



**Upper Tribunal  
(Immigration and Asylum Chamber)**

**Appeal Numbers: PA/02141/2018  
HU/11974/2019**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15 February 2022 via Microsoft  
Teams**

**Decision & Reasons Promulgated  
On 09<sup>th</sup> March 2022**

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH  
DEPUTY UPPER TRIBUNAL JUDGE HALL**

**Between**

**EC  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Lakhvinder Singh, Harbans Singh & Co. Solicitors  
For the Respondent: Mr A. Tan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against a decision of First-tier Tribunal Judge Parkes (“the judge”) promulgated on 2 September 2021. The judge dismissed two linked appeals brought by the appellant, a citizen of Nigeria born in December 1991, against separate decisions of the Secretary of State to (i) refuse his asylum and humanitarian protection claim, dated 29 January 2018; and (ii) refuse his human rights claim made, dated 28 June 2019. Although the two decisions were taken separately, the appeals against each were linked by the First-tier Tribunal, and the issues under consideration by the judge, and on appeal before us, were essentially dealt with as though contained in a single decision, with a single appeal.

### *Factual background*

2. The appellant entered the United Kingdom as a student in 2011, with leave valid until 30 November 2012. He later married a British citizen, and applied for a visa in that capacity. The application was refused on the basis that the appellant's marriage to his wife was not genuine and subsisting. The appellant appealed to the First-tier Tribunal and the appeal was dismissed. In May 2015, the appellant exhausted all remaining avenues of appeal against that decision, and was served with enforcement notices as an overstayer. In 2017, removal directions were set, but were withdrawn when the appellant applied to bring judicial review proceedings challenging his removal and claimed asylum. The basis of the appellant's asylum claim was that he was a bisexual man who would face being persecuted upon his return to Nigeria. The claim was refused on 29 January 2018, and it was the appeal against that refusal that was one of the two linked decisions under consideration by the judge.
3. The appellant was a party to a fraud and money laundering conspiracy which defrauded its victims of a total of around £10 million. He was one of 11 defendants convicted following a trial lasting over six months before the Crown Court at Blackfriars. The conspiracy was complex. It involved 'spamming' many, many email addresses with malicious emails which enabled the controlling conspirators to take control of the computers used by a number of the recipients. Once the conspirators had secured access to their victims' email accounts, the holders of the accounts were tricked into transferring their money to the criminals, thinking they were sending the money to genuine recipients. The conspiracy used the bank accounts of around 160 money 'mules' to receive the stolen money, in an attempt to evade detection and to launder the proceeds of the crime. The largest single transaction in the fraud was €2.3million. Over £400,000 of the conspiracy was attributable to the appellant's personal involvement. For this offence, the appellant was sentenced to 32 months' imprisonment. That offence triggered the automatic deportation provisions contained in the UK Borders Act 2007.
4. The appellant made a human rights claim in response to the Secretary of State's notification that she was minded to deport him. The claim was refused on 28 June 2019, and that was the other linked decision under appeal before the judge.
5. The appellant has a daughter who was born in 2015. He does not have any contact with her.

### *The decision of the First-tier Tribunal*

6. What follows is a summary of the judge's decision. The sequence of topics adopted by the judge was not entirely logical, so we have sought to summarise his decision thematically.
7. The judge began his analysis by considering whether the presumption that certain "serious criminals" are excluded from the 1951 Refugee Convention had been rebutted. The Secretary of State had not certified that that presumption, contained in section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), applied, but the judge said that it was nevertheless still necessary for him to consider whether it had been rebutted. He found that the appellant had rebutted the presumption, in light of what he considered to be his

'modest gains' from the conspiracy, his previous good character, and the fact he had not re-offended. See [22] to [24].

