IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003185
On appeal from: HU/02012/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 February 2024

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VAN HUNG NGUYEN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Nicholas Wain, a Senior Home Office Presenting Officer
For the Respondent: Mr Richard McKee of Counsel, instructed by Mac & Co Solicitors

Heard at Field House on 22 February 2024

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 31 November 2021 to refuse leave to remain and to maintain a deportation order made on 18 September 2008. The claimant is a citizen of Vietnam.

2. **Mode of hearing.** The hearing today took place face to face.

3. For the reasons set out in this decision, I have come to the conclusion that the decision of the First-tier Tribunal contains an error of law. The decision will be set aside for remaking in the First-tier Tribunal.

Background

4. The claimant has an adverse immigration history: he has never had leave to enter or remain in the UK despite having been here for two long periods, from 2003 to 2010, and again from 2012 to date. He is a foreign criminal.

5. On 28 September 2007, the claimant was convicted at Teesside Crown Court on drugs offences and sentenced to 30 months' imprisonment, with a recommendation for deportation. The decision to deport was served on the claimant on 10 July 2008, but he did not exercise his in country right of appeal. On 13 October 2008, he was served with a signed deportation order, and on 10 November 2009, he signed a disclaimer and expressed his willingness to be removed to Vietnam. He was removed on 25 February 2010.

6. The claimant returned clandestinely to the UK, in 2012, without applying for revocation of the deportation order. He remained here, without leave, and in 2015 he began to live with a British citizen (who coincidentally shares his family name), who had a son from a previous relationship. His partner runs a nail salon business. In that same year, 2015, they had a daughter together.

7. On 31 March 2018, the claimant made a private and family life application based on his relationship with his partner, his step-son, and his daughter. He also applied to revoke the deportation order. This appeal concerns the Secretary of State's refusal of that application and his decision to maintain the deportation order.

First-tier Tribunal decision

8. The First-tier Judge allowed the appeal for the reasons set out at [13]-[14] of his decision.

> "13. The appellant's immigration history is set out as above. The respondent accepted that the appellant has a genuine and subsisting relationship with his partner, and with the two children. Section 117C of the Nationality, Immigration and Asylum Act 2002 sets out additional considerations in cases involving foreign criminals. Under Section 117C(5), exception 2 applies where the appellant 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 the appellant's deportation on the part of a child will be unduly harsh. For reasons set out in the skeleton argument, Paragraph 399D of the Immigration Rules has no relevance to the application of a statutory criteria, set out in Section 117C(4)(5) and (6) of the 2002 Act, as stated in the case of *Bikanu (Section 11 TCEA; Section 117C NIAA; Para 399D)* [2021] UKUT 34 (IAC). The

> structured approach under Section 117C is the task to be undertaken by the tribunal, not the provisions of the Immigration Rules.
>
> 14. Taking into account the totality of the evidence, I am persuaded that it would not be proportionate to the legitimate aim of maintaining immigration control under Article 8 ECHR that the appellant should be required to return to Vietnam. He not only has a subsisting relationship with his partner (who runs a successful nail salon business in the UK) and his children (his stepson has provided a supportive letter of 2 January 2023 and has never known his own father), but the length of time that he has been in the UK since 2012 (albeit that he returned to the UK unlawfully) and under Exception 2 of Section 117C(5) his relationship with his partner and children leads me to conclude that the effect of his deportation would be unduly harsh on his partner and children."

9. The Judge declined to make a fee award, stating that he did so 'because the decision made by the [Secretary of State] was reasonable in all the circumstances'. That observation is inconsistent with the substantive decision.

10. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

11. The grounds of appeal contend that the First-tier Judge's decision is inadequately reasoned: see *Budathoki (reasons for decisions)* [2014] UKUT 00341 (IAC). The Secretary of State accepted at the First-tier Tribunal hearing that the relationship between the claimant, his partner, and her son and their daughter was genuine and subsisting.

12. However, the Secretary of State was 'at a loss as to why they have lost' as there was no evidence before the First-tier Judge to show that his leaving the jurisdiction would be unduly harsh for his partner, her son or their daughter. The claimant had breached the deportation order in 2012, which was not to his credit. The Secretary of State asked the Tribunal to set the First-tier Tribunal decision aside for remaking.

13. Permission to appeal to the Upper Tribunal was granted for the following reasons:

> "It is arguable that the brevity of the findings do not encompass adequate consideration of the public interest of maintaining deportation orders in relation to foreign criminals who enter in breach of such an order. All grounds may be argued."

14. There was no Rule 24 Reply on behalf of the claimant.

15. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

16. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal. Mr McKee for the claimant did not seek to dispute that the First-tier Tribunal's reasoning was so poor as to amount to an error of law.

17. I am satisfied that the Judge's reasoning is so inadequate as to be rationally unsustainable: see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022).

18. I therefore set aside the decision of the First-tier Tribunal for remaking afresh in the First-tier Tribunal.

19. The claimant and his representatives have a preference for the appeal being reheard in Birmingham, which is nearer where the claimant lives. That will be a matter for the First-tier Tribunal when directions are set for the remaking hearing.

Notice of Decision

20. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of an error on a point of law.
    I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal.

Judith Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 22 February 2024