Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00077/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 24th November 2015	**On 2nd December 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SEKOVEN SINU LEKUTU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Ndubuisi, of Drummond Miller, Solicitors
For the Respondent: Mrs S Saddiq, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Fiji, born on 17th April 1980. He served in the British Army from January 2000 until 2nd December 2011. He applied on 2nd December 2011 for indefinite leave to remain as a former member of HM Forces but that was refused because of two unspent convictions. His appeal against that refusal was allowed. On 6th September 2012, he was granted discretionary leave for three years.

2. On 4th September 2008, the appellant was convicted of assault to injury at Edinburgh Sheriff Court and fined £300. On 28th April 2011, he was convicted of battery at an army summary hearing at Inverness and given 30 days' detention. On 17th

November 2014, he was convicted at Edinburgh Sheriff Court of assault to injury and robbery with a racist aggravator. He was sentenced to twelve months' imprisonment.

3. The respondent made a deportation order against the appellant as a foreign criminal, and refused his human rights claim. Reasons are explained in a notice dated and served on 29th April 2015. The respondent considered that the public interest required deportation in terms of paragraph 398 of the Immigration Rules, and the private life exception contained in paragraph 399A was not met. As the exceptions to deportation did not apply, consideration was given to whether there were "very compelling circumstances" such that he should not be deported. The appellant had made representations based on having family members in the UK (as he does, although his wife and son live in Fiji). He had also represented that he was experiencing significant psychological and mental health difficulties arising from his time in the army, but he produced only an e-mail from Jason Wallace (a social worker) of Veterans First Point/NHS which was not a formal diagnosis. The social work report prepared for the court said that the appellant described himself as being in good physical and mental health. Although the sources suggested that he might have an alcohol problem, counselling and support groups were available in Fiji. Nothing was found to outweigh the significant public interest in deportation.

4. The appellant appealed to the First-tier Tribunal. In relation to the human rights aspect his grounds were:

> "Decision is incompatible with section 6 Human Rights Act 1998. The appellant has established significant private life in the UK. Has served in HM Forces for over eleven years. There are significant obstacles to return to Fiji. Suffering from psychological problems with time in the army."

5. Under the heading "New Matters", the appellant said:

> "Decision will be incompatible with paragraph 399 of the Immigration Rules."

6. First-tier Tribunal Judge Wallace dismissed the appellant's appeal by a determination promulgated on 3rd September 2015.

7. The appellant appeals to the Upper Tribunal on the following grounds:

> "1. FTJ erred in law in expressly excluding to consider relevant evidence and consideration and assessing whether the appellant meets the terms of Immigration Rules and paragraph 398 particularly as it relates to whether there are compelling circumstances.
>
> 2. ... At paragraph 34 ... FTJ stated:
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> > "All the witnesses ... came across as being very genuine and none of them tried to deny ... the appellant's responsibility for his actions. However, the task before me is to consider the facts ... as they pertained to the deportation order. I cannot look to the historical circumstances."

3. In light of the above conclusion, FTT ... expressly failed to take into account the consultant psychiatric report; appellant's long military record with the British Army which formed the most important evidence ... addressing the question of ... compelling circumstances. The psychiatric report sets out in detail that the appellant is suffering from post-traumatic stress disorder arising from experiences in the British Army for twelve years which required his engagement in conflict zones (Iraq four tours, Afghanistan, Northern Ireland, Kuwait etc). The report ... indicated that upon discharge the appellant was not provided with relevant psychiatric intervention by the army who have since changed their policy ... Further evidence was provided by Mr Jason Wallace ... FTT failed to take these into account or indicate what weight if any was accorded ...

4. Significantly, the conclusion at paragraphs 38 and 29 did not take into account the evidence in the psychiatric report and the witnesses ...

5. The FTJ further failed to consider paragraph 398 of the Rules which is intended to recognise circumstances that are sufficiently compelling to outweigh the public interest but which do not fall within paragraphs 399 and 399A ... In *SSHD v AJ* EWCA Civ 1638 paragraph 46 the Court of Appeal stated:

> "In my view the Upper Tribunal should have approached the assessment of the claim under Article 8 by application of the new Rules and in particular (since the appellant could not bring himself within paragraphs 399 and 399A) by asking itself whether there were very compelling reasons, within the exceptional circumstances rubrics and paragraphs 398, to outweigh the strong public interest in deportation ..."

... see also paragraphs 25, 28 and 29 of *Chege* [2015] UKUT 00165 which was before the FTT ...

6. The FTJ's finding at paragraph 38 of the appellant cannot be seen to have socially and culturally integrated into life in the UK is significantly flawed in failing to take into account the significant period that the appellant has spent in the UK."

8. In a Rule 24 response to the grant of permission the respondent argued:

> "... The judge ... effectively dealt with the exceptions to deportation ... in paragraphs 399 and 399A ... there are *prime facia* no compelling circumstances over and above these paragraphs by means of which the appellant could succeed. The failure to deal with the content of paragraph 398 is not in the circumstances of the instant case a material error of law."

9. Mr Ndubuisi submitted that the grounds made two fundamental points. The eventual conclusion at paragraph 42 is reached on the basis that paragraph 399A of the Rules was not met, it having been accepted that the appellant did not fall within the exception in paragraph 399. That overlooked paragraph 398, which required the judge to consider whether nevertheless the public interest was outweighed by "very compelling circumstances over and above those described in paragraphs 399 and 399A". Those circumstances were the appellant's military history, resulting in PTSD. The second fundamental error was that the judge expressly excluded those circumstances. That was what she meant by the last sentence of paragraph 34. Once the appellant's criminal offending was put into context of his military history and PTSD, it could be seen that the judge had gone wrong.