8. The judge analysed the credibility of the appellant's protection claim, and his general credibility, at [35] onwards. His credibility was harmed for a number of reasons. First, he had sought to rely on a non-genuine and subsisting marriage in order to secure leave to remain previously. He had not attended the appeal before the First-tier tribunal to explain the inconsistencies in the materials he had relied upon before the Secretary of State as part of that application for leave to remain: see [35]. It did not follow, said Judge Parkes, that the appellant was inherently incredible, but his willingness to secure leave to remain on a false basis was relevant to the assessment of his credibility when considering his asylum claim. Secondly, the appellant had been convicted of an offence of dishonesty. Again, that did not 'inevitably' demonstrate that the appellant lacked credibility, but it was relevant. See [36]. And, thirdly, in relation to his substantive asylum claim, it had been made at a late stage, and the judge rejected the reasons proffered by the appellant to explain the delay. That analysis features at [40]. The judge noted that the appellant enjoyed the benefit of legal representation during his earlier proceedings before the First-tier Tribunal, concerning his marriage visa. He rejected the appellant's claim not to have been aware of the possibility of claiming asylum at an earlier stage.
9. Part of the appellant's substantive claim for asylum had been that, in Nigeria, he had been captured by a vigilante gang, and later mistreated by the police, on account of his sexuality. His brother, who gave evidence before the First-tier Tribunal, testified that he knew the appellant had been arrested in Nigeria, but did not know why he had been arrested, and did not know that the appellant was bisexual until he, the appellant, arrived in the UK: see [43].
10. The judge said that the appellant had given a vague account of what took place in Nigeria: [42]. It was not clear why he would have been targeted as he claimed. It would have been surprising, found the judge, if the appellant's father had not known why the appellant had been arrested, as the appellant had claimed. It was significant that the appellant was able to live in Nigeria without being persecuted prior to his departure for the UK in 2011. See [43].
11. The judge accepted that the appellant may have experienced some injuries at the hands of the police, but said that that was a factor to be considered against the remaining evidence that was adverse to the appellant's credibility, and his ability to remain in Nigeria without further problems: see [44].
12. At [45], the judge said:

"The appellant gave no detail about any relationships such as how he met anyone else, the length of any liaison, there is no suggestion that he attended at relevant venues or organisations and no former partner gave evidence of any sort in support. Overall the evidence of the appellant and his brother is best described as a bald assertion without support."
13. At [46], the judge said that, taking the evidence overall, he rejected the appellant's claim to be bisexual. He had not been targeted by a vigilante group or the police in Nigeria. Even if he were wrong in relation to the appellant's claim to have been mistreated by the police, that evidence did not demonstrate any

connection with his sexuality. The appellant was not credible and would not be in need of international protection.

14. As to the appellant's 'family life' human rights claim under Article 8 of the European Convention on Human Rights ('the ECHR'), the judge said that the appellant did not have a partner and did not claim to enjoy a genuine and subsisting relationship with his daughter, whom he had not seen for a number of years. The appellant claimed to enjoy Article 8 family life with his brother and nephews, but there was little evidence to support that contention, and the judge found that the appellant did not enjoy Article 8 'family life' with any persons in this jurisdiction: see [26] to [31]. To resist deportation on Article 8 grounds, observed the judge at [32], the:

"circumstances would have to be sufficiently compelling to outweigh the public interest in the appellant's deportation".

15. At [47] to [49], the judge concluded that the appellant's evidence that he would be returning to Nigeria without any connections, and only distant relatives with whom he has had little contact in recent years, would not prevent him from being able to return to the country. The appellant had demonstrated his adaptability while living in the UK, including finding work (as confirmed by the sentencing remarks by the Crown Court judge), even though he was not allowed to work as a person without leave. As such, he would be able to relocate to Nigeria without facing "insurmountable obstacles or undue hardship in doing so." See [48]. There has been no challenge to these findings.

#### *Permission to appeal*

16. There are three grounds of appeal:
- a. Ground 1: the judge "has not reasoned why the appellant is a continued danger to the society" in light of the appellant's previous good character, his clean criminal record since being released from prison, and the enhanced status he earned as a remand prisoner;
  - b. Ground 2: the judge failed to perform a proportionality assessment under Article 8 ECHR;
  - c. Ground 3: the judge erred by stating it was "not clear" why the appellant was targeted on account of his bisexuality in Nigeria, given the appellant's case was that he would be at risk upon his return as a result of his sexuality.
17. Permission to appeal was granted by First-tier Tribunal Judge Grant in the following terms:

"I have read the record of proceedings carefully. At no point did the respondent raise the section 72 presumption with the tribunal and ask the judge to make findings thereon. The section 72 presumption is rebuttable by an appellant but in order to respond to the presumption the appellant is entitled to know that it is being considered by the judge.

The judge arguably erred in law by procedural unfairness [sic] in finding against the appellant on a matter he had no indication was to be raised and no opportunity to file evidence in support of any case for rebuttal.

