IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003442
First-tier Tribunal No:
HU/02012/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 November 2024

Before

UPPER TRIBUNAL JUDGE RUDDICK

Between

VN
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R. McKee, instructed by Mac & Co
For the Respondent: Mr E. Terrell, Senior Home Office Presenting Officer

Heard at Field House on 29 October 2024

Order Regarding 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 him. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Chamberlain dismissing his appeal against the respondent's decision to refuse his human rights claim.

2. Judge Chamberlain made an anonymity order in the First-tier Tribunal. I have considered whether it is appropriate to continue that order, taking into account *Guidance Note 2022 No.2: Anonymity Orders and Hearings in Private*. I am satisfied that it is appropriate to make such an order, because it is in the best interests of the appellant's children.

Background

3. The appellant is a citizen of Vietnam, born in in Vietnam in 1981. He says that he first entered the UK clandestinely in 2003. He claimed asylum in November 2003, but his claim was refused and his appeal against the refusal dismissed. On 28 September 2007, the appellant was convicted at Teeside Crown Court of conspiracy to supply controlled drugs, specifically cannabis (not cocaine, as erroneously stated in the refusal decision on appeal). He was sentenced to 30 months' imprisonment and the sentencing judge recommended that he be deported. In July 2008, the respondent served the appellant with a notice of his liability for deportation, followed by a decision to make a deportation order against him. He did not appeal that decision, and on 18 September 2003, the respondent signed the deportation order. On 25 February 2010, the appellant was deported to Vietnam.

4. The appellant says that he left Vietnam again in January 2012, arriving in the UK in March of that year. In the summer of 2013, he entered into a relationship with his current partner, TN, a British citizen who was born in Vietnam. The couple are raising two children together, TN's child from a previous relationship, born in November 2007, and their biological child, born in December 2015.

5. On 27 March 2018, the appellant applied to the respondent for leave to remain in the UK on the basis of his family life with his partner and their two children. On 3 November 2021, the respondent considered the appellant's application under Paras. 390, 390A, 398, 399 and 399D of the Immigration Rules and refused it. The respondent accepted that the appellant had a genuine and subsisting relationship with his partner and a genuine and subsisting parental relationship with both children but concluded that it would not be unduly harsh for them either to relocate to Vietnam with him or to remain in the UK without him.

6. The appellant appealed, and his appeal was allowed by a judge of the First-tier Tribunal on 25 May 2023. However, in February 2024 that decision was set aside by the Upper Tribunal and the matter remitted for hearing de novo. It then came before Judge Chamberlain on 8 May 2024. She dismissed the appeal.

Judge Chamberlain's decision

7. The Judge began her "Findings and conclusions" by noting that appellant's bundle of evidence consisted of 17 pages prepared for the hearing in May 2023 [12]. It had not been updated, and she found at [13] that "being one year out of date, the witness statements do not reflect the current position of the family." Further, "they are very short and lack detail." She then proceeded to set out excerpts from the appellant's and TN's statements at [14-15].

8. At [16], the Judge noted that "I have no evidence from any professionals, for example an independent social worker, which addresses the impact that the appellant's deportation would have on the family, in particular the children." This was followed by a summary of the contents of the evidence that she did have, namely a brief letter from each of the children's schools [16] and a letter from the older child dated 2 January 2023 [17]. At [18], she listed "[t]he other evidence provided by the appellant", which consisted of utility and Council Tax bills from 2021-2022 and financial evidence relating to the TN's business. She concluded, "This is all of the evidence which the appellant has provided for his appeal."

9. The Judge does not mention the evidence that the appellant had provided in support of his 2018 application, which was in the respondent's bundle, and the appellant does not complain of this in his grounds of appeal. For the sake of completeness and because there are children affected by this appeal, I have nonetheless reviewed that evidence. It includes brief representations from his legal representatives, the British passports of TN and the children, brief letters from the older child's school and dentist confirming that the appellant had taken him to and from school and to dental appointments, TN's 2011 divorce certificate, 13 family photos and various forms of official correspondence confirming the couple's address, the existence of TN's business, and her finances. There are also school reports and certificates for the older child, confirming his success in school. I find that there is nothing in this evidence, which was more than sic years old that the date of the hearing, that makes it an obvious error for the Judge not to have taken into account in making her decision.

