**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/31619/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 26 June 2014** | **On 17 July 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR DANJUMA BALA JUBRIL SHEKARAU**

Respondent

**Representation:**

For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Ms S Bostwick-Barnes, Thompson & Co Solicitors

**DETERMINATION AND REASONS**

1. The respondent (whom I shall refer to as the appellant as he was before the First-tier Tribunal) is a citizen of Nigeria and his date of birth is 9 May 1987.

2. There is a significant background to this case. The appellant originally came to the UK as a visitor on 5 February 1991 when he was aged 3. His visa expired on 31 July 1991 and he has overstayed since then.

3. The appellant has committed a number of previous offences. The most comprehensive list of these was set out in the determination of First–tier Tribunal (hereinafter "the FtT") Judge Norton–Taylor (promulgated on 14 August 2012) at [36]. There are more recent convictions which I shall refer to later, but Judge Norton-Taylor made the following list and I quote:

"a) shop-lifting: 27 April 2004, 8 October 2004, 7 October 2005, 18 August 2009, 4 January 2012 (the last offence having been committed on 9 December 2011. Community Order sentence);
b) Robbery: 24 November 2004, 11 August 2006 (two years in a Young Offenders Institution);
c) Attempted Robbery: 15 March 2004;
d) Burglary: 26 October 2009 (two years three months custodial);
e) Handling stolen goods: 26 October 2009 (nine months custodial);
f) Possession of cannabis: 30 July 2009, 11 August 2009;
g) Failing to surrender: 8 October 2004, 16 June 2005;
h) Breach of a conditional discharge: 20 May 2005;
i) Assault: two on 27 April 2004, 20 May 2005;
j) Using threatening or abusive words or behaviour: 16 June 2005;
k) Obstructing a police officer: 8 October 2004;"

4. On 12 March 2007 the Secretary of State made a decision to make a deportation order against the appellant pursuant to section 3(5) of the 1971 Immigration Act as a consequence of his conviction for robbery at Snaresbrook Crown Court in 2006 when he was sentenced to two years' imprisonment. It then appears that the Secretary of State, in a decision of 5 April 2010, decided not to make a deportation order as a result of representations made by the appellant.

5. On 25 October 2006 the appellant made an application for leave to remain on the basis of long residence pursuant to paragraph 276B of the Immigration Rules ( hereinafter "the rules"). His application was refused pursuant to paragraph 276B (ii)(e) of the rules following his criminal conviction for robbery. The appellant appealed against the decision and his appeal was dismissed on 31 December 2008.

6. In the Secretary of States' bundle that was before the FtT, there is a letter from the Secretary of State dated 18 March 2010 which is addressed for the attention of the governor of the prison (where the appellant was at that time serving a sentence). It appears from this letter that the Secretary of State had decided that the appellant is liable to deportation, pursuant to section 32(5) of the UK Borders Act 2007 (hereinafter "the 2007 Act") as a result of his conviction on 26 October 2009 at Inner

London Crown Court for burglary and handling stolen goods. There is no reason to believe that a deportation order was ever made against the appellant as a result of this.

7. The appellant made an application on 6 March 2009 for leave to remain pursuant to paragraph 317 of the rules. This was refused by the Secretary of State in a decision of 7 February 2012 under paragraphs 317 and paragraph 322(5) of the rules, in the light of the appellant's character and criminal record. It was noted that since 2007 the appellant had been convicted of further offences. The application was also considered and refused under Article 8 of the 1950 Convention on Human Rights.

8. The appellant appealed against this decision of 7 February 2012 and his appeal was allowed by Judge of the FtT Norton-Taylor, in a decision that was promulgated on 14 August 2012 following a hearing on 2 August 2012. The appeal was allowed by a "relatively narrow margin." The appellant was not granted leave in accordance with the decision of the FtT. Instead the Secretary of State issued another decision of 9 July 2013 refusing the application under Appendix FM and paragraph 276ADE of the rules because the appellant had committed further offences since the determination of Judge Norton-Taylor. On 14 September 2012 the appellant was convicted of possessing cannabis (on 31 August 2012) and on 5 March 2013 he was convicted of possessing cannabis and criminal damage (on 30 September 2012). He received financial penalties for all these offences.

