Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA020262014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Decision & Reasons Promulgated**
On 4th May 2016	**On 9th June 2016**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Miss Johnstone, Senior Presenting Officer
For the Respondent: Mr A in person

DECISION AND REASONS

1. The Secretary of State, appeals with permission, the decision of the First-tier Tribunal, who in a determination promulgated on 9th November 2015

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allowed the Appellant's appeal against the decision of the Respondent made on 2nd October 2014 to make a deportation order against him.

2. I make an anonymity order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. Whilst the Secretary of State brings this appeal, I intend to refer to the parties as they were before the First-tier Tribunal for ease of reference.

4. The background to the appeal is set out in the determination of the First-tier Tribunal at paragraphs [1 to 11]. The Appellant is a citizen of Nigeria who claims to have arrived in the United Kingdom in or about 1982. He was granted indefinite leave to remain on 17th September 1996.

5. Between February 1997 and March 2014, the Appellant received thirteen convictions for 22 offences including damaging property, possession of controlled drugs, resisting or obstruct a constable, attempting to obtain property by deception, burglary, theft on a non-dwelling house, failing to attend for assessments following tests of class A drugs and destroying or damaging property. The full offending history of the Appellant is set out by the First-tier Tribunal at paragraphs [26 to 29].

6. There is no dispute between the parties that the Appellant's criminal history falls into two chronological phases namely that between February 1997 and April 2003 he accrued a number of convictions but between 2003 and June 2013 there was a period of ten years where the Appellant committed no further offences. Between June 2013 and June 2014 the Appellant was convicted of a number of offences including burglary and theft of a non-dwelling, destroying and damaging property, theft and shoplifting and those offences whilst dealt with at the magistrates' court resulted in sentences of imprisonment in 2013 and on 3rd June 2014, a period of eight months' imprisonment.

7. As a result of the offending history of the Appellant, the Secretary of State made a deportation order against him on 2nd October 2014. The reasons for that decision was set out in an accompanying letter dated 14th October 2014. The Secretary of State made a deportation order against him by virtue of Section 5(1) of the Immigration Act 1971 on the basis that the Secretary of State deemed his deportation to be conducive to the public good, within the meaning of Section 3(5) of that Act. The Secretary of State took into account the history of criminal offending that I have referred to and concluded for the reasons given, that deportation would not breach his rights under Article 8 of the ECHR and that his claim did not meet the Immigration Rules under paragraphs 396-399A of the Immigration Rules.

8. The Appellant appealed that decision (on 4th November 2014) on grounds relating to the length of his lawful residence in the UK, relying upon his family life with his partner and children and his private life. He asserted that he had no family to return to in Nigeria and thus removal would be a breach of his rights under Article 8 of the ECHR.

9. The appeal came before the First-tier Tribunal and in a determination promulgated on 9th November 2015 the judge allowed the appeal under the Immigration Rules and in particular paragraph 399(a).

10. The findings of the judge can be summarised as follows. The judge made reference to his criminal history falling into two chronological phases from February 1997 to April 2003 and at [95] referred to the five convictions during that period and that the most serious conviction at that stage, was for obtaining property by deception for which he received a sentence of six months. The judge recorded that there was no evidence as to the circumstances of the convictions but that the Respondent took no action upon them. At [83] he appeared to remain in employment at that time. The judge also recorded at [83] that in 2009/2010 the relationship between the Appellant and his partner broke down and that he went to live with his mother but remained in contact with the children as in their lives and they spent weekends with him and their grandmother. At [83] the judge set out the circumstances of the Appellant’s life at that time, noting that he appeared to have suffered a breakdown which had led to him misusing drugs. This was the background to what the judge described as the second phase of offending which began in 2013. At [83] the judge found that the offences were committed to obtain drugs and that was consistent with the type of crimes that had been committed (theft, burglary and shoplifting). However the deepening concern was reflected in the increased sentences of imprisonment. Thus between 2003 to 2013 the Appellant remained crime free but between June 2013 and June 2014, he had committed a number of offences, the last of which resulted in the period of imprisonment of eight months.

