Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2021-001342
DA/00088/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 May 2022	**On 13 July 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ALAIN BERTRAND JUNIOR BOULARD DE NERVAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Desire Eteko, Solicitor from Iras and Co
For the Respondent: Mr Stefan Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant appeals against the decision of First-tier Tribunal Judge Ford ("the judge"), promulgated on 5 July 2021. By that decision the judge dismissed the Appellant's appeal against the Respondent's decision to make a deportation order against him pursuant to the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

2. The Appellant is a citizen of the Côte d'Ivoire born in 1989. He came to the United Kingdom at the age of 11 to join his mother. In 2009 he was issued with a residence card pursuant to the Immigration (European Economic Area) Regulations 2006. In 2014 he was issued with a permanent residence card under those Regulations. He has retained that status ever since. The Appellant has a partner, Ms V, and three minor children, all of whom are British citizens.

3. The basis for the Respondent's decision to deport the Appellant was his criminal history. In summary, between 2005 and January 2017 the Appellant acquired a number of convictions for matters including possession of Class B drugs and failing to comply with several community orders. In May 2017, the Appellant was convicted of wounding with intent, contrary to section 20 of the Offences Against the Person Act 1861, for which he was sentenced to 33 months' imprisonment.

The decision of the First-tier Tribunal

4. The matter came before the judge in June 2021. Having set out the Appellant's immigration and criminal history, the judge correctly noted that the Respondent bore the burden of showing that the Appellant should be deported. She set out relevant provisions from the 2016 Regulations, quoted at some length from the sentencing remarks, and summarised the evidence provided by the Appellant. Written evidence from other sources was noted, as was the absence from the hearing of the Ms V and his mother.

5. At paragraph 50(a)-(s), the judge set out her detailed findings of fact. In the particular circumstances of this case it is appropriate to set these out in full:

> "a. The Appellant's full criminal history from the first offence he committed at the age of 16. I have borne in mind the gap in his offending between 2010 and 2017 but I do not accept that this gap in his criminal behaviour can be attributed to the stabilising influence of his family life because he did not meet Ms [V] until 2015. I note also that he was convicted of being drunk and disorderly and being in possession of class B drugs in 2017 and the offences were committed on 1/1/2017, only four days before [R] was born. The index offence was committed in November 2017 and the responsibility he had as the father of a young child did not seem to enter the Appellant's thinking at that time and was not a preventative factor.
>
> b. The index offence is the only offence of violence that he has committed in the last ten years, but it is a very serious one. He committed that offence in November 2017 when [R] was less than a year old.
>
> c. The risk of re-offending has been assessed as medium in the up-to-date letter from his probation officer. Rather unhelpfully she does not expressly assess the risk of harm to the public should he re-offend.

She merely refers to the risk of re-offending as being medium. I note that the probation officer says the risk of re-offending has fallen due to stabilising factors. These seem to include family relationships but given my concerns about the state of the Appellant's relationship with his partner, I find that the confidence expressed in the stabilising factors of family relationships in this case is misplaced. The reality is that those relationships are not as strong as was reported to probation.

d. I had limited evidence of integration considering the Appellant has now lived in the UK for over twenty years. The evidence was that the Appellant had not maintained his school attendance and had left school with few qualifications. I had no letters from friends or figures in the community who know him. However, I do accept that he only has weak ties with Côte d'Ivoire through his mother's ongoing connections, given that he never lived there as an adult and left at the age of 11.

e. The Appellant has completed substance misuse and alcohol awareness courses as part of his sentencing plan. He says that he has stopped drinking and I had no evidence to contradict this.

f. The Appellant has acquired a few additional qualifications while in prison in basic IT and literacy. He should be able to use these skills to secure employment or set up a business in Côte d'Ivoire. He speaks French and English. I find that he will retain some memory of the culture and way of life in Côte d'Ivoire given that he lived there until the age of 11. While he faces difficulties to his integration having been away for so long and not having immediate family there to help him, I do not accept that the difficulties he will face amount even to very significant difficulties.

g. It was argued on the Appellant's behalf that he had a difficult childhood, but I do not accept that he did. His mother came to the UK when he was 3 and he was then cared for by his maternal aunt. His mother came to the UK to work and earn money to send back to the family and I believe that she did that. The Appellant was so close to his aunt who cared for him, that he referred to her as his mother.