10. After considering the appellant's evidence, the Judge noted the nature of the appellant's offence (including that it was related to cannabis rather than to cocaine), the length of the sentence, his re-entry in breach of his deportation order and that it was accepted that he had committed no further offences. She noted that he had not made an asylum claim. [19-20]

11. The Judge then referred herself to Section 117C(5) of the Nationality, Immigration and Asylum 2002 Act [21], and to the definition of "unduly harsh" as more than "uncomfortable, inconvenient, undesirable or merely difficult." [22]

12. The Judge then considered the potential consequences of the appellant's removal, first on TN and then on the children. At [23], she noted that TN "is Vietnamese", had come to the UK in 2006, spoke Vietnamese and had extended family in Vietnam, including her parents. She had last visited Vietnam in 2023. She would lose her business if she moved to Vietnam, but "given her qualifications and experience, the support from family, and her knowledge and familiarity with Vietnam, she would be able to establish herself there." Alternatively, she could remain in the UK and visit the appellant. There was "no evidence that she has any medical conditions or that she is receiving medical treatment." She concluded that the effect of the appellant's deportation on her would not be unduly harsh.

13. At [24-25], the Judge set out the respondent's position with regard to the children. This was that they were qualifying children and that the appellant had a genuine and subsisting relationship with them, but that it would not be unduly harsh either for the children to remain in the UK without the appellant or for them to move to Vietnam with him.

14. At [26], the Judge directed herself to ZH (Tanzania) [2011] UKSC 4. At [27], she found that the children were British citizens, had lived in the UK for their entire lives and were in education here. She noted their ages (16 and 8) and found that the older child especially would have built up friendships and a private life in the UK and that his social and cultural ties were here [27]. She found at [28] that it was in their best interests to remain in the UK without "any disruption" to their lives and education, and unduly harsh to expect them to relocate to Vietnam.

15. At [29], she found that it would be in the children's best interests for the appellant to remain in the UK, but directed herself that the question she needed to answer was whether it would be unduly harsh for them to remain in the UK without him.

16. The Judge began her findings on that question with the remark, "It is worth reiterating that I have been provided with very little evidence in relation to" the children. She enumerated that there was no professional evidence regarding the effect of deportation on them, and no evidence of medical, developmental or learning problems or "any particular emotional needs" [30]. At [31], the Judge began her consideration by noting again the absence of evidence: "I have no evidence to suggest that the appellant's partner would not be able to care for [the children] in the absence of the appellant." She noted that TN had her own business and supported the family financially. The children would miss the appellant and his absence would cause "upset and disruption to their lives", but there was no evidence of medical problems or "any other reason" TN could not support or care for them properly and no evidence they would be unable to remain at school without the appellant's presence.

17. At [32], the Judge found that the children could visit the appellant in Vietnam and maintain contact using "modern means of communication". This "is not the same as" physical presence, but there was "no evidence"

that the effect on them would be unduly harsh. Finally, at [33], the Judge noted that the older child was doing his GCSEs but found that "this alone" did not mean that the effect of deportation would be unduly hash.

18. At [34], the Judge found that Exception 2 in Section 117C(5) was not met and at [35-40], she considered the proportionality of the appellant's removal within the framework of Razgar [2004] UKHL 27 and Section 117B and 117C. She concluded at [41] that although the deportation would have "a negative effect" on the children, the appellant had "failed to provide evidence" to show that the consequences would be unduly harsh or that there were exceptional or compelling circumstances.

