IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003896

First-tier Tribunal No:
HU/53903/2021; IA/10151/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5 June 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAMUEL ADO TRYE
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr N Wain, Home Office Presenting Officer
For the Respondent: Ms C Robinson, Counsel instructed by Asylum Aid

Heard at Field House on Thursday 25 May 2023

DECISION AND REASONS

BACKGROUND

1. This is an appeal brought by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge L K Gibbs dated 10 June 2022 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 8 July 2021, refusing the Appellant's human rights claim. The human rights claim and refusal of it were made in the context of a decision by the Respondent to deport the

Appellant to Sierra Leone. The Respondent also made a supplementary decision dated 14 April 2022.

2. The Appellant was born in the UK in March 1990 to a mother of Sierra Leonian origin. He does not know his father. He has grown up in the UK. In 2009, the Appellant was granted indefinite leave to remain in line with his mother. From 2005 onwards the Appellant has committed a series of criminal offences. On 29 December 2013, the Respondent served the Appellant with notice of her intention to deport him to Sierra Leone. The Appellant's appeal was dismissed by First-tier Tribunal Judge Hanbury and on 31 July 2015 he became appeal rights exhausted. The Respondent has tried to deport him to Sierra Leone since that date but has been unsuccessful in obtaining documentation to do so. The Appellant has also approached the Sierra Leonian authorities in the UK but has not obtained any recognition of a right to return to Sierra Leone or to be naturalised as a national of that country.

3. The Respondent was not satisfied that the Appellant meets either exception to deportation under section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C"). She concluded that there were no very compelling circumstances over and above those exceptions and did not accept that deportation would breach the Appellant's human rights.

4. Judge Gibbs accepted that the Appellant does not meet either exception under Section 117C for reasons I will come to. However, she went on to conclude that there were very compelling circumstances over and above those exceptions which meant that the deportation of the Appellant to Sierra Leone would breach section 6 Human Rights Act 1998 (Article 8 ECHR). She therefore allowed the appeal. As I will come to, her reasons predominantly rely on the Respondent's inability to return the Appellant to Sierra Leone so that he would remain in "limbo" in the UK. She found that this would breach the Appellant's right to respect for his private life.

5. The Respondent appeals on two grounds as follows:
   Ground one: the Judge failed to give adequate reasons for finding that Section 117C(6) was met. The Respondent challenges in particular the finding that the Appellant is integrated in the UK.
   Ground two: the Judge failed to take into account as a starting point the earlier decision of Judge Hanbury (per Devaseelan guidance) and failed to take into account case-law regarding the threshold to be met under Section 117C(6).

6. Permission to appeal was refused by First-tier Tribunal Judge Loke on 5 July 2022 in the following terms:

> "1. The grounds can be dealt with as follows:
> a) At [29-32] that the Judge gave reasons for finding that the Appellant had integrated into life in the UK, notwithstanding the arguments regarding the Appellant's criminal lifestyle which he took into account when reaching his conclusion. Para [30] plainly does not indicate the Judge

applied the incorrect burden of proof, the Judge was summarising the Respondent's submissions. It is clear from the Judge's reasoning that he placed the burden of proof on the Appellant.

b) It was open to the Judge to consider the fact that the Home Office had been unable to remove the Appellant, that the Appellant had severe depressive disorder, and the finding he had reformed himself, were all matters which were not before the previous Tribunal and justified departing from that determination."

7. Following renewal to this Tribunal, permission to appeal was granted by Upper Tribunal Judge Macleman on 26 September 2022 in the following terms so far as relevant:

> "..3. The two grounds in this application are headed as inadequacy of reasoning and misdirection of law. Both aim, perhaps not very accurately, to show that there was no adequate basis for finding what is required by section 117C(6), very compelling circumstances, over and above those described in exceptions 1 and 2; without which, the public interest requires deportation.
> 4. There is arguably no foundation for the finding at [27] that the appellant 'is a reformed character'.
> 5. At [34] the FtT noted that the appellant has made a 'stateless application'. No further details appear. At [42] the decision is based partly on saying that he 'finds himself stateless'. That issue, and the status of his application, may not have been adequately resolved.
> 6. While some evidence suggested that the appellant might not automatically hold (or even be entitled to acquire) citizenship of Sierra Leone, despite the finding at [36] it is not clear that he has done all that he might do in that direction.
> 7. There is brief reference at [45] to the appellant visiting Sierra Leone, which arguably called for explanation of the documentation used.
> 8. As matters stand, the appellant is a 'foreign criminal'. The grounds raise a debate on which the FtT was entitled to hold, applying section 117C(6), that the public interest was outweighed by the practical difficulty of documenting and deporting him."