h. The Appellant has three children in the UK with Ms [V]. He has lived on and off with Ms [V] and I am not satisfied that he has been a constant figure in the childrens' lives. Ms [V] does not say that he has but refers to him as a "brilliant father", which on any reading of the evidence is an unsustainable view. I had no evidence to show that he has supported his family financially in a consistent way. I am not satisfied that they are living together at the present time. Ms [V]'s statement was over 6 months old. I had no up to date evidence from Ms [V], no evidence to show that the Appellant still visits her address or spends time with her or the children and no evidence from the children's schools to confirm his involvement with their education or that he has been delivering them to and picking them up from school. I had no notes from the pre-or post-natal medical services to show the Appellant was involved in their births or in caring for Ms [V] and the baby at the time of their births. There was no evidence to show that the Appellant had accompanied her to any medical or other appointments to do with the children. I had no photographs of time they have spent together

this year and given the lockdowns that have occurred I am sure that Ms [V] was greatly in need of his assistance with the children and their education.

i. I am not satisfied that the Appellant and Ms [V] are in an ongoing relationship. She was willing to attend previous hearings but did not attend the hearing on 30.06.2021 and having considered the reason given for her non-attendance, I concluded that their relationship was over. The only reason I was given was that she could not get anybody to care for the baby. I do not accept this explanation as she could have joined remotely and if necessary, had the baby with her while she gave evidence. The Appellant blamed Ms [V]'s post-natal depression and her moody behaviour for the difficulties between them but without further evidence I do not accept that that is true, and I do not accept that there is any real tie of affection between them. I do not accept that they are a couple. I find that their relationship now is purely that they are parents to 3 children and nothing more. I find that Ms [V] is the primary carer of the couple's 3 children.

j. In relation to the children, I am not satisfied that the Appellant's presence in the UK is necessary for their best interests to be protected and promoted. He has not set a good example for them to date given his violent behaviour. He has never been a constant figure in their day-to-day lives. I do not accept he has the level of involvement he claims to have currently in their lives on a day-to-day basis. While I appreciate the family may not have much money, I had no photographs of times the Appellant has spent with his children since his release from prison. While I accept that the Appellant has spoken to his stepson to warn him about the implications of falling with the wrong crowd and getting involved in criminal behaviour and he is to be commended for this, he has not provided his children with a stable family home and upbringing. He was absent entirely from their lives for the time he spent in prison. I heard no account of his providing them with financial support when he was not in prison. He said that he had back issues in 2020 that prevented him from working on construction but then he said that his problem was not a long-term one. I could see no evidence of efforts to secure employment since he lost his construction job in the autumn of 2020. I find that the Appellant has sporadic and limited face to face contact with his children. Their settled home is with their mother and she is their primary carer. The Appellant can maintain emotional support for his children by internet and telephone contact and I do not accept that his absence would do them any long-term or permanent harm. They may be upset for a time but with loving emotional support from both parents, I find that they will settle into a new pattern of indirect contact with the Appellant and in due course some visits.

k. On the issue of rehabilitation, I do accept that the Appellant has completed the drug and alcohol awareness courses. I have fully considered the letter from the Appellant's probation officer who has expressed confidence in his progress towards a non-offending lifestyle. He has expressed remorse for his crime, and this was accepted by the trial judge. However, I was troubled by the Appellant's evidence at the hearing concerning his own involvement in the wounding offence in late 2017. Even now he is unable to fully acknowledge his level of

responsibility for that terrible attack. The trial judge records that the Appellant attacked the victims with a claw hammer repeatedly causing serious injury to shoulder and elsewhere. He did this because he believed the victim had taken money from him. His reaction was extremely violent and is anger uncontrolled. But I have no evidence to show that the Appellant had undergone any anger management courses. Probation rather surprisingly, did not seem to think it necessary. The Appellant blamed his outburst on alcohol, but this does not reduce the level of responsibility he must accept for his actions. Even at the hearing his evidence was inconsistent as to whether he accepted responsibility or not, saying at one point that he had not used a claw hammer before accepting that he did use a claw hammer. He was asked why he did not plead guilty until the day of the trial and he told me that he had to see the evidence before he decided to plead. He finally pleaded guilty on the day of the trial. He said he could not remember what had happened but new that the victim had been hurt. I am not satisfied in the circumstances that the Appellant has completed his rehabilitation.