The grounds of appeal

19. The appellant's grounds of appeal run to 16 paragraphs. In summary, they argue that the Judge erred by failing to take into account the guidance of the Supreme Court in HA (Iraq) [2022] UKSC 22 and instead basing her decision on the now-discredited approach, which emerged from KO (Nigeria) [2018] UKSC 53, of looking for a degree of harshness that went beyond "what would necessarily be involved for any child faced with the deportation of a parent". The Judge was also said to have erred by minimising the effect of deportation by reference to the maintenance of relationships "by indirect means only" and by treating physical harm as intrinsically more important than emotional harm.

20. The grounds also complained that the Judge had considered whether the older child's GCSE exams were relevant to the unduly harsh question, when in fact the appellant had not said that they were. His exams were mentioned merely to explain his failure to give evidence in person. Mr McKee confirmed at the hearing before me that there had been no request for an adjournment to allow the child to attend and give evidence and was unable to explain how this complaint made out a ground of appeal. I say no more about it.

21. Permission was granted on the ground that it was arguable that in determining whether the appellant's deportation to Vietnam would have unduly harsh consequences, the Judge had applied too high a standard.

Discussion

22. In deciding whether the Judge's decision involved the making of a material error of law, I have reminded myself of the principles set out in Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 [26] and Volpi & Anor v Volpi [2022] EWCA Civ 464 [2-4], and of the danger of "island-hopping", rather than looking at the evidence, and the reasoning, as a whole. See Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5 [114].

23. I find that there is no indication in the Judge's reasoning that she has applied too high a standard in her consideration of the unduly harsh question. She cannot be faulted for not specifically referring to HA (Iraq),

for the reasons given in Ullah [26(v)]. Nor is there any evidence that she relied on KO (Nigeria) for her definition of "unduly harsh" at [22]. The definition she sets out there is taken from MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) [46], and although it was endorsed in KO (Nigeria), it was also endorsed in HA (Iraq) [41-42].

24. I also agree with Mr Terrell that the Judge's finding at [28] that it would be unduly harsh for the children to relocate to Vietnam indicates that she was not setting the bar for undue harshness particularly high.

25. It is correct that the Judge refers at various places to the absence of evidence of medical, psychological or developmental problems, but it would be wrong to take these comments out of context. As detailed above, she commented repeatedly on the paucity of evidence in general but she gave detailed consideration to the evidence that she did have. She noted that the personal statements of the appellant, his partner and his stepson were out of date, as well as brief and lacking in detail, but she nonetheless set out their contents in detail. She considered the specific, albeit limited, contents of the letters from the older child's schools. There is nothing wrong with her noting that there was nothing further. If the comments on the lack of expert or medical evidence are taken out of context, they could appear to be requiring such evidence. When seen in the context of the Judge's repeated comments on the overall paucity of evidence, it is clear that the Judge was not privileging this type of evidence over any other. She was merely recording the limited extent of the evidence before her.

26. I do not agree that the Judge has treated physical harm as more important than emotional harm, as Mr McKee submitted. She found that the appellant's removal would cause "upset and disruption to the children's lives", but that their mother would be able to care for them [31]. There is nothing here to suggest that she was referring to the mother's physical rather than emotional care. The appellant's problem was not that his evidence of emotional harm was not given due weight, it was – as the Judge commented repeatedly – that there was so little evidence of any kind.

27. Nor did the Judge put undue weight on the ability of the children to communicate with the appellant after his removal. She acknowledged that this would be not the same as physical presence, but returned to the lack of evidence that the consequences would be unduly harsh. She also referred at [32] to their ability to maintain their relationship with their father through visits to Vietnam, which the older child visited in 2018 and the mother as recently as 2023.

28. In short, her conclusion that the unduly harsh threshold was not met was one that was reasonably open to her on the very limited evidence provided.

Notice of Decision

29. 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 appellant's appeal is dismissed and Judge Chamberlain's decision to dismiss the appellant's appeal stands.

E. Ruddick

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 November 2024