Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2021-001747**
HU/04467/2020

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On the Thursday 25 August 2022	**On the 11 October 2022**

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PATRICK PRINCE AYESU DADEY

Respondent

Representation:
For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr C Rahman, Counsel instructed by BWF Solicitors

DECISION AND REASONS

FACTUAL AND PROCEDURAL BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of the First-tier Tribunal Judge M Cohen promulgated on 22 December 2021 ("the Decision"). The Decision followed a remote hearing before Judge Cohen, sitting at Taylor House, on 19 April 2021. By the Decision, the Tribunal allowed the Appellant's

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appeal against the Respondent's decision dated 26 February 2020 refusing his human rights claim. That claim, based on the Appellant's Article 8 ECHR rights, was made in the context of a decision by the Respondent to deport the Appellant to Ghana in consequence of his criminal offending.

2. The Appellant came to the UK on 24 October 2007 with entry clearance to join his mother who had been given leave as the spouse of a person settled in the UK. He was given indefinite leave to remain in that capacity on 15 October 2009.

3. On 11 July 2019, the Appellant was convicted of offences of bringing prohibited articles into the prison where he worked as a prison officer. The Appellant was sentenced to thirty months for each of the two offences to run concurrently.

4. Having been given the opportunity to make representations as to why he should not be deported, on 25 February 2020, a deportation order was signed against the Appellant. On the following day, a decision was made to refuse the Appellant's human rights claim. We note at this juncture that the appeal is against that latter decision and not the deportation order itself. The Appellant appeals only on human rights grounds.

5. We begin by noting, since it is relevant, that the Decision was made following a delay of just over eight months following the hearing. The Judge allowed the appeal, finding that deportation of the Appellant would have an unduly harsh effect on his partner, Kimberley, and her daughter (the Appellant's stepdaughter), [A]. He also found that there were "compelling circumstances" which justified the allowing of the appeal based on the Appellant's family life.

6. The Respondent appeals the Decision on the basis that the Judge unduly delayed in reaching the Decision. The Respondent accepts that delay in and of itself does not infect the legality of the Decision. She accepts that there must be a nexus between the delay and the safety of the Decision. However, she contends that there are errors of both fact and law which meet that nexus.

7. On 17 January 2022, Resident Judge Zucker gave notice that he intended to set aside the Decision in exercise of his power to review the Decision and to order a de novo hearing of the appeal. By a Rule 35 Response dated 28 January 2022 ("the Rule 35 Response"), the Appellant objected to that course. Some factual aspects of the Respondent's grounds are not accepted (particularly in relation to the Appellant's partner's evidence). The Appellant disputed the Respondent's submission that the Judge had also committed errors of law. We here record that we were not provided with a copy of the Rule 35 Response which this Tribunal did not have on file. It was left to Ms Ahmed to provide the same. She very fairly drew our attention to it in the course of the hearing and invited us to have regard to it before reaching our conclusion whether the Decision

contains an error of law. She provided it to us after the hearing. We are grateful to her for her candour. We confirm that we have had regard to what is said in the Rule 35 Response when considering below the errors which the Judge is said to have made.

8. In consequence of the Rule 35 Response, the Decision was not set aside. Instead, permission to appeal was granted on 10 February 2022 by First-tier Tribunal Judge Monaghan in the following terms so far as relevant:

> "… 2. The matter came before me on 11th January 2022. Based on the information available to me at that time, I considered that it was appropriate to have the decision set aside. Accordingly I invited Resident Judge Zucker to consider the matter because decisions to set aside require the consideration of a Resident Judge. However in the light of the response to Judge Zucker's notice I have been asked to reconsider the matter which I now have done.
>
> 3. Whilst I accept that it would not now be appropriate to set aside the decision, I remain of the view that there is an arguable error of law because the Judge has made a mistake of material fact in stating that the sponsor adopted her witness statement when she was unable to connect remotely to the hearing and did not give any evidence.
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> 4. Further the Judge has arguably applied an incorrect test when assessing the relationship between the Appellant and his stepchild finding that there was a genuine and subsisting *familial* relationship between them and arguably applied a further incorrect test in assessing at paragraph 40 whether there are *compelling circumstances* rather than very compelling circumstances.
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> 5. The remaining grounds, though less meritorious, are also arguable."

