



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000549
First -Tier Number: PA/00701/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 12th of September 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD (DRC)
(anonymity order made)

Respondent

Representation:

For the Appellant: Mr M. Diwnycz, Senior Presenting Officer
For the Respondent: Mr D. Katani, Katani & Co Solicitors

Heard in Edinburgh on the 3rd September 2024

ANONYMITY

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant 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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Respondent is a national of the Democratic Republic of Congo born in 1972. On the 10th January 2024 the First-tier Tribunal (Judge Bird) allowed, on human rights grounds, his appeal against a decision to deport him. The Secretary of State now has permission to appeal against that decision, granted by First-tier Tribunal Judge Boyes on the 19th February 2024.

Background and Matters in Issue

2. The Respondent arrived in the UK in May 2008 and claimed asylum. His claim was rejected but in July 2014 he was successful in obtaining leave to remain on human rights grounds, it being accepted that the refusal of leave would be disproportionate interference with his Article 8 family life with his wife. The Respondent is now a father to three British children, C1 born in 2012, C2 born in 2016 and C3 born in 2018. He is also a stepfather to his wife's daughter, born in 2010.
3. The Secretary of State made an order to deport the Respondent on the 16th August 2022. The reason for that order is that on the 16th December 2020 the Respondent was convicted, at Glasgow High Court, of offences including assault, sexual penetration and sexual assault on three young girls in his family: his stepdaughter and two of his wife's nieces. He had denied these offences, but was convicted after trial by jury. In his sentencing remarks the trial judge said this:

71. Sex offences are among the very worst kind of offence and the public rightly expects both children and adults to be protected from those who perpetrate such appalling crimes.

72. All the available evidence indicates that you perpetrated this offence for your own sexual gratification, and that you had no regard to the impact your actions would have on your young victim(s). There can be no excuse for your behaviour.

73 In addition to the potential for physical injury, the effects of this kind of abuse on children, and indeed adults include depression, post-traumatic stress disorder, anxiety and a propensity towards further victimization in adulthood. The impact upon the young victims, and indeed adult victims of such crimes is often a lifelong legacy of psychological harm.

74. This is a particularly serious and appalling crime. Not only was it sexually motivated for your own gratification, but also the nature of the offences, were committed on victims in whom you had installed trust. The family/ families of your victims will also have suffered considerable distress as a result of your behaviour. Moreover, sexual offences of this nature have a wider impact upon society in that they create a climate of fear in communities.

4. The Respondent was sentenced to 3 years in prison. He is therefore a foreign criminal by operation of s.32(1) UK Borders Act 2007.
5. The Respondent appealed against the decision to deport him on two grounds: that he has a well-founded fear of persecution in the DRC because of his political opinion, and because it would be 'unduly harsh' for his biological children, in

particular his youngest son C3, if he were to be removed from the UK. C3 has behavioural and educational challenges and at the date of the appeal was being assessed for autism.

6. The appeal was heard by Judge Bird who found that the Respondent was not entitled to refugee status because he is a serious criminal. The Secretary of State had sought to exclude the Respondent from the protection of the Refugee Convention on that basis, by 'certifying' the claim under section 72 of Nationality Immigration and Asylum Act 2002, and Judge Bird upheld that decision, noting as she did that "the appellant's continued denial of his offence and his refusal to take responsibility for his offending behaviour he continues to pose a risk at present to a section of the community. The appellant's continued denial of any wrongdoing adds to this risk and danger".
7. Judge Bird went on to consider whether the proposed deportation would be unlawful under s6(1) Human Rights Act 1998. The decision is focused on the situation of C3. It is accepted that C3's mother is struggling to control and manage his behaviour and needs, as well as offering support to her other children. An Independent Social Worker (ISW) had prepared a report which concluded that the Respondent's three children had missed him when he was in prison and that their emotional needs would be better met by having both their parents in their lives. Their mother would be assisted by their father being able to remain in the UK. The Tribunal's conclusions are expressed like this:

51. The appellant must show that the consequences will be unduly harsh. In this appeal what tips the balance is the child [C3] and his as yet undiagnosed autism. The Social reports and the ISW's report all accept that the strain on looking after him on her own has had an adverse impact on his mother's health. She told the ISW "Chris can only eat mashed food, is still in nappies, he cannot bear her to leave him, he has tantrums, his sleep is poor and he wakes her up at night. If she helps the other children he pulls her away and cries. If his older sister tries to help he gets aggressive and hits her and then hits his mother" - paragraph 9.