All the grounds may be argued.”

*Legal framework*

18. Article 33 of the 1951 Refugee Convention provides:

**“PROHIBITION OF EXPULSION OR RETURN (“REFOULEMENT”)**

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

19. Section 72 of the 2002 Act makes statutory provision for the construction of Article 33(2) of the 1951 Refugee Convention. Section 72(2) provides that those sentenced to a period of imprisonment of at least two years shall be presumed to meet the above criteria contained in Article 33(2). The presumption is rebuttable.

20. Section 72(10) also enables the Secretary of State to certify that the presumption applies in respect of an individual. Where she has done so, certain procedural consequences follow in statutory appeals against the refusal of asylum claims; under section 72(10), a tribunal hearing an appeal against the refusal of an asylum claim must begin its substantive deliberation on the appeal by considering the certificate. If, having given the appellant an opportunity to rebut the presumption, the tribunal agrees that the presumption applies, it must dismiss the appeal insofar as it was brought on protection grounds. That does not, however, abrogate the tribunal from the obligation imposed upon it by section 86(2)(a) of the 2002 Act to determine any matter raised as a ground of appeal in the course of its substantive consideration of the appeal: see *Essa (Revocation of protection status appeals)* [2018] UKUT 244 (IAC).

21. Section 117C(1) of the 2002 Act provides that the deportation of “foreign criminals” is in the public interest for the purposes of determining the proportionality of deportation under Article 8(2) ECHR. The appellant satisfies the definition of foreign criminal as he is not a British citizen, and has been convicted of an offence which led to a period of imprisonment of at least 12 months: see section 117D(2) of the 2002 Act.

22. Section 117C makes provision for exceptions to the public interest in the deportation of foreign criminals in these terms:

“(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."

### *Submissions*

23. In relation to ground 1, Mr Singh relied on Judge Grant's grant of permission to appeal: it was unfair for the judge to address the issue of the statutory presumption against the appellant in circumstances when it had not been raised, either by the Secretary of State, or by the judge at the hearing. In relation to ground 2, Mr Singh contended that the judge's analysis of the proportionality of the appellant's removal was not expressly addressed, and nor did the judge conduct a balancing exercise of the matters militating in favour of his removal, and those mitigating against it. The judge did not address the appellant's relationship with each family member with whom he enjoys family life, and the extent to which the judge did purport to consider such matters, at paragraph 50, he was dismissive. In relation to ground 3, Mr Singh emphasised the lower standard of proof applicable to protection appeals. He submitted that the judge had not considered the evidence that was before him, and reached the wrong conclusion.
24. For the Secretary of State, Mr Tan submitted that the judge addressed section 72, as he was obliged to, but resolved his analysis in a manner favourable to the appellant. No unfairness could possibly have arisen. The appellant's submissions concerning the judge's treatment of article 8 did not seek to challenge the judge's application of *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, and there was no express challenge to the judge's conclusion that article 8 would not be engaged on a family life basis by the appellant's removal. The judge reached findings in relation to the protection claim that were open to him on the evidence.

### *Discussion*

#### *Ground 1*

25. We indicated to Mr Singh that it was difficult to see how the judge's application of section 72 was adverse to the appellant, nor, therefore, how any procedural unfairness arose as a result of the judge's approach. Put simply, the judge's section 72 analysis was not adverse to the appellant; he found at [24] that the presumption should not apply to the appellant, for the reasons he gave.
26. Contrary to the suggestion raised by Judge Grant in her grant of permission to appeal, no procedural unfairness could have arisen as the result of the judge undertaking an analysis of the appellant's protection appeal in terms that were *favourable* to the appellant. Judge Parkes was, of course, obliged to consider section 72 even though it had not been raised by the Secretary of State, as he correctly identified. So much is clear from *Secretary of State for the Home Department v MS (Somalia)* [2019] EWCA Civ 1345 per Underhill LJ at [64]:

“Under s.72 a person sentenced to imprisonment for at least 2 years is to be presumed to have been convicted of ‘a particularly serious crime and to constitute a danger to the community’ of the UK. **That statutory presumption is of general application and it applies regardless of whether a s.72 certificate has been issued.**” (emphasis added)

See also the authorities cited by the Court of Appeal at [65], [66] and [68] to the same effect.