9. The matter comes before us to determine whether the Decision contains an error of law and, if we so conclude, to consider whether to set it aside. If the Decision is set aside, it is then necessary for the decision to be re-made either in this Tribunal or on remittal to the First-tier Tribunal.

10. We had before us a core bundle of documents relating to the appeal, the Respondent's bundle ([RB/xx]) and Appellant's bundle ([AB/xx]) which were before the First-tier Tribunal.

11. The appeal was listed before us for a hearing to commence at 10am. The Appellant was present. However, his legal representatives were not. The Tribunal clerk was informed by the Appellant himself that he was waiting for Counsel who his solicitors had told him was on her way. There was no attendance by the solicitors. We heard one of the other cases in advance of this case. By that time, it was after 11.30am. We were told by the Appellant that his solicitors had informed him that there was some confusion in relation to the instruction of Counsel and that an alternative barrister had to be instructed. He would be unable to attend before 2.30pm. Having considered what the Appellant told us, we determined to hear another case in advance of his and to defer the hearing until 2.30pm. We informed the Appellant, however, that his solicitors should

email the Tribunal with an explanation of what had occurred and why the Tribunal had not been informed by them directly of the difficulties rather than leaving the Appellant to explain.

12. We received an email from Mr Rahman timed at 12.25 hours explaining that he had been "instructed to represent the above matter urgently to cover as the acting counsel is not available for unknown reason", had just received the bundle and required some time to prepare. There was no explanation from the solicitors as we had directed. At 2.30pm, Mr Rahman attended. We checked that he had sufficient time to prepare and he confirmed that he did.

13. Having heard oral submissions from both representatives, we indicated that we would reserve our decision (particularly in light of Ms Ahmed's submission in relation to the Rule 35 Response as noted above) and that we would provide our decision in writing which we do below.

14. We also expressed to Mr Rahman our dissatisfaction with the way in which the Appellant's solicitors had conducted themselves on the day of the hearing. We make clear that we have no criticism of Mr Rahman who stepped into the breach on the day of the hearing itself. Nor do we criticise the Appellant who did his best to convey what he was being told by his solicitors. We were however concerned about the conduct of the solicitors, particularly in their failure to update the Tribunal in relation to the delay in Counsel's attendance.

15. We therefore directed (via Mr Rahman) that the Appellant's solicitors write explaining their conduct, what had gone wrong and in particular why they had failed to communicate with the Tribunal about the delay.

16. We did not receive a response until 31 August 2022. We have read that letter carefully. We understand that the delay arose from confusion between solicitors and Counsel who had been handling the appeal to date (Ms Ferguson). We find it difficult to understand how this has arisen. It is for solicitors to brief Counsel to attend a hearing and to ensure that the hearing is in Counsel's diary. The notice of hearing is sent to the solicitors and not Counsel. It is for the solicitors to book the hearing into Counsel's diary and not simply to "share" the notice of hearing. Ms Ferguson cannot therefore be criticised for non-attendance or for the course of events which followed.

17. We were particularly concerned about the failure of the solicitors to keep the Tribunal informed in relation to the delay in Counsel's attendance. We note that the solicitors tried to contact the Tribunal clerk by phone. There is no explanation why an email was not sent informing the Tribunal of the difficulties. It was not for Counsel who was instructed in place of Ms Ferguson to explain what had happened (particularly since he had no involvement in those events). In accordance with their duty to the Tribunal, the solicitors should have written to the Tribunal and failed to do so. Moreover, the Appellant was left unrepresented to deal with the

Tribunal and to try to explain what had happened. He had entrusted his case to the solicitors and it is they who should have communicated the difficulties and/or attended to explain the problem.

18. We have given careful thought to whether further action is required to deal with the solicitor's conduct but have decided on this occasion that this would not be appropriate. BWF solicitors are put on notice however that should such conduct be repeated, the Tribunal may decide to report it to their professional regulator.