8. The Appellant filed a Rule 24 reply dated 10 November 2022 which, inter alia, takes issue with the grant of permission to appeal and seeks to have that set aside. I deal with that as part of the discussion below. Aside that issue, the matter comes before me to decide whether the Decision contains an error of law. If I conclude that it does, I must then decide whether the Decision should be set aside in consequence. If the Decision is set aside, I must then either re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for re-determination.

9. I had before me a core bundle of documents relating to the appeal, the Appellant's bundle and Respondent's bundle ([RB/xx]) before the First-tier Tribunal together with the Appellant's skeleton argument before the First-tier Tribunal. In light of the arguments put forward at the hearing I do not need to refer to the documents other than the Decision, the grant of permission to appeal and the earlier appeal decision which appears at [RB/6-22].

10. Having heard submissions from Mr Wain and Ms Robinson, I indicated that I would reserve my decision and provide that with reasons in writing. I now turn to do that.

DISCUSSION

Challenge to grant of permission to appeal

11. The Appellant takes issue in the Rule 24 response with the grant of permission. He sets out the test for when permission should be granted. The Appellant does not however explain the test for when a permission grant may be set aside nor from where the Tribunal's jurisdiction to do so arises. In any event, for the reasons I outlined at the outset of the error of law hearing, there would be little point in dealing with this as a preliminary issue. If I find there is an error of law, clearly the error is one which was always arguable. If I find there to be no error of law, the Appellant succeeds in any event. On a pragmatic basis, given that both parties attended the hearing, there would be little point in wasting time determining whether permission should have been granted in the first place.

Ground one: Failure to give reasons

12. The Judge found that the Appellant could not meet either of the two exceptions under Section 117C but found for the Appellant on the basis that there are very compelling circumstances over and above those two exceptions.

13. Mr Wain first drew my attention to [27] of the Decision where the Judge described the Appellant as a "reformed character". That did not sit comfortably with what is said at [22] of the Decision about the Appellant's continuing offending. The Judge there finds that the Appellant "continued to commit serious criminal offences despite being aware of the fact that the respondent was considering his deportation order, after the deportation order was made and following his unsuccessful appeal".

14. Ms Robinson sought to explain away this apparent inconsistency on the basis that the Judge is considering the background facts at [22] of the Decision whereas at [27] of the Decision the Judge is making an assessment. It is a little difficult to see any distinction particularly since the Judge at [22] of the Decision expressly makes a finding of fact.

15. However, I have reached the conclusion that there is no inconsistency because at [22] of the Decision the Judge is looking to the past (the time of the previous unsuccessful appeal) whereas at [27] the Judge is assessing the present position.

16. The Respondent's pleaded ground draws attention to the finding at [27] which she says is inadequately reasoned. However, that finding has to be read in the context of the facts of the case. Albeit the Appellant has, as the Judge notes at [22] of the Decision, continued to offend after the unsuccessful appeal in 2015, his last conviction was in September 2020 whereas the appeal hearing was in 2022. That gap in offending is not explained by the Appellant being in custody as his convictions in the period from 2016 onwards did not attract custodial sentences.

17. As the Appellant also points out in the Rule 24 Response, the Judge heard evidence from the Appellant and was clearly impressed by him as a witness. The Judge also heard evidence from a character witness, Mr Knight.

18. It was open to the Judge to find as she did on this issue.

19. Turning then to the Judge's finding that the Appellant is socially and culturally integrated in the UK, that finding is based on reasons set out at [29] to [31] of the Decision. The Judge there points out that the Appellant was born in the UK and has never lived in another country. He was educated here. He had not sought to evade immigration control or indeed deportation. The Appellant's case, as I will come to, is that the Respondent cannot deport him as the Sierra Leonian authorities will not accept him as a national.

20. Those reasons are adequate. The Judge was entitled to reach the conclusion she did for the reasons she gave.

21. The Respondent's pleaded grounds take issue with [30] of the Decision which it is said represents a reversal of the burden of proof. That paragraph simply makes reference to Court of Appeal authority about the impact of criminal offending on integration. The rejection by the Judge of the Respondent's submission that "the appellant's criminal offending is evidence of a lack of integration in British society" cannot on any view be read as a requirement on the Respondent to prove lack of integration. It simply rejects the submission that the criminal offending alone was sufficient to show a lack of integration. As the Appellant points out, the reasons given at [31] of the Decision show that the Judge required the Appellant to show that he was integrated and did not place the burden on the Respondent to prove lack of integration.