l. The probation report referred to the protective factor of the Appellant's family. I note that the Appellant has said that he always moved between family members and his mother and siblings have been there for him since he arrived in the UK. The protective factor of his mother and siblings did not prevent him from committing crime. I am not satisfied that his mother is able or willing to provide him with much support at the present time. She did not attend the hearing and given that this was a re-hearing, it was clear that she should have attended if she wished her witness statement to be given its full weight. Reliance was placed on her witness statement, but in the circumstances, I could place little weight on it. It was over 6 months old and was short and rather vague. I not satisfied that she has much involvement in the Appellant's life at the present time.

m. The risk of re-offending has been assessed as medium.

n. The Appellant suffers from depression and is currently prescribed anti-depressants. I have no reason to believe that his medication or suitable equivalent will not be available to him in Côte d'Ivoire. I had no evidence on which to base such a finding. Should the Appellant need to pay for it or need further assistance, I find that his mother and other family members in the UK will be willing to help him until he gets established. Apart from his depression the Appellant is in good health. His back issues were as a result of a physical labouring job on a construction site, and he told me that his back issues were not permanent.

o. The Appellant is 33. As at the date of his offence he had been in the UK for 19 years, well over half his life.

p. Although the Appellant's mother and siblings, nieces, nephews and other members of his extended family live in the UK and he does share a private life with them, paragraph 2 of Schedule 1 states that, "An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or

language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom". Given the seriousness of the Appellant's index offence, his previous criminal record, (I do take account of the 10-year gap) and the lack of evidence concerning social, cultural, religious or community ties, I do not accept that the Appellant has integrated in the UK, despite spending most of his life here from the age of 11. I do not accept that he shares a family life with his family members. He says that he is staying with his sister, but I had no evidence from her. His dependency on family members has risen from his criminal offending and is temporary and I do not accept that it is such as to create family life between them.

q. I have looked at the nature, the number and the seriousness of the Appellant's criminal offences. While most of the offences were minor and were committed when the Appellant was a minor, and there was a long gap in his offending, the index offence was committed when the Appellant should have been a mature adult in his thinking. He was 28 years of age but was unable to control his anger against the man he believed had stolen money from him and attacked him viciously. The Appellant and his co-accused effectively hunted down the victim and lured him back to what he believed to be a place of safety before attacking him stop they had ample opportunity to think about what they were doing but did not alter their pre-meditated course of action.

r. The Appellant's previous convictions do not in themselves justify the decision.

s. The fundamental interests of society in this case are,

i. maintaining public order;
ii. preventing social harm;
iii. protecting public services; the cost to the public purse of prosecuting the index offence to trial as well as the cost of what must have been extensive medical treatment for the victim must be recognised
iv. excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action
v. protecting the public."

6. In the two paragraphs immediately preceding and following the detailed findings of fact, the judge set out the test she was applying to the Appellant's case. As stated at paragraphs 49 and 51 the question was, in her view, whether the Appellant posed a "genuine, present and sufficiently serious threat to the public interest to the fundamental interests of the United Kingdom". In the latter paragraph the judge concluded that the Respondent had shown that the Appellant posed such a threat.

7. At paragraph 52, the judge went on to address the principle of proportionality. In light of her findings of fact she concluded that the Respondent's decision was, in all the circumstances, proportionate.

8. The Appellant's appeal was duly dismissed.

The grounds of appeal

9. In the original grounds of appeal put forward to the First-tier Tribunal, two matters were raised. First, it was said that the judge had applied the wrong test under the 2016 Regulations. Second, it was said that the judge had erred in respect of her assessment of rehabilitation.

10. Permission was refused and the application for permission was then renewed. The renewed grounds were drafted more restrictively than the original grounds. The relevant passage states:

> "The Appellant pursues a narrow point which it is submitted FtJ got it wrong. Whilst FtJ correctly recognised that the Appellant had permanent residence … FtJ failed to set out and apply the correct test for deportation. She wrongly framed the test as to whether the Appellant's conduct 'represents a present threat to society' … The real test concerned is rather serious grounds of public policy or public security for removing the Appellant as a result of his conduct."