DISCUSSION

19. We begin by setting out the legal position in relation to delay in the issuing of a judicial decision. That is now neatly encapsulated in the Court of Appeal's judgment in R (oao SS (Sri Lanka)) v Secretary of State for the Home Department [2018] EWCA Civ 1391 ("SS (Sri Lanka)"as follows:

> "The question raised on this appeal is whether, in cases heard by the First-tier Tribunal (Immigration and Asylum Chamber) ("FTT") where the credibility of the appellant is in issue, there is a rule that a delay of more than three months between the hearing of oral evidence and the date of the FTT's decision renders the decision unsafe. The short answer to the question is that there is no such rule. In tribunal cases, as in court proceedings, excessive delay in making or promulgating a decision is not itself a reason for setting the decision aside. The correct approach is to ask whether the delay has caused the decision to be unsafe so that it would be unjust to let it stand. The only significance of the fact that delay between the hearing and the decision in an asylum case has exceeded three months is that, where the decision is challenged on an appeal, the Upper Tribunal should examine the FTT judge's factual findings with particular care to ensure that the delay has not caused injustice to the appellant."

Although that question is framed in the context of injustice to an appellant, we consider that the same principles apply to the Respondent who is also a party to the appeal. As the Court went on to say at [29] of its judgment, in a case where the delay exceeds three months (as an "appropriate marker"), the First-tier Tribunal Judge's findings of fact should be "scrutinised with particular care to ensure that the delay has not infected the determination".

20. We turn then to the reasons why the Respondent says that the delay has infected the Decision.

21. At [28] of the Decision, Judge Cohen said this:

> "The sponsor then adopted her witness statement as her evidence in chief. There was no cross-examination".

22. In her grounds, the Respondent points out that the Appellant's partner (strictly not the sponsor as this is a deportation case) did not give evidence because she was unable to connect to the hearing remotely.

She could not therefore have adopted her statement. It is submitted that the Judge may not have recalled what actually happened.

23. In the Rule 35 Response, issue is taken with the facts as there set out. The Rule 35 Response was drafted by Counsel who attended the First-tier Tribunal (Ms Ferguson). What is there said is not supported by a witness statement but neither do we have the Presenting Officer's minute and we can therefore place some weight on the content of the Rule 35 Response.

24. It is accepted in the Rule 35 Response that the Appellant's partner joined at the start of the hearing but was then unable to reconnect. It is said that when it became clear that she could not do so, the Judge indicated that "full weight would be given to her witness statement". It is said that the Judge was not mistaken about what happened as "her statement was to be treated as unchallenged evidence". We note that it is not said that the Presenting Officer accepted this but equally it is pointed out that she could have said that it was unfair if she thought it was.

25. As we pointed out in the course of the hearing, ordinarily if a party does not call a witness to give evidence, the prejudice is to that party and not to the opposing party. Less or even no weight might be given to the witness statement if the evidence cannot be tested. If, as Ms Ferguson says was the case, the Judge indicated that he would still give full weight to the statement, that point perhaps has less force. As is pointed out, the Presenting Officer could have objected and indicated that, unless the witness gave oral evidence, no weight should be given to her statement or that the hearing should be adjourned to allow her to attend. The issue for us though is whether the factual situation as set out by the Judge accords with what occurred or whether the delay has affected his recall of events.

26. It is submitted in the Rule 35 Response that what is said at [28] of the Decision reflects what actually occurred. We disagree. There is a significant difference between saying that a witness gave oral evidence and that the witness statement was taken as read. The Appellant's partner could not have adopted her statement as she was not present to do so. The inference which a reader would draw from the comment that this witness was not cross-examined is that the Respondent did not take issue with what was said by this witness whereas the reality of the situation was that the Respondent could not cross-examine because the witness was not present. The way the Judge has portrayed the evidence of this witness therefore is as undisputed and uncontroverted whereas the reality is that the evidence was never tested.

27. If the evidence of the Appellant's partner had been peripheral to the issues, it might not have had an effect overall on the safety of the Decision. However, the central issue in this case was the Appellant's relationship with his partner and more importantly, her daughter. As the child's mother, her evidence was bound to carry some weight in the analysis. That evidence was therefore potentially significant.

28. Even if we were wrong about that, we consider that there are a number of other errors of fact and law made by the Judge which affect the safety of the Decision as follows.