9. Paragraph 276ADE of the rules contains the requirements to be met by an applicant for leave to remain on grounds of private life in the UK and there are a number of requirements. Paragraph 276ADE (i) of the rules requires that the applicant does not fall for refusal under any of the grounds in Section S-LTR.1.2. to S-LTR.2.3. and S-LTR.3.1. in Appendix FM. The position of the Secretary of State is that the appellant engages S-LTR.1.4, S-.LTR.1.5. and S-LTR.1.6.

10. S-LTR.1.4. reads as follows:

> "The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for less than four years but at least twelve months."

11. S-LTR.1.5. reads as follows:

> "The presence of the applicant in the UK is not conducive to the public good because in the view of the Secretary of State their

offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law."

12. S-LTR.1.6. reads as follows:

> "The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

13. The appellant appealed against the decision of 9 July 2013 (and the removal decision of 10 July 2013) and his appeal was allowed by Judge of the FtT Aziz under Article 8 Article 8 of the 1950 Convention on Human Rights in a decision dated 4 April 2014 following a hearing on 19 March 2014. The Secretary of State sought leave to appeal and this was granted in a decision of 14 May 2014 by Judge of the FtT Grant-Hutchison. Thus the matter came before me.

**The Hearing Before Judge Aziz**

14. The appellant's evidence was that in relation to the cannabis offence this had taken place on 31 August 2012 and he was on bail at the time of the hearing before Judge Norton-Taylor. He accepted all convictions. His evidence was that he had been living with his girlfriend for three to four years and that he had not committed any further offences (since September 2013). In relation to the cannabis offences, he had been smoking cannabis in a social context.

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15. The FtT heard evidence from the appellant's mother, Dr Rose Shekarau. Her evidence was that she and her other children had made applications for indefinite leave to remain in the 1990s and she did not know why the appellant's application was not considered as part of the joint application. All the family members, save for the appellant were granted ILR. Her son's relationship with his girlfriend is strong and they hope to marry one day. The appellant had been seriously assaulted as a child by his adopted brothers.

16. Judge Aziz found that the appellant's mother was an impressive witness. He found that the appellant showed a level of maturity and recognition of wrongdoing at the hearing before him. He found that the appellant had failed to fully appreciate the decision of Judge Norton-Taylor, but Judge Aziz was satisfied that he now understands the decision and that he realises the impact that his actions have on other members of his family.

He found that the appellant had a troubled past and his lack of status may provide an explanation for his behaviour. Judge Aziz was persuaded that the appellant fully realises the predicament he is in and that he

showed contrition for his past behaviour and a real desire to better himself through work or studies.

17. At [76], [77] and [78] the Judge made the following findings:

> "76. Whilst I fully take into account all of the concerns raised by Mr Lobo and find that the additional offences have caused a further narrowing of the margins, I am not quite persuaded that the commission of these particular offences has resulted in the pendulum swinging the other way. On all of the evidence before me, I find that by an even narrower margin, that the appellant's private life outweighs the public interest.
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> 77. However, the appellant needs to understand that he is in the 'last chance saloon' and that if he were to appear before the Tribunal again in similar circumstances, he may find it very difficult to persuade a Tribunal (for a third time) that his awful criminal record outweighs the public interest."
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> 78. Although I do not in any way wish to condone the appellant's actions, I note that the respondent has sought to delay issuing the appellant with some sort of leave regularising his immigration status. This is far from satisfactory. One of the main reasons why the appellant's 'private life' argument is so strong is because of the respondent's decision not to take deportation action against him at a much earlier stage in his life. At the same time they have not sought to regularise his stay and left him in 'limbo'. This cannot continue. The appellant's appeal has been allowed and I direct that the respondent grant him leave in line with the findings of this Tribunal."