11. Permission to appeal was subsequently granted by Upper Tribunal Judge Pickup on 3 March 2022.

12. Following the grant of permission, the Respondent provided a rule 24 response in which it was said that whilst there may have been an error by the judge in respect of the applicable test, this was not material as the judge would have come to the same ultimate conclusion given her findings of fact.

The hearing

13. At the hearing, I indicated my provisional view that the judge had indeed erred in law by failing to apply the correct test under the 2016 Regulations.

14. Given that the Appellant had acquired a permanent right of residence, the correct test was whether there were serious grounds of public policy or public security, this being the middle level of protection in the hierarchy under the 2016 Regulations. The judge had seemingly applied the lowest level of protection to the Appellant.

15. I asked both representatives to address me on the issue of materiality. Mr Eteko submitted that the error could have made a difference. The judge

should have assessed the index offence according to the appropriate threshold. The judge could have concluded that there were no serious grounds and the Appellant would then have succeeded in his appeal. Alternatively, if the threshold was, met the judge would still have then had to go on and consider the issue of proportionality. The error was described as "extremely" material because the Appellant had been deprived of the higher threshold of protection.

16. Mr Eteko then sought to argue that the error had infected the judge's findings of fact at paragraph 50. I asked Mr Eteko to clarify whether he was seeking to amend the narrowly drawn single ground of appeal. He confirmed that he was. Mr Kotas opposed that application.

17. I refused the application to amend the grounds of appeal for the following reasons. First, those grounds were clear and specifically stated that the challenge was being brought on a "narrow point". There was no hint of a challenge to the judge's findings of fact at that stage. Second, there had been no written application to amend the grounds in advance of the hearing. Third, the bare assertion that the failure to have applied the applicable legal test (which ultimately goes to the overall conclusions to be drawn by the fact-finding tribunal) in some way infected the factual findings did not raise any arguable challenge. Those findings were based on an evaluation of the evidence as a whole and in my judgment it is plain that there was no causal link between the application of the wrong level of protection and that evaluation. Fourth, the principle of procedural rigour (incorporating as it does the need to ensure fairness to the other party) is important in this case, as in all others.

18. I then asked Mr Eteko to address me on how the matter should be disposed of if I were to find that there was an error of law. He asked me to set aside the judge's decision and either remit the case to the First-tier Tribunal, or to have a resumed hearing in the Upper Tribunal where all matters could be revisited and without any findings of fact being preserved. He stated that the Appellant's licence had expired in October 2021 and that he "envisaged" a request to obtain a final report from the Probation Service, an independent social worker's report, and medical reports on the Appellant and his partner. This, submitted Mr Eteko, would assist the Tribunal. He urged me to consider the "interests of justice" and submitted that a lot of "water had passed under the bridge" since the First-tier Tribunal had considered the Appellant's case.

19. Mr Kotas relied on the rule 24 response and submitted that any error was not material because the judge would inevitably have dismissed the Appellant's appeal based on the unchallenged findings of fact. Alternatively, it was submitted that I could set aside the judge's decision and then re-make the decision based on the unchallenged findings of fact. There was no need to either remit or conduct a resumed hearing in the Upper Tribunal.

20. At the end of the hearing I reserved my decision.

Conclusions on error of law

21. I conclude that the judge has erred in law. It is clear from the face of his decision that she applied the wrong level of protection to the Appellant, given his permanent right of residence: see paragraph 14, above.

22. The next question is whether this error was, in all the circumstances, material.

23. The judge's findings of fact are detailed, highly adverse to the Appellant and, significantly, stand unchallenged. On that basis, my provisional view was that the judge's error was not material. Having reflected further, I have decided that, given the low threshold of materiality (that an error *could* have made a difference, not that it would have), the judge's decision should be set aside in order that I can re-make the decision in this case based on an application of the correct level of protection. There is no question of remitting this case to the First-tier Tribunal.

