IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001953

First-tier Tribunal No: HU/03782/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

3rd November 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDOULAYE GUEYE

Respondent

Representation:
For the Appellant: Mr A Tan, Senior Home Office Presenting Officer
For the Respondent: Mr Khan of Prestige Solicitors

Heard at Manchester Civil Justice Centre on 25 October 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Gueye's appeal against the respondent's decision to refuse his human rights claim further to a decision to deport him under section 32(5) of the UK Borders Act 2007.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Gueye as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a national of Senegal, born on 4 March 1969. He claims to have entered the UK in March/April 2004 and to have returned to Senegal to marry his partner Julie Lishke, a British citizen, in 2008. Following his marriage he applied for entry clearance as a spouse, on 21 July 2008, but his application was refused and he subsequently entered the UK on a false French passport, on 4 August 2009. On 11 September 2009 he was convicted of possessing or controlling a falsely obtained document and seeking or obtaining leave to enter the UK by deception and he was sentenced to 12 months imprisonment. On 27 November 2009 he was notified that he was liable for automatic deportation and on 26 January 2010 a deportation order was signed against him. He claimed asylum on 27 January 2010 but subsequently withdrew his claim and on 25 March 2010 he was served with reasons for automatic deportation together with the signed deportation order. His appeal against the deportation decision was dismissed on 5 August 2010 and he became appeal rights exhausted on 17 August 2010. He made an EEA application in December 2011 which was rejected on 10 January 2012.

4. On 20 December 2012 the appellant responded to a status review questionnaire, making further representations on the basis of his relationship with a different British partner, Mato Niang, with whom he had two British children. On 24 October 2013 the respondent issued a decision refusing to revoke the appellant's deportation order, in response to which the appellant lodged an appeal which he then later withdrew, becoming appeal rights exhausted again on 19 March 2014. The appellant made further representations on Article 8 grounds on 16 January 2015, but the respondent made a decision on 15 May 2015 refusing his human rights claim and certifying the claim under s94B of the Nationality, Immigration and Asylum Act 2002. That decision was withdrawn following the judgement of the Supreme Court in Kiarie and Byndloss [2017] UKSC 42. Further to contact being made with the Senegalese authorities in relation to the issuing of a travel document for the appellant, the Senegalese Embassy advised the appellant on 7 August 2018 that they were unable to process the application without further supporting evidence. On 13 August 2018 the appellant submitted a Stateless Leave application.

5. On 9 October 2019 the appellant submitted an application for leave to remain on family and private life grounds, relying upon his family life with his British partner Mato Niang and his three British children, Ngamdy (born on 10 January 2011), Astou (born on 7 April 2012) and Farba (born on 12 July 2019). The respondent refused the appellant's application in a decision of 30 June 2021. The respondent did not accept that the appellant was stateless and rejected that part of his claim. As for his family life with his partner and children, the respondent accepted that the appellant had a genuine and subsisting relationship with his partner and three children and accepted that it would be unduly harsh for them to relocate to Senegal. The respondent noted that Ngamdy had been diagnosed with autism and that Farba had a long-term medical condition (complete AVSD), but considered that it would not be unduly harsh for the children to remain in the UK with their mother when the appellant was deported. The respondent did not, therefore, accept that the appellant met the family life exception to deportation in paragraph 399 of the immigration rules. The respondent did not accept that the appellant met the private life exception to deportation in paragraph 399A as he had not been lawfully resident in the UK for most of his life, it was not accepted that he was socially and culturally integrated in the UK and it was not accepted that there were very significant obstacles to his integration in Senegal. The respondent did not accept that there were very compelling circumstances outweighing the public interest in the appellant's deportation and concluded that his deportation would not breach his Article 8 rights. The deportation decision was therefore maintained.

6. The appellant appealed against that decision and his appeal was heard on 1 February 2023 in the First-tier Tribunal by Judge Chowdhury. The appellant had, by that time, separated from his partner, claiming that that was due to the pressure of having two autistic children. He claimed that he still lived with his partner and that he continued in his role within the household, playing an active role in the upbringing of the children. He and his former partner had four children by that time, two boys and two girls, with the youngest, Ndoumbe, born on 20 February 2022. The appellant gave evidence about his children's medical conditions, explaining that the eldest child, Ngamdy, was autistic and required a lot of care and attention, that one of his daughters had medical issues with her kidneys and that Farba had a large arachnoid cyst on his brain causing development issues and had multiple medical and developmental needs. The appellant's former partner had prepared a statement for the appeal but was not in attendance. She claimed in her statement that she had no support network of her own without the appellant and that she would not be able to care for the children without him.

7. The judge did not accept that the appellant could meet the private life exception to deportation. She did not accept that he was stateless and, with regard to his own medical issues, she did not accept that that, or any other factors, presented very significant obstacles to his integration in Senegal. The judge, however, found that the family life exception was met on the basis that it would be unduly harsh on the children for them to be separated from their father, the appellant. She found that the appellant had an extensive and pivotal role in the children's upbringing and that it was highly unlikely that the children would be able to visit him in Senegal because of the complex medical needs of two of the children and because of affordability issues. She concluded that the effects of the appellant's deportation on his children went beyond being unduly harsh and that his circumstances were especially compelling. The judge found, in the circumstances, that the appellant's Article 8 rights outweighed the public interest in favour of deportation and she accordingly allowed the appeal.

