IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003888
UI-2023-004995
On appeal from: HU/50199/2022
HU/55408/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 December 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

ABDUL-RAHMAN OMODOLAPO RAJI
(NO ANONYMITY ORDER)

Respondent

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDUL-RAHMAN OMODOLAPO RAJI
(NO ANONYMITY ORDER)

Respondent

Representation:

For the Appellant: Mr Chris Avery, a Senior Home Office Presenting Officer
For the Respondent: Mr Craig Holmes of Counsel, instructed by Axis Solicitors Ltd

Heard at Field House on 2 November 2023

DECISION AND REASONS

Introduction

1. The Entry Clearance Officer has permission to appeal the decision of the First-tier Tribunal on 15 August 2023 which could be read as allowing the claimant's appeal against his refusal on 21 December 2021 to grant entry clearance.

2. The Secretary of State has permission to appeal the decision of the First-tier Tribunal on the same date and in the same decision, allowing the claimant's appeal against his decision on 2 August 2022 to decline to revoke an extant deportation order against him.

3. The claimant is a citizen of Nigeria and a foreign criminal. For convenience, given that there is significant overlap between the two sets of grounds, I shall refer to the appellant in these proceedings as 'the Secretary of State' and the respondent as 'the claimant.

4. For the reasons set out in this decision, I have come to the conclusion that the Secretary of State's appeals should be dismissed and the decision of the First-tier Tribunal upheld.

Procedural matters

5. **Mode of hearing.** The hearing today took place as a blended face to face and Microsoft Teams hearing. There were no technical difficulties. I am satisfied that the hearing was completed fairly, with the cooperation of both representatives.

6. **Anonymity.** No anonymity order was sought by the claimant's representative Mr Holmes before the First-tier Tribunal and none has been applied for in the Upper Tribunal proceedings. I make no anonymity order.

Deportation order (2 September 2009)

7. The claimant is a foreign criminal, having been sentenced on 16 July 2009 to 16 months' imprisonment for a robbery undertaken with another young person. The sentence would have been longer had he not been only just an adult, and pleaded guilty, albeit at a late stage in the proceedings. The claimant did not appeal either the sentence or the conviction.

8. A deportation order was signed on 21 September 2009 and he was removed to Nigeria on 22 January 2010.

9. In March 2021, the applicant married a British citizen whom he met in Nigeria in 2017. They married in Nigeria and she was aware of his immigration circumstances. They have never spent time as a family in the UK. The claimant's partner visits Nigeria regularly to see him. Two sons were born to them in May 2021 and May 2022.

Entry clearance application (16 September 2021)

10. No application to revoke the deportation order had been made when the application for entry clearance was made on 16 September 2021. In his refusal letter, the Secretary of State made a negative suitability finding, pursuant to paragraphs S-EC.1.3 – S-EC.1.5 of Appendix FM to the Immigration Rules HC 395 (as amended).

11. He considered the circumstances of the application but in the light of the claimant's conduct considered it undesirable to issue entry clearance and was not prepared to exercise discretion in his favour.

12. The claimant appealed to the First-tier Tribunal.

Application to revoke deportation order (24 May 2022)

13. On 24 May 2022, the claimant sought revocation of the deportation order, citing his private and family life with his wife, a British citizen by whom he had two sons, and his reformed character and rehabilitation. He has educated himself and has faced and apologised to the young person whom he and his friend attacked.

14. By a letter dated 2 August 2022, the Secretary of State noted that the deportation order had now been in force for more than 10 years and considered the exercise of discretion to revoke it, reminding himself that outside the period of 10 years, the exercise of discretion was on a case-by-case basis.

15. The Secretary of State refused to revoke the deportation order, by reference to paragraphs 390 and 391 of the Rules, noting that the claimant, who came to the UK on 13 December 2002 (when he would have been 12 years old) with a 2-year visit visa, had overstayed from 12 January 2004 and had been deported with emergency travel documents on 21 January 2010 (aged 20), having committed a serious criminal offence as well as disregarding the UK's Immigration Rules.

16. The Secretary of State did not accept that it would be unduly harsh for the claimant's wife and children to remain in the UK without him, or to join him in Nigeria. He did not accept that there were insurmountable obstacles to the integration of the wife and children in Nigeria. He did not accept that the claimant had a genuine and subsisting relationship with his sons: more than mere biological paternity was required, and the claimant could not show meaningful positive involvement in the children's lives. The children had always lived with their mother in the UK and not with their father. She was the primary carer.

17. The Secretary of State did not consider that the claimant had been able to bring himself within any of the Exceptions in section 33 of the UK Borders

Act 2007 and he maintained his deportation decision, as section 32(5) required him to do where the Exceptions do not apply.

18. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

19. Both appeals came before First-tier Judge Beg at a hearing on 15 August 2023. The Judge recognised at [26] that the entry clearance application was premature and could not succeed, as the deportation order was still in force when it was made. However, at [44] in her decision, the First-tier Judge recorded that the representatives before her 'accepted that the revocation appeal and the entry clearance appeal are linked and that if the Tribunal decides that it is appropriate for the deportation order to be revoked, then the refusal of entry clearance under the suitability rules would fall away'.

20. The First-tier Judge went on to deal in detail with the appeal against the Secretary of State's refusal to revoke the deportation order. She received a detailed witness statement from the claimant, and heard his wife give evidence on his behalf. She found that the claimant's relationship with his wife, and with his sons, was genuine and subsisting despite the difficulty caused by living in different countries. The claimant had completed tertiary education and was now working as a teacher.

