At [21], she noted that the children were settled in the UK but were "missing crucial formative years of living with their father". It would be in the children's best interests to remain in the UK and to live with both parents "as a family unit" [23].

16. The Judge then directed herself to HA (Iraq) [2022] UKSC 22 and stated that she had adopted the caution urged therein with regard to the issue of rehabilitation, but that she accepted that the appellant had accepted his

guilt and had not reoffended. [23] At [24], she accepted that ten years had lapsed since the making of the deportation order.

17. At [25-32], the Judge applied the law to her findings. She found that there was a genuine and subsisting relationship between the appellant, his partner and his children [25], that it would be "very challenging" for the children to live in France because they were in school in the UK and speak English. However, although the "current arrangement" was undesirable, she was not persuaded that it would be unduly harsh for it to continue. Therefore, neither Exception 1 or 2 of Section 117C of Nationality, Immigration and Asylum Act 2002 was met [26-27].

18. The Judge then turned to the question of whether the deportation should be maintained, with reference to para. 391 of the Immigration Rules (the framework in which the parties had agreed she should decide the appeal) [28]. She first considered that there had been a significant change in the appellant's circumstances since the deportation order was made (which is a relevant factor under the rules), namely that the appellant had three children who were unable to grow up with him in their country of nationality. She then directed herself to the guidance in EYF (Turkey) v Secretary of State for the Home Department [2019] EWCA Civ 592 and on that basis rejected Mr Hart's submission that the deportation order "has effectively lapsed". Nonetheless, she did consider, with reference to EYF (Turkey) [28] that the public interest in the appellant's removal had been "attenuated by the passage of time." [29] She further found at [30] that maintaining contact through visits and phone and video calls "would not be adequate on an indefinite basis" [30]. At [31], she noted the appellant's good character and the passage of 10 years since the deportation order.

19. Her conclusion at [32] was as follows:

> "The public interest in the maintenance of the appellant's deportation order does not weigh against him as heavily as it once did. The very compelling circumstances of this case do not justify his continued exclusion from the UK."

20. She allowed the appeal.

The grounds of appeal

21. The respondent sought permission to appeal on one combined ground: "Failing to give reasons or any adequate reasons for findings on material matters / Making a material misdirection of law on any material matter – consideration of Exception 1 or 2 of s.117C of the Nationality, Immigration and Asylum Act 2002."

22. Under this multifaceted heading, the respondent said that she did not "seek to reargue the appeal", but that the Judge should have put less weight on P's evidence as she had not been cross-examined, that the Judge had not "referred to any specific evidence to support the finding" that the appellant had a genuine and subsisting relationship with his children, and that there was "insufficient evidence" to support such a

finding because the passport stamps were the only "objective evidence of travel" and "financial support alone does not demonstrate that the appellant has taken parental responsibility for making key decision in the upbringing of the children." She noted that the letter from one child's school did not mention the appellant, and while the letter from another did list him as an emergency contact, "it is not clear what assistance, if any, the appellant may be able to offer from France". Less weight should be "afforded family life" because P had chosen to travel to France and conceive a third child even after the appellant had been deported. The family had never lived together as a family unit, the letters from the older children were "self-serving" and there was "no evidence of direct contact with the children via remote means".

23. Having presented a range of arguments most of which had not been made previously, the respondent then went on to state that she continued to rely on the RFRL and the Review, which had been "ably expanded upon" by the Home Office Presenting Officer at the hearing below, "who maintained the appellant had not demonstrated a genuine and subsisting relationship, as recorded by the FTTJ at [15]".

24. The respondent further asserted that the Judge had placed the burden of proving further convictions on the respondent, and erred in accepting the word of a "convicted fraudster who has engaged in deception before previous Tribunals". Here, she did not rely on any previous determinations but on excerpts quoted in her refusal letter.