29. At [31] and [32] of the Decision, the Judge says this:

> "31. The burden of proving that the decision of the respondent was not in accordance with the law and the relevant Immigration Rules rests upon the appellant. The standard of proof is the balance of probabilities. The relevant date for the purposes of this appeal is the date of the hearing (**LS Gambia**).
>
> 32. I go on to consider the appellant's human rights and in the alternative, appeal against the decision to make a deportation order against him."

30. There are a number of errors in this analysis. The grounds of appeal based on the decision being "not in accordance with the law" or "not in accordance with the Immigration Rules" have not been available since the amendments made to section 82 Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") by the Immigration Act 2014 (in 2015). A decision to make a deportation order has not been the subject of a right of appeal since that time. The only decision subject to the appeal in this case was the refusal of the human rights claim and the only ground of appeal was that this decision is contrary to section 6 Human Rights Act 1998.

31. The error in this regard may arise from use of an old "template". It might not have any impact if the Judge in fact understood the legal context in which he was deciding the appeal. That context in this case was the Immigration Rules ("the Rules") relating to deportation and section 117C of the 2002 Act ("Section 117C"). The Judge refers to the relevant Rules when setting out the Respondent's decision at [13] of the Decision. He refers also in that context and by reference to the Appellant's grounds to the substance of Section 117C at [13] to [18] of the Decision. We also accept that he understood the presumption in favour of deportation and that there were exceptions to deportation which apply when reaching his findings at [34] of the Decision. He refers to Section 117C(5) at [39] of the Decision.

32. Again, though, there are difficulties with the safety of the Decision in this regard. The Judge finds at [37] of the Decision that the Appellant, his partner and stepdaughter have "an extremely strong genuine and subsisting family relationship" and that he has had "regards to exceptions to deportation". However, the test is whether the impact on those relationships is unduly harsh not merely whether they exist. Even if "family relationship" equates with "parental relationship" for the purposes of Section 117C(5), that is not the end of the matter.

33. The Judge then goes on to have regard to the Appellant's risk of reoffending. That is irrelevant in relation to Section 117C(5) (see in that regard KO (Nigeria) v Secretary of State for the Home Department [2018]

UKSC 53). There is no balance between the public interest and the undue harshness. If and insofar as the positioning of that paragraph indicates that the Judge took into account the low risk of reoffending when considering Section 117C(5), he was wrong to do so.

34. The Judge then explains his reasoning for finding the impact on Kimberley and [A] to be unduly harsh at [39] of the Decision as follows:

> "I have got the exceptions at S117C(5). I find in this case, that the exceptions set out therein are made out. In so doing, I have regard to the case of HA (Iraq). All These (sic) are that the appellant has a genuine and subsisting relationship with a qualifying partner and genuine and subsisting parental relationship with a qualifying child, and the effect of the appellant's deportation on the partner or child would be unduly harsh. This is because [A] has had little involvement with her biological father and has bonded with the appellant as her stepfather. She suffered significantly when he was in prison and I find that the appellant's deportation would have a devastating effect upon her which, she and her mother indicate in their statements. This is supported by her school. Furthermore, the appellant has supported his partner in her studies. She has an important job with a government ministry. She is improving her position. The appellant persists in maintaining the house and looking after raising [A] while she works."

34. The first observation we make is that the Judge's analysis does not clearly identify that the test is whether it would be unduly harsh for Kimberley and [A] to go to Ghana with the Appellant or to remain without him. It is not clear how the impact on Kimberley in particular could be said to be unduly harsh merely because she would have to find alternative childcare if left in the UK without the Appellant.

35. The position in relation to [A] is perhaps more finely balanced. We accept that the Judge has had regard to factors which are clearly relevant to the legal test such as the significant impact which the Appellant's detention is said to have had on [A]. If the Judge's reasoning stands up on the evidence, as analysed and unaffected by the delay in reaching the findings made, there might be no sufficient nexus between that delay and the safety of the Decision.

36. Again, however, we are unable to accept that to be the position. The first issue is the relationship which [A] has with her biological father. It is said at [39] that [A] has "little involvement" with him. Elsewhere, the Judge says that the Appellant indicated in his evidence that "[A]'s father had no input in her life" ([26]) and that the relationship between [A] and the Appellant "is all the more significant based upon the fact that [A]'s biological father disappeared from her life at an early stage" ([35]).

