IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006019
First-tier Tribunal No:
HU/06704/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 April 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

COE
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr S Hingora, counsel
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 19 April 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Gillespie promulgated on 29 November 2022.

2. Permission to appeal was granted by First-tier Tribunal Judge Seelhoff on 22 December 2022.

Anonymity

3. An anonymity direction was made previously and is maintained because this appeal concerns the Family Court proceedings of the applicant's minor children.

Background

4. The appellant is a national of Nigeria now aged thirty-six. He entered the United Kingdom on 4 September 2004 with leave to enter as a student. Thereafter he was granted further leave to remain as a student, on an outside the Rules basis and limited leave to remain as a partner. On 10 January 2013, the appellant was granted indefinite leave to remain in the United Kingdom owing to his marriage to a British citizen.

5. The appellant was first convicted of an offence of battery in relation to his former wife on 3 March 2014 and was sentenced to community punishments. On 19 September 2019, the appellant was convicted of battery of a different partner and sentenced to 3 months' imprisonment. Lastly, on 27 November 2019, the appellant was sentenced to 21 months' imprisonment, in total, for the assault of a third victim as well as a linked offence of perverting the course of justice.

6. On 24 January 2020, the appellant was made subject to an indefinite restraining order preventing him from having contact with a named woman.

7. On 11 February 2020, the appellant was served with a notice of decision to make a deportation order. The appellant submitted representations based on Article 8 family life with his two daughters.

8. A deportation order was signed in respect of the appellant on 13 July 2020. By way of a decision dated 14 July 2020, the Secretary of State informed the appellant that his deportation was conducive to the public good under section 3(5)(a) of the Immigration Act 1971 and section 32(5) of the UK Borders Act 2007. The appellant's claim to enjoy a family life with his two minor British daughters was considered, with the respondent noting the absence of any supporting evidence, including of their existence or of the appellant's relationship with them. The respondent noted that the appellant was divorced, and that the appellant had since committed an assault against another female partner. The respondent did not accept that the appellant had been lawfully resident for most of his life nor that there were very significant obstacles to his reintegration in Nigeria. It was not therefore accepted that the appellant met the exceptions to deportation nor that there were very compelling circumstances in existence.

The decision of the First-tier Tribunal

9. At the hearing before the First-tier Tribunal, the appellant renewed his application for an adjournment to await a review of an order of the Family Court. When this was refused, the appellant made an accusation of bias against the judge. The judge concluded that there was little realistic prospect of the appellant securing greater contact with his children and that there was no subsisting relationship between them and the appellant.

The grounds of appeal

10. In the grounds of appeal, it was argued that the judge erred in refusing to adjourn, that the judge further erred in failing to take account of the children's circumstances, that he ought to have utilised the protocol to obtain documentation from the Family Court proceedings and failed to consider the appellant's evidence, including as to the recommendations of CAFCASS. In the grounds it was further argued that the assessment of whether there were very compelling circumstances was inadequate. Lastly, the judge was said to have been affected by the appellant's accusation of bias and it was argued that this coloured his assessment of the appellant's character. It was contended that there was an appearance of bias resulting from the exchange between the appellant and the judge after the adjournment request was refused.

11. Permission to appeal was granted on all grounds, albeit the judge granting permission considered that the approach of the judge to the adjournment application was fair and sustainable.

12. The respondent provided a Rule 24 response, dated 10 January 2023 in which the appeal was opposed and the following comments were made.

> 3. In response to ground 1 it is submitted that the FTTJ dealt with the matter of the requested adjournment fairly noting that the appeal had already been adjourned previous and he was informed in the resulting directions that it would not be postponed indefinitely. And in [5] notes that the caselaw refers to the mere possibility of an application being made in the family court is not a relevant criterion in deciding to adjourn an immigration appeal. It is submitted that to find otherwise and adjourn an immigration appeal for lengthy periods whilst the appellant decides whether to lodge proceedings in the family court would be erroneous. Similarly, the grounds contend that the judge should've made findings in relation to the appellants claim that the family court in making the indirect contact order for 12 months with the intention of this increasing over time would be speculative. As above there was no evidence before them that a renewed application had been made in the family court so the appellant has not established this to be the case.
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> 4. It is said that the judge failed to take into account the circumstances of the appellants case it is submitted that the FTTJ gave adequate regard to his case but the finding that he had not had direct contact with them in over 3 years, the circumstances of his offending history being violence against his ex partner and at least one of his children, the fact that the indirect contact he has can be continued from Nigeria and so the finding that there was no genuine and subsisting relationship with his children and it was not unduly harsh for them to remain in the UK without him was open to the judge.
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> 5. It is submitted that the FTTJ's record of the appellants conduct at [6] and the resulting finding at [24] is not an indication of judicial bias. The FTTJ is entitled to observe and note the appellants conduct in court and in this case make the observation that becoming angry at the refusal of an adjournment and trying to intimidate the tribunal does not sit with his claim to have changed particularly in light of the nature of his criminal offending.