27. In *MS (Somalia)*, the Court of Appeal held that it had been an error of law for the First-tier Tribunal and the Upper Tribunal *not* to consider the section 72 presumption, even though the Secretary of State had not only not raised it, but had expressly confirmed to the Upper Tribunal that there was no challenge to the First-tier Tribunal’s failure to apply it of its own motion (see [61]). The court said at [70]:

“Given the obligation on the FTT and the UT to apply the statutory presumption, and the public interest in deportation of serious criminals who are to be regarded as a danger to the community of the UK, I am satisfied that this is a ground of appeal which the SSHD should be allowed to raise, even though it has not previously been raised in these terms and was not an issue appealed to the UT.”

28. Even if Judge Parkes *had* applied the presumption in a manner adverse to the appellant, there would have been no prejudice, in light of his findings of fact that the appellant was not a refugee in any event (see below for our dismissal of ground 3). Those were findings that the judge would have had to address, regardless of his approach to the section 72 issue: see *Essa*, headnote paragraph (2). By definition, a person who is not a refugee does not require the benefit of the principle of *non-refoulement*.
29. In conclusion on ground 1, therefore, the judge did not fall into error, and no procedural unfairness arose, as a result of his finding that the appellant did *not* constitute a danger to the community of the United Kingdom. It is not clear why permission to appeal was granted on this basis.

#### *Ground 2*

30. We accept that the judge did not, in terms, set out a ‘balance sheet’ analysis of the proportionality of the appellant’s prospective removal, but we do not consider that it was an error of law for the judge not to do so. At [32] the judge set out his overall conclusions on the family life limb of the appellant’s appeal:

“... the circumstances would have to be sufficiently compelling to outweigh the public interest in the appellant’s deportation. Given the limited evidence of the domestic circumstances of the appellant and his brother and brother’s family, and the background against which it was formed, I do not see how it could be said that the appellant’s deportation would be disproportionate. There is no evidence to show that there are compelling circumstances not addressed in the immigration rules or section 117D.”

31. By his reference to section 117D, and the need for the appellant to demonstrate ‘compelling circumstances’ to resist deportation on Article 8 grounds, the judge was referring back to the substantive statutory public interest considerations

contained in section 117C of the 2002 Act. Section 117C makes provision for two statutory exceptions to the general principle that the deportation of foreign criminals is in the public interest: see section 117C(4) and (5), addressing an appellant's private and family life respectively, quoted at paragraph 22, above. Mr Singh has not challenged the judge's conclusion that neither exception applied to this appellant, and it is difficult to see how either could have been met on the evidence.

32. The judge was correct to state that the appellant could only succeed if he were able to demonstrate very compelling circumstances over and above the exceptions. That is because where an appellant is unable to succeed under exception 1 or 2, the public interest will require their deportation, unless there are 'very compelling circumstances' over and above those exceptions, pursuant to section 117C(6). Although subsection (6) is expressed to apply only to those sentenced to more than four years' imprisonment, all foreign criminals enjoy the ability to demonstrate that there are 'very compelling circumstances' over and above the exceptions which negate the public interest in their deportation: see *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662.

33. While some judges perform the 'very compelling circumstances' analysis by means of a balance sheet assessment, whereby the 'pros' and the 'cons' for deportation are weighed against each other, it is by no means mandatory for all judges to do so. As the Lord Chief Justice said in *AS v Secretary of State for the Home Department* [2019] EWCA Civ 417 at [14]:

"Failure to include a balance sheet in a determination does not give rise to an independent right of appeal if otherwise the assessment of the issues is satisfactory and appropriate."

34. The judge found that there were no compelling circumstances. His assessment was plainly satisfactory and appropriate. Contrary to the submissions of Mr Singh, it was not necessary for the judge to address each family member in any further depth than he already had considered the overall family circumstances of the appellant. Mr Singh did not draw our attention to any evidence that was before the judge which he had failed to take into account, or which could rationally have only led to an alternative conclusion. The evidence discussed at [26] to [32] was fully analysed by the judge. The judge considered the witness statement provided by the appellant's brother. It described the appellant's role as a brother and uncle in relatively high level terms; the judge noted at [27] that it did not provide any further information, and the witness had not been invited by the appellant's representative to provide any further information. At [28] the judge said there is no evidence to show that the appellant played a significant role in the life of any of his nieces or nephews. That led to his conclusion at [29] in the following terms:

"With so little information about the nieces and nephews and the actual role that the appellant plays, where they live in relation to him, how much he sees them and so on there is no basis for finding that his role is significant or that their best interests would require his continued presence. This situation does not engage the unduly harsh provisions and the evidence does not show that the situation engages Article 8, or if it does that the appellant's departure would be contrary to their best interests of [sic] disproportionate."