21. The children were still very young, aged one and two, but they had visited the claimant in Nigeria and he maintained contact with them through telephone calls and video calls. At [37] the Judge found that the claimant had attempted to bond with his sons, but that the primary carer for the children was their mother. The elder boy was exhibiting speech delay, according to the parents, but there was no medical evidence about that.

22. The claimant's wife had never lived in Nigeria. She was raising the children without family support in the UK, due to an estrangement from her mother and brothers and sisters. She was a business analyst. She might have to perform youth service before taking up employment in Nigeria, and her employment would be less well paid and a downgrade for her career.

23. The First-tier Judge allowed the appeal, finding that the deportation order had been 'materially and ideologically effective' and had served its purpose. Maintaining it would be a disproportionate breach of the Article 8 ECHR rights of the claimant and result in unjustifiably harsh consequences for him and his family. It was now appropriate for the deportation order to be revoked.

Permission to appeal

24. The Secretary of State sought permission to appeal, limiting his criticism of the decision to the revocation of the deportation order. He has not sought

to go behind the concession made by the Presenting Officer that the entry clearance appeal would succeed if the deportation order was revoked.

25. There are two sets of grounds of appeal and two grants of permission, but both relate to the same First-tier Tribunal decision.

26. In his grounds of appeal dated 23 August 2023, the Secretary of State argued that his decision to uphold the deportation order would not be unduly harsh on the facts, and that the First-tier Judge had not correctly applied *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. The British nationality of the children was not a trump card. There was no medical evidence about the alleged learning difficulties of the 2 year old. The reasons given for relocation to Nigeria not being in the children's best interests were inadequate.

27. The assertion that the wife would earn less in Nigeria was not an insurmountable obstacle to her integration in Nigeria, where she would have the support of the claimant and his extended family, which would be better than her current situation in the UK, where she is estranged from her own family and raising two small boys as a single parent.

28. Permission to appeal to the Upper Tribunal was granted on 8 September 2023 by First-tier Judge Austin in these terms:

> "The grounds assert that the Judge erred in making material errors of law by failing to provide any or any adequate reasons for making findings on material matters. The grounds disclose an arguable error of law and permission to appeal is granted."

29. In grounds of appeal dated 9 November 2023, the Secretary of State challenged the reasoning on family life, noting that the Judge did not refer to the claimant's failure to disclose his extant deportation order when applying for entry clearance initially, and that his wife had married him in Nigeria, appeared to have been well aware of his immigration status, and she and the children had never lived with him in the UK.

30. There has been no application to vary the August 2023 grounds of appeal but as there is a strong similarity between both sets of grounds, and the point was not taken before me, I will have regard to the way the grounds were argued both in August and November 2023. In the November 2023 grounds, the Secretary of State argued that the unduly harsh threshold was a high one and the facts did not meet it. The claimant and his wife began their relationship in full knowledge that he was prevented from returning to the UK by a deportation order.

31. On 22 November 2023, First-tier Judge Hollings-Tennant also granted permission to appeal. His decision, which I consider must be a nullity on the *functus officio* principle, because the appeal was already before the Upper Tribunal by then, was focused on the suitability point, which

properly understood was not in issue given the concession made by the Presenting Officer, which has not been withdrawn.

Rule 24 Reply

32. No Rule 24 Reply was filed on behalf of the claimant in relation to either grant of permission to appeal.

33. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

34. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal under both file numbers.

35. I approach these appeals on the basis that the real challenge is to the First-tier Judge's approach to the Secretary of State's refusal to revoke the deportation order. Mr Holmes made full and helpful submissions on this issue. He contended that the First-tier Judge's reasons were adequate, relying in particular on the observations of Lord Hope JSC in *Jones v First Tier Tribunal & Anor* [2013] UKSC 19 (17 April 2013), in which he criticised the Court of Appeal for its approach to the reasoning of the First-tier Tribunal, in particular at [25]:

> "25. ...[The Court of Appeal] was also unduly critical of the First-tier Tribunal's reasoning, attributing to it things that it did not, in so many words, actually say. It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it. …"

36. In his oral submissions, Mr Holmes argued that the First-tier Judge's findings were not inadequately reasoned, to that standard. The grounds of appeal (both sets) effectively required 'reasons for reasons' and it had been open to the Judge to make the family life findings which she had. The claimant had reformed and was rehabilitated and there was no suggestion in the grounds of appeal that any relevant matters were not taken into account. The decision was lawful and should be upheld.

Conclusions

37. The Court of Appeal has recently restated the principles for interference with the decision of a fact finding judge in *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [2]-[3] and [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justice Males and Lord Justice Snowden agreed. At [2], Lewison LJ stated that the following principles were well-settled and required no recourse to authority:

> "(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> (ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> (v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> (vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

38. The decision of the First-tier Judge in this appeal is not perfect. The reasoning could have been better. However, given how long ago the offence was committed, and there being no evidence of any subsequent or previous criminal activity, I find that it was open to the Judge to conclude, as she did, that the Secretary of State's exercise of discretion in relation to the application to revoke the deportation order was disproportionate.

39. The claimant is not the 20 year old single man who committed the index offence. He is married, with young children, and working as a teacher. The First-tier Judge's decision may be generous, and another Judge may have reached a different conclusion, but it is not rationally insupportable on the evidence before her.

40. For these reasons, I decline to interfere with the First-tier Judge's findings and I uphold her decision.

Notice of Decision

41. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 5 December 2023