10. I enquired what evidence was put before the First-tier Tribunal about the likelihood of treatment and rehabilitation if the appellant remained in the UK. Mr Ndubuisi said that this was contained in the psychiatric report. I also asked what information there had been about facilities in Fiji. Mr Ndubuisi said that no such information had been before the First-tier Tribunal. He said that "arguably at least" the obligation was on the UK government through the Ministry of Defence to provide the appellant with such facilities as he might require for his recovery, and the evidence had suggested that his case would be followed up if he remained in the UK.

11. (It emerged at this point of the submissions that the appellant has recently been removed to Fiji. That of course has no bearing on whether there has been error of law by the First-tier Tribunal.)

12. Finally, Mr Ndubuisi submitted that the First-tier Tribunal determination should be set aside and a further hearing fixed (whether in the FtT or in the UT, he did not say) for evidence to be led with a view to making a fresh decision. Mr Ndubuisi accepted that there has been no application to lead any further evidence, but suggested that the opportunity should be given to provide information on the availability of psychiatric treatment in Fiji.

13. Mrs Saddiq submitted that the judge took into account all relevant evidence. She referred to the psychiatric report by Dr Alex Quinn at paragraph 21. She mentioned the e-mail correspondence with the support worker, Mr Wallace, at paragraph 19. Although she had not explicitly set out the further test of very compelling reasons going beyond the exceptional circumstances covered by the Rules, that was a very high test indeed. The appellant's wife and son live in Fiji. Although he has not returned there since he left the army, that is where he used to spend his leave. There is no doubt a public interest in providing care for discharged soldiers who have problems arriving from their service, but the appellant produced no evidence of any policy of the Ministry of Defence of which he should have been given the benefit. There was little evidence that he would take advantage of facilities available to him in the UK, or to explain why he had not done so while here, and no evidence that he might not be able to obtain appropriate psychiatric assistance in Fiji. It was implicit in the determination that the same conclusion would have been reached even if the issue of very compelling reasons had been specifically addressed, so any error was not material. Alternatively, if the decision did have to be re-made, that should be carried out on the evidence which the appellant had chosen to produce. Any case based on inadequacy of psychiatric services in Fiji should have been investigated long before now.

14. Mr Ndubuisi in reply said that the judge might have referred to the evidence, but that was not the same as assessing it. The psychiatric evidence was left out of the eventual conclusions. This was a very unusual case which might succeed on the basis of private life in the UK, even although the appellant's closest family life was based in Fiji. The test of very compelling reasons was a high one, but it was not impossible. He reiterated that there was a public interest in seeing that the Ministry

of Defence faithfully discharged its duties to ex-servicemen, and that a further hearing should be fixed at which additional evidence might be led.

15. I reserved my determination.

16. The appellant's case has taken a long time to crystallise. His grounds of appeal to the First-tier Tribunal did not recognise that to succeed he would have to show very compelling circumstances in terms of paragraph 398, over and above those going to family life in paragraph 399 and those going to private life in 399A of the Rules. The ultimate hurdle should have been obvious to his representatives from the start. It emerges very clearly from the structure of the respondent's decision.

17. The grounds show nothing wrong with the judge's finding that the appellant is not socially and culturally integrated in the UK. It would be idle to suppose that there are any obstacles to his integration, or reintegration, into Fiji. The grounds of appeal to the First-tier Tribunal in respect of significant obstacles to return to Fiji were far-fetched.

18. It is not clear to me what the judge meant by saying that she could not look to the historical circumstances. However, I do not think that she thereby excluded from her assessment anything relevant which she was invited to consider.

19. Item 9 at pages 31 to 34 of the appellant's inventory of productions in the First-tier Tribunal is a report by Dr Alex Quinn, consultant psychiatrist of Veterans First Point, NHS Lothian, addressed to the medical centre at HM Prison Edinburgh. The author considers that the appellant meets the criteria for combat related PTSD. He notes that the army has changed its process for dealing with such traumatised individuals since 2008 and wonders if the appellant might have been picked up if current process had applied. The author says:

> "I find it somewhat uncomfortable that we are considering detaining this man for deportation after close to twelve years of military service ... I would be happy to review him in the community should he be released."

20. I note that the judge recorded at paragraph 12 of the determination that the appellant said he was scared of the trauma his return to Fiji might cause to his wife and child, and that he believed that after proper counselling he would be in a good emotional and psychological state to have a relationship with his wife and son. I also note that at paragraph 20, evidence is recorded from Mr Wallace that the appellant had said he would engage fully with alcoholic services within the prison system.

21. That was the height of the evidence on which the appellant might have made his case of very compelling circumstances. It is a high target, although, as Mr Ndubuisi observed, it cannot be an impossible one. The case has a sympathetic aspect in the underlying suspicion that the appellant may have been let down by the public authorities; but it is no more than a suspicion, and there is very little to show that the appropriate reparation might be for the appellant to remain in (or be returned to) the UK.

22. A case is perhaps conceivable along the lines of (a) a public failure to diagnose and treat the appellant at the right time; (b) facilities now available for effective treatment here; (c) his conscientious interest in taking advantage of such treatment; and (d) absence of facilities for effective treatment in Fiji. However, such a case was barely outlined either in terms of the legal framework or on the evidence in the First-tier Tribunal.

23. I am not inclined to find material error where the case was not developed to a viable point in the First-tier Tribunal; and it is plain that on such evidence as there was, the judge would have come to the same conclusion, even if the test in paragraph 398 had been squarely addressed before her.

24. The determination of the First-tier Tribunal shall stand.

25. No anonymity order has been requested or made.

Upper Tribunal Judge Macleman

25 November 2015