22. Paragraph [6] of the pleaded grounds is simply a disagreement with the Judge's finding.

23. The Respondent also submits that the Judge has departed from the findings of the previous Judge on the issue of social and cultural integration. This crosses over with the second ground, and I deal with it below.

24. Finally, the Respondent takes issue with the Judge's reliance on what is said to be "delay" which it is said is blamed on the Respondent. The Respondent submits that this does not amount to a very compelling circumstance.

25. Paragraph [33] of the Decision has to be read in context. The significant factor was not a delay as such but "the respondent's inability to [cannot] (sic) document the appellant and deport him, thus leaving him in limbo" where he will be "unable to work, study, claim benefits or make any plans for his future".

26. As Ms Robinson submitted, and I accept, the Respondent's inability to deport the Appellant to date is a factor which does not fall within either of the two stated exceptions to deportation. As such, it was clearly a factor on which the Judge was entitled to place reliance when considering the very compelling circumstances over and above the two exceptions.

27. The Judge does not "blame" the Respondent for the delay. At [34] to [43] of the Decision, the Judge sets out the evidence about the inability to deport. The only "blame" which the Judge places on the Respondent is a failure to progress the statelessness application which was pending at the time ([34]) and/or a failure to deal with this issue in the decision under appeal ([35]).

28. Whilst not conceding the point, Ms Robinson did accept that it may not have been open to the Judge to make the finding she did at [42] of the Decision that the Appellant "finds himself stateless". That places the Judge in the position of primary decision-maker in relation to that issue. However, irrespective of that potential error, Ms Robinson submits, and I accept that the Judge was entitled to have regard to all the evidence about the Appellant's attempts to obtain documents from the Sierra Leonian authorities and the Respondent's failed attempts to obtain documents to deport him to Sierra Leone. That evidence was pertinent in the way the Judge explained to the impact of the Respondent's decision on the Appellant's private life.

29. Mr Wain drew my attention to the Court of Appeal's judgment in RA (Iraq) v Secretary of State for the Home Department [2019] EWCA Civ 850 ("RA"). He submitted that the Judge had not approached the issue of "limbo" in accordance with the guidance there set out.

30. There is nothing to suggest that the Judge was taken to that authority. It is not mentioned in the pleaded grounds. I have however considered whether the Judge's approach is consistent with what is there said. I am satisfied that it is.

31. First, in looking at whether the "limbo" is prospective or actual, it is clear that this case falls within the latter category. The Appellant has a deportation order against him. The Judge observed that he is and would be unable to work etc at [33] of the Decision. The Judge noted at [42] of

the Decision that the Appellant "is therefore left in limbo" (my emphasis) because the Respondent has refused to revoke the deportation order.

32. The Judge considered, in line with the second heading of the guidance, whether there was any prospect of deportation now or in the foreseeable future. She set out the evidence in that regard at [34] to [38] of the Decision. She also had regard to evidence from a country expert as to the Appellant's ability to obtain Sierra Leonian citizenship. Whilst the Judge may have gone too far in finding that the Appellant is stateless, she has clearly found at [42] of the Decision that the Appellant "cannot be deported to Sierra Leone and does not have, and will not be able to obtain citizenship for that country".

33. Under the third heading, the Judge on two occasions ([33] and [42]) makes findings about the impact of the inability to deport on the Appellant's private life. The Judge has not ignored the public interest as was submitted. The Decision read as a whole considers this also in the context of the Appellant's criminal offending. Further, since the Judge reaches her conclusion based on Section 117C(6), she was clearly obliged to and has conducted a balancing assessment between the impact on the Appellant and the public interest in relation to his criminal offending.

34. In substance, therefore, the Judge has followed the Court of Appeal's guidance as set out in RA.

Ground two: Material misdirection of law

35. The Respondent submits that there has been no material change of circumstances since the earlier appeal decision of First-tier Tribunal Judge Hanbury. Mr Wain asserted that the Judge has failed to follow the Devaseelan guidance.

36. As Ms Robinson pointed out, the Judge at [19] of the Decision has reminded herself of the principle in Devaseelan. As the Judge correctly identifies, however, she may depart from the earlier Judge's conclusions on further evidence.

37. As noted above, one of the areas where it is said that the Judge ought not to have departed from the earlier decision is in relation to the Appellant's social and cultural integration. It is said that there has been no change of circumstances in that regard.

38. The first point to be made in this regard is that Judge Hanbury himself noted attempts to reform made by the Appellant immediately before the hearing in the first appeal. At [58] of that decision ([RB/21]), Judge Hanbury found that "[m]ore recently …the appellant has attempted to play a constructive role in society and with his children but he has no idea how he will provide a constructive role model for his children let alone play a useful in society".