25. The respondent then turned to the "key question" of whether the continuation of the deportation order would have unduly harsh consequences for the appellant and his children. She argued that there was a "contradiction" between the Judge finding that the consequences of the family's ongoing separation would not be unduly harsh and her later finding that maintaining family life through visits and phone and video contact "would not be adequate on an indefinite basis." The Judge had failed to identify any reasons why family life could not continue as it has "for some time" and the difficulty of travel to France, passage of time and the appellant's "claim he has not accrued further offences are not considered to be 'very compelling circumstances.'"

26. Permission was granted because there was "arguably an inconsistency in the findings and application to the relevant statutory framework and […] a lack of clear reasoning for the overall conclusion."

27. The matter then came before me for hearing at Field House.

Discussion

28. In deciding whether the Judge's decision involved the making of a material error of law, I have reminded myself of the principles set out in Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 [26] and Volpi & Anor v Volpi [2022] EWCA Civ 464 [2-4], and of the danger of "island-hopping", rather than looking at the evidence, and the

reasoning, as a whole. See Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5 [114].

29. I have also taken into account the guidance set out in Lata (FtT: principal controversial issues) [2023] UKUT 163 (IAC), regarding the parties' obligation to identify the issues during the proceedings before the FTT.

30. At hearing before me, Mrs Nolan informed me that the respondent was no longer maintaining that the finding that there was a genuine and subsisting relationship between the appellant and the children was not open to the Judge on the evidence before her. She also confirmed that the respondent was not challenging any of the specific findings made at [18-24].

31. I am mindful, however, that the respondent has considered it appropriate to change her position between the hearing before the First-tier Tribunal and the grounds of appeal to the Upper Tribunal. I therefore set out my own reasons for rejecting the respondent's challenges to the Judge's findings.

32. I consider that in spite of her protestations to the contrary, the bulk of the respondent's grounds are nothing more than an expression of her unhappiness with the Judge's findings. Moreover, she has treated the grounds as an opportunity to make a range of new submissions, some of which are inaccurate. Among the inaccurate submissions are that the Judge has "not referred to any specific evidence" to support the finding that the appellant has a genuine and subsisting relationship with his children. She refers to the evidence of travel, the records of communication and to P's statement. It is not clear what the appellant is trying to say, moreover, when she complains that there was no "objective evidence of travel" other than passport stamps; there were also multiple photos of the family together, and in any event, the fact of travel has consistently been accepted by the respondent. It is not correct that previous Tribunals have found that the appellant "engaged in deception" before them; the full determinations are not before me and were not before Judge Pickering, and even the excerpts in the refusal letter contain no such findings. One Tribunal noted that it "appeared" that the appellant had "let slip the existence of [… C1] by accident and had intended to conceal it", but this falls short of a finding that he had "engaged in deception". The second excerpt merely says that the appellant had made an asylum claim, which he later withdrew.

33. The respondent has also made a number of submissions in the grounds of appeal that she had not raised below. There is no indication in the refusal letter, the respondent's review or the challenged decision that the respondent questioned the credibility of the appellant's partner or that it was suggested at the hearing that less weight should be put on her evidence because of her absence, or for any other reason. Moreover, the Judge has given reasons for putting weight on her evidence in spite of her absence and those reasons are cogent ones.

34. Other submissions that the respondent appears to be raising for the first time include that "financial support alone" does not create a parental relationship, that the children's statements are self-serving, that the appellant could not helpfully act as an emergency contact if he is in France (it is unclear why this is; he could, for example, assist in locating their mother in an emergency or give permission for the school to administer first aid), and that little weight should be put on the appellant's family life with his third child, because the child was conceived after he was deported.

35. More fundamentally, the respondent had not taken a position on the genuineness of the appellant's relationship with his children prior to the hearing, as set out above. She now says that the RFRL and Review were "ably expanded upon" by the Presenting Officer at the hearing below, suggesting that the HOPO not only raised this issue for the first time, but argued it, perhaps even by reference to the evidence. However, there is no indication of this in the determination, which does not mention any submissions on this issue. The paragraph the respondent refers to simply confirms the fact of the respondent's position at the outset of the hearing. If the Presenting Officer had, in fact, "ably expanded upon" the statements in the RFRL and the Respondent's Review and the Judge has failed to take these submissions into account, it is for the respondent to provide some evidence that this was the case. Not only has she not done so (by, for example, producing the transcript of the hearing or a statement from the Presenting Officer), but she has pointed to a paragraph in the decision that strongly suggests that the position was simply confirmed, not that it was "expanded upon".