**The Grounds Seeking Leave to Appeal and Oral Submissions**

18. The grounds of appeal argue that the FtT failed to consider whether removal is proportionate to the legitimate aim in accordance with Razgar, R ( on the application of) v SSHD [2004] UKHL 27. It failed to consider whether the appellant had addressed his drug habit. The decision was contrary to the guidance in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) and Nagre, R (on the application of) v SSHD [2013] EWHC 720.

19. It is argued that the FtT failed to provide adequate reasons why the appellant's circumstances are compelling or exceptional. The appellant is old enough to live independently in Nigeria. The Judge did not properly take into consideration the appellant's lack of credibility. The Judge

allowed the appeal because of the delay in processing the application and did not address the delay in the context of EB (Kosovo) [2008] UKHL 41.

20. I heard oral submissions from both Mr Whitwell and Ms Bostwick-Barnes. Mr Whitwell expanded on the grounds seeking leave to appeal. Mr Whitwell accepted that there was some difficulty with the grounds because it is likely that ta deportation order would not be lawful because it would be contrary to the Secretary of States' own rules. He also indicated that the Secretary of State had not appealed the decision of Judge Norton-Taylor. He argued that it was not clear what effect the Judge Aziz found the latest offences had on the proportionality assessment. The assessment under Razgar was flawed. In relation to the delay Mr Whitwell argued that the offences had only occurred sixteen days after Judge Norton-Taylor's determination had been promulgated. Ms Bostwick-Barnes relied on the Rule 24 response.

## Conclusions

21. The FtT allowed the appeal in a determination prepared by Judge Norton-Taylor. There was no appeal against this decision, but the appellant was not granted leave in accordance with it as he should have been. Instead the Secretary of State issued another decision. The second decision was produced eleven months after the determination of Judge Norton-Taylor was promulgated. The refusal letter of 9 July 2013 invoked paragraph 276ADE of the rules. There is also consideration of Article 8 outside the rules, but the decision maker decided that there no compelling or compassionate circumstances.

22. The grounds argue that the Judge erred because he did not consider the appeal in the context of Gulshan and that the Judge's proportionality balancing exercise was flawed for a number of reasons, the first being that he did not attach weight to the legitimate aim.

23. The application was made on 6 March 2009 and the decision was made on 13 July 2013. Whether or not the decision maker can rely on paragraph 276ADE of the rules and Appendix FM was not an issue raised before me. There is some tension on this issue between the Court of Appeal decisions of Edgehill [2014] EWCA Civ 402 and Haleemudeen [2014] EWCA Civ 558**.** I will adopt the approach of the Court of Appeal in the latter case.

24. Judge Aziz did not have regard to the rules and misdirected himself. In my view that was a material error of law. I set aside the decision under section 12 (2) (a) of the Tribunals, Courts and Enforcement Act 2007 and remake it pursuant to section 12 (2) (b) (ii). Both parties agreed that I could remake the decision on the evidence before the FtT and that there would be no need for a re-hearing.

25. The Secretary of State has deemed that the presence of the appellant is not conducive to the public good for various reasons. However, there has been no deportation decision. The most recent offences committed by the appellant, since his appeal was allowed by Judge Norton-Taylor, would not give rise to an automatic deportation under section 32 of the 2007 Act. However, as a result of his previous convictions the appellant is a foreign criminal as defined by the 2007 Act and as such his deportation would be conducive to the public good (whether or not such an order has been made). Thus the appellant does not meet the requirements of paragraph 267ADE of the rules.

26. The issue is whether or not there are arguably good grounds for granting leave outside the rules. The Court of Appeal found in MF (Nigeria) v SSHD EWCA Civ 1192 that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by Strasbourg jurisprudence. This is required to be carried out in cases of deportation where paragraph 399 or 399A of the rules do not apply. However, where these paragraphs apply the Secretary of State cannot deport a foreign criminal (notwithstanding that deportation is conducive to the public good). Should the Secretary of State make a deportation order against the appellant (under the 2007 Act or by the exercise of discretion) instead of a removal decision, having decided that the appellant is a persistent offender who shows a particular disregard for the law (paragraph 398 (c) of the rules), she would then have to consider whether paragraph 399 or 399A apply. It is likely, in my view, that 399A (a) would apply. I am confident about this because it is a fact that the appellant has lived in the UK in excess of 20 years. In addition the Secretary of State accepts that the appellant has no ties (including social, cultural or family) with Nigeria in the context of 276ADE (vi) of the rules. In these circumstances, in my view, if this was a case involving a decision to deport this appellant, his appeal would succeed under paragraph 399A (a) of the rules and there would be no need for the Tribunal to consider exceptional circumstances.

