IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001752

First-tier Tribunal No: HU/58171/2023
LH/00604/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28 June 2024

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

Peter Matai Jethro Marawai
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms N Wilkins, counsel instructed by SMK Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 17 June 2024

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Jepson who allowed the appellant's deportation appeal following a hearing which took place on 16 February 2024. However, for ease of reference hereafter the parties will be referred to as they were before the First-tier Tribunal.

2. Permission to appeal was granted by First-tier Tribunal Judge C M Monaghan on 15 April 2024.

Anonymity

3. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

4. The appellant is a national of Fiji now aged forty-three. He entered the United Kingdom as a visitor during 2008 and shortly afterwards enlisted in the British Army. On 19 August 2016, the appellant was convicted of battery against a former partner. In 2018, the appellant was also convicted of drink-driving and driving without insurance. On 5 February 2021, the appellant was granted indefinite leave to remain in the United Kingdom.

5. On 24 March 2022, the appellant was convicted of actual bodily harm against the same former partner and destroying/damaging property for which he was sentenced to one year and three months imprisonment. He was served with a decision to deport on 15 July 2022 and his subsequent human rights claim was refused in a decision dated 7 June 2023.

6. The appellant's human rights claim was based on the family life he had established with his three British children. The Secretary of State relied on an OASys assessment that the appellant posed a risk to his former partner and his children and furthermore did not accept that the appellant had a genuine and subsisting relationship with any of the children. It was noted that there was no evidence of C1 being autistic. There was said to be treatment for autism as well as the appellant's mental health condition in Fiji. The Secretary of State did not accept that the appellant met any of the exceptions to deportation nor that there were very compelling circumstances such that the appellant should not be deported.

The decision of the First-tier Tribunal

7. The Secretary of State was not represented before the First-tier Tribunal because the presenting officer assigned to the appeal was unwell on the day of the hearing. The judge refused to adjourn the appeal.

8. The First-tier Tribunal judge concluded that the effect of the appellant's deportation on his youngest child would be unduly harsh and allowed the appeal solely on this basis.

The appeal to the Upper Tribunal

9. There was a sole ground of appeal, that there was inadequate reasoning to support the judge's finding that it would be unduly harsh on the appellant's son for the appellant to be deported. No argument was raised in relation to the obvious procedural fairness in the judge hearing the appeal in the absence of a representative who was unwell.

10. Permission to appeal was granted on the basis sought.

The error of law hearing

11. The matter comes before the Upper Tribunal to determine whether the decision contains an error of law and, if it is so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was attended by representatives for both parties as above.

12. Both representatives made submissions and the conclusions below reflect those arguments and submissions where necessary. A bundle was submitted by the

Secretary of State containing, inter alia, the core documents in the appeal, including the appellant's and respondent's bundles before the First-tier Tribunal.

Discussion

13. The judge proceeded to consider the appellant's appeal in the absence of cross-examination or any challenge to his evidence. In those circumstances, it was particularly incumbent on the judge to provide adequate reasons so that the Secretary of State could understand why he had lost.

14. At [57], the judge set out their reasons for concluding that it would be unduly harsh on the appellant's youngest child were the appellant to be removed. Those reasons were that 'bridges built' would disappear, that modern means of communication would be 'difficult,' and visits to Fiji 'unlikely.' The judge may have been correct in these conclusions however there is an absence of reasoning underpinning those findings. I have taken into account Ms Wilkin's submission that the judge set out the evidence considered in the earlier pages of the decision. Nonetheless, repetition of the evidence adduced is no substitution for analysis and reasons.

15. Given the elevated threshold required for a finding of undue harshness which was endorsed in *HA* (Iraq)[2022] UKSC 22 along with the lack of any evidence, including expert, to support the claim that the appellant's removal would have an adverse effect on the child, it is difficult to understand why the judge found that Exception 2 was met.

16. At [58], the Judge found that the appellant's child would be robbed of their Fijian heritage. This was not an issue which was raised either in the letter signed by the child's mother or in the appellant's witness statement. The judge failed to provide any reasoning for adopting a submission point which was not supported by evidence.

17. There were also conflicts in the evidence which the judge failed to resolve. A letter was produced which was signed by the child's mother (who was the victim of the appellant's index offence) which stated that the appellant had contact with the child once a fortnight. The appellant's oral evidence was that he had had overnight contact with the child. The judge gives no reasons for preferring the evidence of the appellant over the mother of the child and at [58] concludes that the 'overnight stays has been in place for a substantial portion of the child's life.'

18. There was an absence of consideration by the judge as to whether the mother's statement had been signed under duress. Indeed, the evidence before the judge was that there remained a 5-year restraining order against the appellant in respect of his child's mother since the appellant's conviction in 2022. The statement of the mother was brief and made vague positive assertions containing no detail nor examples to support any of the claims made, such as that there was a strong bond between the appellant and the child. There was no mention of overnight contact. The mother did not attend the hearing. It is further somewhat surprising that the mother would describe the appellant as a 'role model' given his conduct towards her.

19. Ms Wilkins tentatively suggested that the judge would have found there to be very compelling circumstances had the appeal not been allowed under Exception 2. I reject that argument and can find no support for it in the decision and reasons.

20. There was some discussion as to the venue of any remaking hearing with Ms Wilkins favouring remittal. Ultimately, Mr Bates was sanguine about that disposal.

21. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I carefully considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statements. I took into consideration the history of this case, the nature and extent of the findings to be made as well as the fact that the nature of the errors of law in this case meant that there was an inadequate consideration of this deportation appeal. I further consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and therefore remit the appeal to the First-tier Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

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

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard by any judge except First-tier Tribunal Judge Jepson.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 June 2024

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email.