24. In respect of whether I should proceed straight to re-making the decision based on the judge's unchallenged findings of fact, or whether there should be a resumed hearing in the Upper Tribunal, I have concluded that the former course of action is appropriate. This is so for the following reasons. First, the findings are comprehensive and deal with all relevant matters, both in respect of the Appellant's criminality, his personal circumstances in the United Kingdom, and matters relating to Côte d'Ivoire. Second, this is not a case in which the hearing before the First-tier Tribunal occurred two or more years ago, it took place only some ten months in the past. Third, there has been no application under Rule 15(2A) of the Tribunal's Procedure Rules to adduce any further evidence. The most Mr Eteko could say at the hearing was that it was "envisaged" that further evidence might be sought. There was no explanation as to why relevant evidence had not been provided before the First-tier Tribunal. Other than the statement that the Appellant's licence had expired in October 2021 (which I am prepared to accept did in fact occur), the bald statement that much "water had passed under the bridge" since the First-tier Tribunal hearing was both vague and of little assistance. Fourth, I afforded this Mr Eketo the opportunity to say anything else on the Appellant's behalf at the hearing. Fifth, it is in general the expectation that the Upper Tribunal will go on and re-make a decision without a further hearing based on the materials before it, subject of course to fairness and the interests of justice. In this case, neither of those two important principles in any way preclude me from adopting the course of action which I now take.

Re-making the decision

25. In re-making the decision in this case, I preserve and bring forward all of the findings of fact made by the judge and quoted in full earlier in this decision.

26. In addition, I very much bear in mind the best interests of the three children and the position of Ms V.

27. I apply the middle level of protection to the Appellant's case, namely that it is for the Respondent to show that there are "serious grounds" of public policy or public security which justify deportation.

28. Having applied the medium level of protection, I am satisfied that the Respondent has indeed shown that such serious grounds exist here. I place particular reliance on the findings of fact made by the judge set out at paragraph 50(b), (c), (k), (m), (q) and (r) of her decision. Without repeating those findings in full, the Appellant committed a very serious offence in late 2017, remains a medium risk of re-offending and certain protective features relied on by the Appellant have been doubted or rejected by the judge. Although the Probation Service does not seem to have specifically addressed the issue of the risk of serious harm were the Appellant to re-offend, it is clear to me that such a risk would be at the very least medium, if not high, given the index offence and, importantly, the preserved findings on rehabilitation. That offence was the only violent act in the Appellant's criminal history, but there have been a number of breaches of community orders indicating a lack of respect for the imposition of sentences by courts and there have also been convictions relating to the possession of drugs. Whilst these matters are clearly not as serious as the index offence, their cumulative effect is relevant to the overall assessment of the serious grounds issue.

29. I take account of the fact that the Appellant's licence expired in October 2021 and that on the face of it he has not been in any trouble since the index offence and his release from prison. This adds little to his case overall, given the incentive to have complied with the licence conditions whilst they were in place (in order to avoid being recalled to prison) and the knowledge that the Respondent was taking deportation proceedings against him. Having said that, I do weigh in his favour the absence of further convictions.

30. There is no evidence before me as to any material changes in the Appellant's personal circumstances in the United Kingdom other than the simple passage of time.

31. Having concluded that there are serious grounds for deportation, I go on and consider proportionality. I take into account all of the judge's findings and everything else I have said in this decision. The best interests of the children remain a primary consideration. However, in light of the judge's adverse findings on the Appellant's familial circumstances, I conclude (independently, but coincidentally in line with the judge's conclusion) that the Respondent's decision is proportionate. In particular, I conclude that a

cumulative evaluation of the following considerations go to outweigh the substantial period of residence accrued by the Appellant and or other factors weighing in his favour:

(a) the absence of a subsisting relationship with Ms V;

(b) the limited involvement with the three children;

(c) that the children's best interests would not be significantly prejudiced by his absence;

(d) the lack of integrative ties with the United Kingdom;

(e) the ability to re-integrate into the society of Côte d'Ivoire, albeit not without some difficulties.

32. In light of the foregoing, I dismiss the Appellant's appeal.

Notice of Decision

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

I set aside the decision of the First-tier Tribunal.

I re-make the decision and dismiss the Appellant's appeal.

No anonymity direction is made.

Signed H Norton-Taylor Date: 23 May 2022

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed H Norton-Taylor Date: 23 May 2022

Upper Tribunal Judge Norton-Taylor