39. The second point is that Judge Hanbury does not consider social and cultural integration separately from the other elements of the first exception. At [60] of the earlier decision, Judge Hanbury says this:

> "I take full account of the appellant's long residence in the UK, the strength of his connections here, but also his personal history, character, conduct and lack of employment or attempt to address the issues he faces. The appellant is not in any form of settled relationship with anybody and his previous criminal record and future prospects of offending justify the deportation order. In addition, I am not satisfied the appellant's family have severed all links with Sierra Leone. They have cultural links there and there may even be relatives to whom they could turn, although the appellant and his witnesses were less than forthcoming about that."

40. Whilst I accept that this does in substance amount to a finding that the Appellant is not socially and culturally integrated when looked at in the round, the finding is not as categoric as the Respondent suggests.

41. Finally, as Miss Robinson pointed out, the findings made by Judge Gibbs in this regard are based on her hearing evidence from the Appellant and Mr Knight. Whilst many of the factors referred to in the positive conclusion at [31] of the Decision are based on the Appellant's past history, they also include forward looking factors. As Judge Gibbs summarised at [31] of the Decision "in terms of culture, education, and outlook the appellant is completely British". That might not have been the conclusion that every Judge would have reached on the evidence, but it was one open to this Judge having heard and considered all the evidence.

42. That brings me on to Mr Wain's submission that the Judge also erred by failing to have regard to the case of Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813. Whilst the Judge did not make an express reference to that case, when looking at whether the Appellant would be able to integrate in Sierra Leone, the Judge refers at [9] of the Decision to the need for there to be "very significant barriers" to integration. Having found at [31] of the Decision that the Appellant is to all intents and purposes British, she sets out at [32] what the factors are which would prevent integration in Sierra Leone. She says that this "will be particularly difficult for a person of the appellant's age, who has never lived in the country". She further finds that the Appellant's "mental health problems …will further impact his ability to integrate". In substance, therefore, there is no error in the application of the relevant test and no misdirection.

43. The Respondent's pleaded ground also submits that "the delay in deportation does not amount to a favour weighing in the appellant's favour". Reliance is placed on the case of Reid v Secretary of State for the Home Department [2021] EWCA Civ 1158 ("Reid").

44. The first point to make is that, as with RA, neither party made reference to the judgment in Reid before the First-tier Tribunal Judge. It was not obviously relevant as the passage cited in the Respondent's grounds is a makeweight for what was otherwise a case predominantly concerning the appellant's relationship with his children and not one based on his private life. Moreover, the point for which the judgment is cited is a very different one. The Court of Appeal in Reid was speaking of inaction by the Respondent and not inability to deport. This is a very different case. I have already dealt with the case of RA, which is closer to this case but explained why the Judge in substance directed herself in accordance with the guidance there given.

45. Finally, the Respondent submits in her pleaded grounds that "the FTTJ has failed to have regard to the relevant case law pertaining to very compelling circumstances over and above the exceptions set out at s117C of the NIAA".

46. This point is without any merit. The Judge referred at [20] of the Decision to more recent authority in relation to deportation principles than that cited in the grounds (HA and RA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176). That Court of Appeal judgment has since been upheld by the Supreme Court.

47. The Judge applied that test in substance. She recorded at [23] of the Decision that the public interest in deportation "is strong". Although she referred to the Section 117C(6) test as "Exception 3", she correctly records at [28] of the Decision that the test is "whether there are sufficiently compelling circumstances over and above those described in Exception 1 and 2" but concludes that the Appellant's appeal should succeed "notwithstanding the significant public interest in the appellant's deportation".

48. Thereafter, she records her reasons for reaching that conclusion including that the Appellant is to all intents and purposes British, that return to Sierra Leone "will be particularly difficult for a person of the appellant's age, who has never lived in this country" and what the Judge finds to be "a very significant factor" that the Respondent is unable to document the Appellant for return to Sierra Leone so that he will be left in "limbo" with the implications which this would have for his private life.

49. Not every Judge would have reached the conclusion which this Judge did. The Appellant should also be under no misapprehension about the future risk of deportation should he go on to commit further offences.

50. However, based on the Respondent's pleaded grounds and Mr Wain's oral submissions and for the reasons I have given above, the Respondent has failed to identify any material error of law in the Decision. I therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

CONCLUSION

51. The Decision does not contain material errors of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

NOTICE OF DECISION

The decision of First-tier Tribunal Judge Gibbs dated 10 June 2022 does not contain any material error of law. I therefore uphold the decision with the consequence that the Appellant's appeal remains allowed.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 May 2023