<u>The hearing</u>

13. When this matter came before me, I heard detailed submissions from Mr Hingora and Ms Nolan which I carefully noted. At the end of the hearing I reserved my decision.

Decision on error of law

14. The first ground concerns what is said to be the unfairness in the judge proceeding with the appeal hearing notwithstanding the appellant's application for an adjournment. The reason the appellant sought an adjournment was because he wished to have time to make a further application to the Family Court. I accept Mr Hingora's submission that all the indications are that the appellant has demonstrated a commitment to his children, evidenced by his previous application for a child arrangement order in 2020. Nonetheless, at the time of the hearing before the First-tier Tribunal, the appellant had not resumed the process, despite being able to do so on the anniversary of the Family Court order, which was made in September 2022, two months prior to the hearing. The judge therefore made no error in applying *RS* (Immigration and Family Court) India [2012] UKUT 00218 (IAC). Notwithstanding the foregoing point, I find that the material before the judge was inadequate for a detailed consideration of the appellant's circumstances and that of his children. While the judge had the order of the Family Court before him, in terms of identifying the best interests of the children involved, the judge would have been assisted by the additional details which were likely to have emerged had the Family Court protocol been employed. Indeed, at [16], the judge states that there was no such evidence available. I therefore conclude that fairness dictated that this appeal ought to have been adjourned with directions to enable the Family Court to provide documentation to the First-tier Tribunal. The first ground is therefore made out. My aforementioned findings also address the points made in the second ground.

15. The third ground also identifies a material error of law. The judge's findings on the appellant's relationship with his children and the effect upon them of his deportation are set out over less than a page of the decision and reasons[18-22]. While that might be adequate in many cases, it was not in this instance. The appellant, who was unrepresented, had provided lengthy grounds of appeal to the First-tier Tribunal which set out details of his relationship with his children. Those details indicated that the appellant continued to have unsupervised contact with his children even after his relationship breakdown. The appellant has also provided a substantial quantity of copies of letters and cards he has sent to the children while he was imprisoned. There are also hundreds of pages of photographs and text messages concerning the appellant's relationship with his children. There is no engagement by the judge with any of these documents or with the detail contained in the appellant's witness statement, either at [21] when the judge concludes that there is no genuine and subsisting relationship, nor at [22] when the issue of the effect of deportation on the children is briefly considered. There is also no indication on the face of the decision to show that the judge assisted the appellant to put forward his case, as is stated at [8]. There is no reference to any enquiry made of the appellant as to the best interests of the children or whether the appellant's removal would have unduly harsh consequences. For the foregoing reasons, I find that the appellant did not have an adequate consideration of his human rights appeal.

16. The fourth ground concerns bias. At [24], the judge comments thus

> His attempt to intimidate the Tribunal as to its finding and which I had the opportunity of observing in the hearing room, does not sit well with

> his claim that his character has changed. It would not take very much to cause this man to lose his temper.

17. The judge was making reference to the appellant's response to the refusal to adjourn which the judge records at [6], noting that the appellant 'accused the Tribunal of bias, said he could see where the proceedings were going, and that if he did not get a decision that pleased him, he would go all the way on appeal.'

18. While it was, at a minimum, inappropriate for the judge to interpret the appellant's indication that he would appeal to be a character issue, I am not persuaded that it could be said that a fair minded and informed observer would view the judge as biased. Indeed, Mr Hingora did not make much of this ground.

19. I canvassed the views of the parties as to the venue of any remaking and both were of the view that the matter ought to be remitted if a material error of law was detected. 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 the appellant was deprived of an adequate consideration of his human rights 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

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of 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 heard by any judge except First-tier Tribunal Judge Gillespie.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 April 2023