37. We find those comments to be particularly difficult to reconcile with the evidence. At [35] of the Decision, the Judge refers to a letter written by [A] which we understand from the context to be that at [RB/40-41] and [AB/C12-13]. In that letter, [A] says that she is "so fortunate to have such a wonderful mother, father and step-father" (our emphasis). She

refers to the Appellant as “Uncle Patrick”. Whilst we do not suggest that the latter epithet has any bearing on the closeness of the relationship with the Appellant, there is no indication that [A] has either little or no involvement with her biological father. We can find nothing in the witness statements of the Appellant or his partner dealing with that relationship. Of course, the Appellant’s partner could not be asked about this as she was unable to give evidence. [A]’s letter on its face undermines the Judge’s finding.

38. The Judge also refers to [A] suffering significantly when the Appellant was in prison. Although we accept that the Appellant’s partner speaks in her statement of finding it difficult “getting used to or carrying on effortlessly” since the Appellant’s incarceration ([AB/A12]), she does not say that [A] suffered significantly. In fact she says little at all about the impact on [A] as opposed to the impact on herself and on the Appellant. We can find nothing to support the Judge’s finding about the impact on [A] of his detention in the Appellant’s own statement. There is no evidence we can find to support the Judge’s analysis at [39] of the Decision regarding the impact of the Appellant’s deportation on [A].

39. It is said in the Rule 35 Response that the Judge “refers to independent evidence in support of [the] contention” (that the Appellant’s deportation would have a devastating effect on [A]). We have found that assertion difficult to square with the evidence which we have and which was before Judge Cohen. There is no independent social worker’s report regarding the impact of the Appellant’s deportation on [A]. The Judge places some reliance on a letter from [A]’s school. Unfortunately, we can find no such letter in either the Appellant’s or the Respondent’s bundle. We are unclear whether the Judge had sight of such a letter either since he refers only to “reference” being made to such a letter “confirming the involvement of the appellant in [A]’s life and indicating that he picks her up from school in addition to the above” ([23]). Even if he did have sight of it, the description of what it says (as set out at [23]) is at odds with what it is said to describe in the Judge’s analysis at [39] regarding the impact of the Appellant’s detention or potential deportation on [A].

40. There are also other factual errors which may be slips rather than any misunderstanding of or failure to engage with what the evidence shows. For example, at [42] of the Decision, the Judge refers to the Appellant having “six children and a stepchild”. He refers to the Appellant being removed “from his children’s lives” (thereby replicating that error) at [45] of the Decision.

41. The Judge makes a further legal error when considering the impact of deportation beyond the exceptions. We have already identified errors in the Judge’s analysis, both legal and factual, when considering the exception in Section 117C(5). Those would also impact on his analysis of the position outwith the exceptions. When carrying out that latter analysis, the Judge also refers erroneously to the test as being whether “there are compelling circumstances in the appellant’s case”. The test as

the Respondent points out in her grounds is whether there are "very compelling circumstances over and above the exceptions". There is no recognition of the high threshold there involved. Indeed the reference to Razgar at [41] of the Decision suggests that the Judge has failed to apply the legal test in the context of deportation at all.

42. We end where we began. We are enjoined by the Court of Appeal's judgment in SS (Sri Lanka) to scrutinise the findings made with particular care to ensure that no injustice has been caused by the delay. Having done so, we are satisfied that the Decision is unsafe. There are various errors of fact and law as well as an incomplete analysis on evidence which is not identified and findings made which are inconsistent with or at least not supported by the evidence the Judge had before him.

43. For those reasons, we are satisfied that the Decision must be set aside. We agreed with both representatives that, if that were our conclusion, we would remit the appeal for a de novo determination of all the issues with no findings preserved.

CONCLUSION

44. The Decision contains errors of law. We therefore set aside the Decision. We remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge M Cohen. No findings are preserved.

DECISION

The Decision of First-tier Tribunal Judge M Cohen involves the making of material errors on a point of law. We therefore set aside the Decision. We remit the appeal to the First-tier Tribunal for hearing before a Judge other than Judge M Cohen.

Signed L K Smith Dated: 5 September 2022
Upper Tribunal Judge Smith