IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001024
(HU/50993/2021); IA/03643/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 March 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Mohamed Cherif
(no anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mrs Chaudry, Counsel instructed by ILAC
For the Respondent: Ms Young, Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 22 February 2023

DECISION AND REASONS

1. The Appellant is a national of Guinea date of birth 1st January 1970. He appeals with permission against the decision of the First-tier Tribunal (Judge Drake) to dismiss his appeal on human rights grounds.

2. The Respondent wants to deport the Appellant. That is because, on the 16th November 2007 the Appellant was convicted of the use of a false instrument, a Belgian passport to which he was not entitled. He was sentenced to 15 months in prison. The Appellant has remained in the UK since then but has never had leave to do so.

3. When, on the 19th March 2021, the Respondent refused the 'fresh' human rights claim made by the Appellant in 2018, she did so on the grounds that nothing in

the Appellant's circumstances was capable of rendering the decision to proceed with the deportation disproportionate and therefore unlawful. Specifically the Respondent did not accept that it would be 'unduly harsh' for any of the Appellant's family members if he were to be deported, or that there were, even cumulatively, very compelling circumstances in this case.

4. When the matter came before the First-tier Tribunal the Appellant argued that it would be unduly harsh for his wife and three children (then aged 10, 5 and 5) if he were to be deported. He enjoyed a close and genuine parental relationship with the children which would be effectively severed by his deportation. His partner is Malian and the children are all Malian by descent. His stepson, the eldest child, is a refugee and should not be expected to relocate again. All of the children would be severely impacted by the loss of their father. In respect of the wider holistic analysis required by s117C(6) of Nationality, Immigration and Asylum Act 2002 the Appellant points to several factors including: the refugee status of his stepson, the fact that none of his family members have any familiarity with Guinea nor automatic entitlement to enter that country, that his wife would be left to cope alone as a single mother to three young children, his own long residence, the uncontested assertion that in 15 years he has never been convicted of any other offence and so can be regarded as rehabilitated, his subsequent cooperation with the Home Office, the delay in dealing with his fresh claim, and his long absence from Guinea.

5. The First-tier Tribunal rejected all of those submissions and the appeal was dismissed.

6. The Appellant now has permission to appeal to this Tribunal, granted by Upper Tribunal Judge Lindsley on the 23rd May 2022.

Discussion and Findings

7. The striking thing about the decision of the First-tier Tribunal in this case is that there is at best only fleeting reference to the applicable statutory framework. That framework is to be found at Part 5A of Nationality, Immigration and Asylum Act 2002:

> **117CArticle 8: additional considerations in cases involving foreign criminals**
>
> …
>
> (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.

8. At its paragraph 19 the Tribunal appears to refer to this framework where it states that it is "blindingly obvious that exception (a) is not met because he has not resided in the UK legally since he arrived". I assume this to be a reference to the 'private life' exception to the automatic deportation procedure set out at s117(C)(4) above. Since the Appellant did not in fact assert that he met Exception 1, this finding was otiose.

9. The Appellant did assert however that his case engaged Exception 2. Nowhere is the test therein, of "undue harshness", referred to or considered by the First-tier Tribunal decision. Instead the Tribunal embarks on what would, in another context, be referred to as a 'freewheeling' proportionality balancing exercise. I am satisfied that in doing so the Tribunal erred in three material respects.

10. First, it fails to follow the statutory interpretation offered by the decision in KO (Nigeria) [2018] UKSC 53. There the Supreme Court make clear that the impact of deportation on any children must be considered *in isolation* from the offending behaviour that resulted in the deportation action. It is apparent from its decision that this is not the approach that the Tribunal took:

> 22. However, I can find that to deport the Appellant will interfere with his right to respect for private life, and the rights of his partner and their children. I admire and applaud the honesty and candour of TD and I recognise her distress in the prospect of the Appellant being deported. Though I recognise and respect it, *I have to balance it according to the test of proportionality prescribed in Article 8(2)*.

(Emphasis added).

11. Second, in HA (Iraq) [2020] EWCA Civ 1176 the Court of Appeal explained the undue harshness test requires a careful and holistic analysis of the impact on each child and the family unit as a whole. I can see nowhere in the decision where this analysis is undertaken.

12. Third, in reaching its findings on the children the Tribunal says this:

> 21. I am satisfied that the Appellant's efforts to forestall deportation were motivated to acquire rights protected by the ECHR are deliberate efforts to frustrate immigration control. I find that this also cannot be in the public best interests.

13. Although the meaning of that passage is not entirely clear, the Tribunal seems to me to be suggesting that the Appellant has deliberately fostered a relationship with his partner, and had children with her, in order to circumvent immigration control. If that was its finding, that would plainly be pertinent to the first question the Tribunal had to ask itself: is there a genuine family life here? If in fact the Tribunal was not satisfied that the Appellant enjoys a genuine and subsisting parental relationship with his three children then it should have said so in terms, and given the Appellant and his witnesses a chance to respond, since this does not appear to have been an assertion of fact challenged by the Respondent.

14. Given that the decision in this appeal was reached without reference to the applicable statutory framework or material evidence, I set it aside in its entirety and remit it to the First-tier Tribunal for remaking *de novo*.

Notice of Decision

15. The decision of the First-tier Tribunal is set aside.

16. There is no direction for anonymity.

17. The decision in the appeal is to be remade by a Judge of the First-tier Tribunal other than Judge Drake.

Upper Tribunal Judge Bruce
23rd February 2023