52. If the appellant were to be removed, his wife would lose all emotional support that the appellant is able to provide her. Without that support it is likely that her physical and mental condition will deteriorate. This will negatively impact the children wellbeing. The appellant has been able to provide some emotional support to the other two children who are suffering the consequences of [C3]'s behaviour and their mother's inability to fully care for them.

8. The appeal is allowed on this basis.
9. The Secretary of State now appeals on the grounds that the decision below must be set aside for the following errors of law:
 - i) Failure to take material matters into account
 - ii) Inadequate reasoning
 - iii) Irrational approach to the evidence, in particular the report of the ISW, which is accepted at face value without any of the Secretary of State's criticisms being taken into account.

My Findings

10. The Secretary of State's grounds are primarily concerned with the quality of the ISW report, and the rationality or otherwise of weight being attached to that evidence in the way that it was. The ISW interviewed the Respondent, who denies his crimes. She then interviewed his wife, who also denies that he could have committed the crimes for which he was convicted. She did not speak herself to any of the children in the house, who notably included the Respondent's stepdaughter, the victim of his most serious offences. It is therefore difficult to see how her assessment of these children's best interests was complete. I accept that these criticisms are well made.
11. I am nevertheless satisfied that the decision contains a more obvious error in approach. The Tribunal found, in its analysis on s72, that this man continues to pose a risk to the community, in particular children. The decision then proceeds to consider whether his deportation would be 'unduly harsh' for his children, without once considering the risk that he might pose to them. There is no mention of the welfare of the Respondent's stepdaughter, now a 15 year old living in the family home. She is an integral part of the family unit that the Respondent wishes to rejoin. It was in my view incumbent on the Tribunal to stand back and assess how his presence in the family home might impact upon all of these relationships. It is an obvious point. A conclusion that children will benefit from the presence of their father as they grow up is – absent direct risk – generally uncontroversial. The same cannot be automatically said where those children also have a relationship with their sister, and where their sister might well be negatively affected by his return. Neither the ISW or the Tribunal consider how this child, a victim of assault by penetration, might react to that outcome. It seems to me that this should have been the starting point for the enquiry.
12. I am therefore satisfied that in its analysis of undue harshness the First-tier Tribunal has omitted to consider relevant facts and it must be set aside.
13. The Secretary of State's grounds further take issue with the First-tier Tribunal's acceptance that there is a family life between the Respondent and his biological children. I am not satisfied that any criticism of this finding can be justified. There is a presumption of family life between a father and his biological children. Whilst it was true that he his imprisonment and the conditions attached to his release had prevented him living in the family home, this fell far short of demonstrating that those links had been severed. Indeed it was no part of the Secretary of State's case that they had.
14. One other matter arising is that having upheld the s72 certificate the Tribunal does not go on to conduct any analysis of the Respondent's case that he has a well founded fear of return to the DRC because of his involvement with the political opposition group APARECO. The decision contains no assessment of that risk, which remained relevant in the context of Article 3, regardless of the certificate. This is not a point taken in any cross appeal, but as Mr Katani explained, he has only very recently been instructed. Mr Diwnycz accepted that this was a Robinson obvious omission which would need to be rectified in any remaking.
15. In the circumstances the parties agreed that the decision in this appeal would need to be remade *de novo* in the First-tier Tribunal.

Decisions and Directions

16. The decision of the First-tier Tribunal is set aside.
17. Mr Katani indicated that C3 has now received a formal diagnosis of autism. Given C3's importance to the case Mr Katani requested permission to adduce up to date evidence about his condition and needs, and possibly further evidence from the ISW in light of the points that I make at my [10] and [11] above. Such permission is granted. I direct that fresh stitched bundles are to be filed and served within 8 weeks of this decision.
18. The decision in the appeal will be remade by a differently constituted First-tier Tribunal. The hearing will take place in Glasgow, where the Respondent now lives. No interpreter is required and the time estimate is, at present, 4 hours. This is to accommodate evidence being heard from the Respondent, his wife, and the ISW. If either party considers that this time estimate is wrong they are to inform the First-tier Tribunal as soon as practicable. The hearing should not be listed before the 4th November 2024.
19. There is an order for anonymity. This is not to protect the identity of Respondent but to protect the identity of his children, in particular his stepdaughter.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
3rd September 2024