8. Permission to appeal against that decision was sought by the respondent on the grounds that the judge had failed to give adequate reasons for finding that the appellant's deportation would result in unduly harsh consequences and that the evidence did not support the judge's conclusions.

9. Permission was refused in the First-tier Tribunal, but was subsequently granted on a renewed application in the Upper Tribunal.

10. The matter then came before me and I heard submissions from both parties.

11. Mr Tan submitted that the judge's reasoning was limited to [45] and that anxious scrutiny had not been applied, which in turn had led to inadequately reasoned conclusions. Mr Tan submitted further that the evidence did not support the judge's findings. At [37] the judge referred to the appellant having two autistic children, but the medical evidence did not show that the second child had been diagnosed with autism. At [40] the judge found that the appellant had an extensive role in the children's upbringing, but the evidence produced showed no more than that the appellant took the children to school and to appointments, whereas the occupational therapist report at page 43 of the appeal bundle only referred to the child's mother and not the appellant. The judge had not considered what the circumstances would be if the appellant left and did not consider the support network in place and adaptations that could be made in his absence.

12. Mr Khan submitted that he had appeared before Judge Chowdhury and he confirmed that there had been a lot of detail provided in the evidence about the appellant's relationship with his four children and his role as their father. There was evidence that he played a crucial role, in particular because the two autistic boys were very aggressive and difficult to control, and their mother was unable to control them by herself. The judge had accepted the appellant's version of events.

13. Mr Tan did not have any further submissions in reply.

Discussion

14. It seems to me that the respondent's challenges to the judge's decision are essentially an argument with the weight she accorded to the evidence. It is clear that the judge was fully aware of the high threshold for meeting the 'unduly harsh' test and for establishing 'very compelling circumstances'. She directed herself appropriately in that regard at [30] and [44], with reference to relevant caselaw and she clearly considered the evidence in that context.

15. I do not agree with Mr Tan that the judge failed to apply anxious scrutiny to the evidence when she plainly undertook a detailed assessment of the evidence, both documentary and oral. Having heard from the appellant in person, and having considered the documentary evidence before her, the judge gave reasons why she was satisfied that the appellant played a significant and pivotal role in the lives of his children. It was Mr Tan's submission, however, that the evidence did not support the judge's conclusions in that regard, as set out at [40]. Again I do not agree.

16. Mr Tan submitted that there was no evidence that the appellant's second son had been diagnosed with autism and that the judge simply accepted the appellant's evidence in that regard. However, whether or not he been diagnosed with autism, it is clear from the evidence accepted by the respondent in the refusal decision, as well as the evidence produced at pages 48 to 50 of the appellant's appeal bundle that the appellant's second son had a complex medical history with current developmental issues. That was what the judge considered and set out at [39] of her decision, with reference to [6]. As for the submission that the documentary evidence merely showed that the appellant took the children to appointments and to school, and that he was not referred to in the occupational therapist's report, it seems to me that the documents went beyond that in referring to a more active role played by the appellant. There was evidence before the judge of the appellant having an active role in attending school meetings and school events (page 68), of the appellant being the main contact for his eldest son and being available if there were behavioural issues arising with his son (page 60). The judge set out and addressed that evidence at [40] of her decision. What is relevant to consider, as Mr Khan submitted, is that the judge did not rely solely on that documentary evidence but she had the benefit of extensive oral evidence from the appellant and the statement from the children's mother attesting to the important role the appellant played and the lack of alternative means of support. The judge was clearly impressed by that evidence and accorded it weight, as she was entitled to do. The respondent may disagree with the amount of weight she gave to that evidence, but that was a matter for the judge, having heard and considered all the evidence.

17. A point made in particular in the grounds was the lack of evidence that the children's mother could not look after the children in their father's absence, with the support of social services. Indeed it was on that basis that permission was granted by UTJ Hanson, where he found it arguable that the judge had failed to give adequate

consideration to the situation if the appellant was removed. I accept that that was not a matter specifically addressed by the judge. However, it seems to me that it was implicit in the judge's findings that the appellant's role was unique to him as the children's father. That is apparent from her reference at [38] to the evidence of the appellant being called by the school to calm his son down, the reference at [41] to the need for consistency and stability and to the parents supporting each other emotionally and the reference at [42] to the children being unable to visit their father in Senegal. In addition the judge gave weight to the evidence of the children's mother in her statement, albeit without her presence at the hearing, whereby she spoke of her inability to cope without the appellant given the lack of any other support network. In the circumstances, and as UTJ Hanson observed may be the case, I consider that any error in the judge failing to specifically address the point was simply not material.

18. For all these reasons I do not consider that the grounds identify any material errors in the judge's decision. It may be that the judge could arguably have provided more detailed reasoning and that she could arguably have expected more evidence on the impact on the children of the appellant's deportation. However, ultimately, it seems to me that she provided adequate reasons for reaching the conclusions that she did and that the decision she reached was one which was open to her on the evidence before her.

Notice of Decision

19. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The Secretary of State's appeal is therefore dismissed and the decision to allow Mr Gueye's appeal stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 October 2023