35. In our judgment, the judge's consideration of all Article 8 family life issues was satisfactory and appropriate. The matters before the judge could not have amounted to "very compelling circumstances" on any view. We dismiss the appeal on ground 2.

### Ground 3

36. Under ground 3, the grounds of appeal contend that the judge erred in his conclusion that 'it is not clear' why the appellant had been targeted as claimed by the police in Nigeria, at [42]. The grounds state that it was clear: the appellant said in his screening interview that he was targeted because of his sexuality. He had given a consistent and detailed account of his claim. Contrary to the judge's description of the appellant's account as 'vague', he had given a clear description of the threat he faced.
37. Ground 3 is a challenge to the judge's findings of fact that the appellant did not have a well-founded fear of being persecuted. Appeals lie to this tribunal on the basis of errors of law, not disagreements of fact. Of course, some findings of fact may feature errors which fall to be categorised as errors of law: see *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [9]. Appellate courts and tribunals are to exercise restraint when reviewing the findings of first instance judges, for it is trial judges who have had regard to 'the whole sea of evidence', whereas an appellate judge will merely be 'island hopping' (see *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]). As Lady Hale PSC said in *Perry v Raleys Solicitors* [2019] UKSC 5 at [52], the constraints to which appellate judges are subject in relation to reviewing first instance judges' findings of fact may be summarised as:
- "...requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."
38. We pressed Mr Singh at the hearing as to what the judge's error of law was under this ground. After consulting the grounds of appeal, he submitted that the judge failed to take into account the 'objective evidence' (without specifying what it was), and submitted that he impermissibly dismissed the appeal on the basis of minor discrepancies. In doing so, the judge had applied a higher standard of proof than the 'reasonable likelihood' or 'real risk' standard.
39. In our judgment, ground 3 is nothing more than a series of disagreements with the findings of fact reached by the judge having had the benefit of hearing the appellant's evidence, and that of his brother. Mr Singh struggled to identify an error of law other than by reference to vague and imprecise submissions that the judge applied the wrong standard of proof, or failed to consider unspecified objective evidence. In our judgment, the judge was entitled to ascribe significance to the appellant's very late asylum claim, against the background of having previously sought leave to remain on the basis of a relationship found by the First-tier Tribunal not to be genuine and subsisting, and having committed a significant offence of dishonesty. The judge rightly directed himself that none of those factors would be capable of being determinative, in isolation. Against that background, the judge reached a legitimate finding that it was not clear why the appellant had been targeted by the vigilante group and the police as he claimed. Having had the benefit of considering all the evidence in the case, the judge described the appellant's account as 'vague'. That is an observation by a trial judge with which this appellate tribunal will be slow to interfere. In addition, the

appellant had provided no evidence of any relationships in this country, nor had there been any evidence from a former partner. The judge was entitled, in our view, to describe the evidence of the appellant and his brother as ‘bald assertion without support.’ Cumulatively, the judge’s findings entitled him to arrive at a conclusion that the appellant had not demonstrated, even to the lower standard, that he was at a real risk of being persecuted on a ground that would engage the refugee Convention.

40. The appeal is dismissed on ground 3.

*Concluding observations*

41. By way of a concluding observation, we should say that the judge’s decision was not structured as helpfully as it could have been. However, there has been no express challenge to the decision on that basis and, properly understood, we consider the judgment to be tolerably clear.

*Anonymity*

42. There are linked Family Court proceedings involving the appellant and his daughter. By an order dated 21 July 2020 the Family Court at East London ordered that the names of the parties involved in those proceedings must be kept confidential. In order to respect that order, we make an anonymity order in these proceedings.

**Notice of Decision**

The appeal is dismissed.

The decision of Judge Parkes did not involve the making of an error of law such that it must be set aside.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Stephen H Smith

Date 28 February 2022

Upper Tribunal Judge Stephen Smith