36. I find that all of the arguments that the respondent is now putting forward as to why the evidence does not support a finding that there is a genuine and subsisting relationship between the appellant and his children are ones that she should have made before the First-tier Tribunal. Her grounds of appeal do not appear to have taken on board the clear guidance in Lata.

37. I am not persuaded that the Judge in fact placed the burden of proof on the respondent as to the appellant's lack of offending in France. She says that she accepts "the appellant's evidence on this point" [19]. It is trite that she was not required to refer to specific items of evidence with regard to every one of her findings, and it is important to note that not only did she have statements from the appellant and P confirming his remorse and lack of reoffending, but she also had evidence that the appellant had established a business in France. Indeed, it was the Respondent's position, as expressed in the Review, that the evidence showed that he was "fully integrated and established in France". It may have been an error of fact for the Judge to believe that the respondent would have been able to access evidence of any reoffending in France, but I find that this error was not material.

38. The respondent further argues that it is “inconsistent” for the Judge to have found at [26-27] that the impact on the family of continuing their relationship through visits and communication would not be “unduly harsh” and at [30] that this “would not be adequate on an indefinite basis.” There is no inconsistency. It is well-established that consequences can be “uncomfortable, inconvenient, [or] undesirable” but not unduly harsh. MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 [46] There is no reason that “inadequate” cannot be added to the list of adjectives describing a situation that is adverse but does not rise to the elevated threshold of unduly harsh.

39. The respondent further argues that, having found that the consequences would not be unduly harsh, the Judge was required to point to additional considerations that constituted very compelling circumstances and did not do so. The respondent argues both that the Judge failed to identify any compelling circumstances and, in the alternative, that the factors that she did identify “are not considered to be ‘very compelling circumstances’”. Mrs Nolan’s argument before me focussed on the first of these two arguments. She urged me to look at [32] in isolation and find that the Judge failed to identify the “very compelling circumstances” on which she was basing her decision. Essentially, the Judge had failed to give any reasons for a crucial finding.

40. I reject this argument, and I find runs directly counter to the Court of Appeal’ guidance in Ullah [26(iii)] that “the basis upon which the FTT reaches its decision […] may be set out directly or by inference”. At [18-31], the Judge made a series of factual findings related both to the adverse effect of separation on the appellant’s children and to the diminishing public interest in the appellant’s deportation. Paragraph 32 is the conclusion she reaches on the basis of those findings. There was no need for her to list them again in [32], because the reasoning can be inferred from the structure of the decision. She has set out her reasons.

41. The respondent’s final argument is that the factors the Judge has identified “are not considered to be” very compelling circumstances. The Judge has taken into account that the appellant committed one offence almost 14 years ago. Although the Judge does not specifically address the seriousness of the offending, when considering whether her decision is one that no rational Judge could have come to, it is worth noting that the appellant was sentenced to 12 months in prison, which is at the lowest end of the threshold for automatic deportation, and the offence did not involved drugs or violence. The Judge found that he has not offended since, and it is accepted that he is “fully integrated” in France, where he has established a business. The Judge made specific findings about where the best interests of the children lie, and about the inadequacy of their maintaining their relationship with their father through visits, both given the crucial stage in their development and because visits were becoming increasingly expensive and difficult. It may be that other Judges would not have found this combination of factors very compelling, but it cannot be said that no reasonable Judge could do so.

Notice of Decision

42. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The respondent's appeal is dismissed and Judge Pickering's decision to allow the appellant's appeal stands.

E. Ruddick

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 November 2024