27. Returning now to the decision which is the subject of this appeal and taking into account the above, there must be arguable grounds for granting leave outside the rules in accordance with the guidance in Gulshan. It supports this finding that the appellant has been in the UK since the age of three. The public interest in favour of deportation or removal may be stronger or weaker and the more pressing the public interest in removal or deportation the stronger must be the claim under Article 8 if it is to prevail. The legitimate aim in this case is the prevention of crime and disorder. Here the appellant has no right to be here and so the economic well-being of the country is also engaged. The fact is that the appellant is a foreign criminal and his removal is conducive to the public good. This is a significant factor in the favour of the Secretary of State. However, in this case there are significant factors is favour of the

appellant which tip the balance of the scales in his favour. There are exceptional and compelling circumstances and the decision to remove the appellant is not proportionate to the legitimate aim. The reasons for this conclusion can be summarised as follows:

a) In accordance with N (Kenya) [2004] EWCA Civ 1094, I have attached weight to the public indignation at the appellant's conduct and the deterrence both of which contribute to the legitimate aim, but the interference has to be proportionate. The appellant has been a persistent offender but Judge Aziz accepted that he had shown contrition and a real desire to better himself. He accepted the evidence of the appellant and his mother and there is no coherent challenge to these findings. He accepted his evidence in relation to possession of cannabis namely that it arose in a social context. Judge Aziz made favourable findings about the appellant's intentions and there is no reason for me to go behind those findings.

b) The appellant's appeal (against a removal decision) was allowed under Article 8 by Judge Norton- Taylor. There was no appeal by the Secretary of State against this. The further offences committed by the appellant, which gave rise to the decision under appeal, date back to August 2012 (according to the appellant) or September 2012 and they are relatively minor in nature, given that they were all dealt with by way of financial penalties.

c) Whilst the removal of the appellant is conducive to the public good and he cannot satisfy the rules, there has been no attempt to deport him as a result of the recent offences. The Secretary of State is aware that she would face a significant hurdle. A deportation order, in my view, would be contrary to the Secretary of States' own rules. There has been no decision pursuant to section 32 of the 2007 or any other legislative source which may add force to the pressing social need. The necessity (of removal) is weakened by the fact that the Secretary of State has failed to act upon her intention to deport the appellant on two previous occasions (before the new rules came into play). If one applied the Secretary of States' own rules to a hypothetical decision to deport the appellant, the decision would not be proportionate to the legitimate aim. I accept that the consequences of removal for an appellant are less severe than deportation, but I do not accept that in this case this would result in a disproportionate decision becoming proportionate. There may be an irrationality argument, but this was not pursued before me or the FtT.

d) Proportionality and exceptionality must be considered in the context of Boultif v Switzerland (no 54273/00) [2001] ECHR 479 which was adapted and augmented in subsequent judgments in Maslov v

Austria no 1638/03 [2008] ECHR 546. When considering Maslov, it weighs heavily in favour of the appellant that he has been here since the age of three and he does not have ties with Nigeria. The appellant has overstayed for a considerable time, but he was a very young child when he came here and it appears that for one reason or another he was not considered for ILR along with other members of his family who were subsequently granted leave. In this case very serious reasons would be required to justify expulsion. The appellant has been convicted of a number of offences some of which are very serious (robbery and burglary) and this is reflected by custodial sentences. There is a pattern of persistent offending albeit some of the more recent offences are less serious. However, the most serious offence of robbery was committed in 2004 when the appellant was a youth. _

**The Decision**

28. The appeal is allowed under Article 8 of the 1950 Convention on Human Rights.

Signed Joanna McWilliam Date 15 July 2014

Deputy Upper Tribunal Judge McWilliam