11. In relation to the last offences, the judge had no evidence as to the value of the thefts concerned and as to the circumstances of those offences themselves. However, it was noted that the Secretary of State relied upon the Appellant as a persistent offender and it was the persistence rather than the severity of the offences. At [96] the judge recorded that the circumstances of the crimes were consistent with the Appellant’s account and that the judge accepted his motivation for the offending history.

12. As to the circumstances of the Appellant, the judge rejected his account that he was in a subsisting relationship with his partner. However in relation to his children, the judge found that he had two children one who is over 18 and one who was a minor (both who lived with their mother). The judge found that they had lived together as a family until 2010 and had finally separated in or about 2012. The Appellant had visited and picked them up to go to school but there had been a lessoning of contact between them as a result of having been homeless [see 83x]. The

Appellant's partner had not visited him in prison and she did not attend the court [78] although she had provided a written statement. The judge did not find that he had resumed a relationship with her nor that there was any realistic prospects of a resumption. The judge found that the mother had been the one with responsibility for the children in recent years [87] but accepted the evidence that even after separation, the Appellant had been a constant presence in their lives.

13. The judge identified the question under paragraph 399(a) at [76] and concluded at [86] that despite the separation of the parents, the Appellant's relationship with the children remained significant and of fundamental importance to their lives. The conclusion was that this was not a superficial parental relationship.

14. At [87] the judge made reference to the evidence that D was doing well at school, that his mother had been the one with full parental responsibility for the children during the last three years and that there was no evidence that the Appellant's absence from the family home had any detrimental impact on D.

15. At [97] on balance the judge found the impact on D would be "unduly harsh" that there was a genuine and subsisting relationship and that the judge was –

> "persuaded that upon release the efforts of all involved (including the partner) would be to restore the close relationship between father and son. Clearly this is in the best interests of D, primary consideration. The considerable public interest in his deportation in this case lessoned by the relatively low level nature of offending, and the fact that the motivations for its persistence are now reduced. He is now drug free and there are promises, albeit rather vague, from his family to support him on release."

16. The judge went on to make reference to the lack of any post-release plan but considered that was as a result of the Appellant being unrepresented and that whilst the judge had approached the evidence of the Appellant with some caution, that the judge was persuaded by the evidence that overall the –

> "seriousness of his situation had hit home by the time of the hearing and that both realised the importance of his getting his life back on track and that this would be the 'last chance'".

At paragraph [100], the judge found that the appeal was "finely balanced" and concluded as follows:-

> "My conclusion that this Appellant should be given a second chance has turned on the impact of his deportation on D, when set against the type and seriousness of offending. In doing so I have taken a lenient view of the re-offending, explained as it is in part (although not excused) by circumstances at the time. I conclude that my determination of this appeal is open to me on the evidence, but equally it may be argued that the opposite conclusion is permissible."

17. Thus the judge allowed the appeal under the Immigration Rules under paragraph 399(a).

18. The Secretary of State sought permission to appeal that decision and on 15th December 2015, Upper Tribunal Judge King granted permission.

19. The appeal came before the Upper Tribunal. The Appellant is unrepresented before the Tribunal as he was before the First-tier Tribunal thus the procedure was explained to him and he was given the opportunity to make submissions to the Tribunal, having heard the submissions made on behalf of the Secretary of State. He was able to take notes whilst those submissions were being given and was given the opportunity to ask any questions at any time if he did not understand the procedure being adopted.

20. On behalf of the Secretary of State, the Presenting Officer relied upon the grounds. She submitted that the judge allowed the appeal under paragraph 399(a) of the Rules having found that it would be unduly harsh for the child to remain in the UK without the person who is to be deported. However, she submitted that the judge failed to evaluate why it was unduly harsh for the child to remain in the UK without the Appellant. In this context she referred the Tribunal to paragraph [87] and the evidence therein which she submitted was inconsistent with the conclusions that the judge made that the Appellant's removal would be unduly harsh. In that paragraph, the evidence recorded that the child was doing well at school, that it was his mother who had had full parental responsibility for the children during the past three years and that there was no evidence that the Appellant's absence from the family home had any detrimental impact upon the child. Whilst it was acknowledged he would miss his father and that the effect of a long physical separation may be harsh it had not been shown to be "unduly harsh". Thus she submitted that the judge failed to engage with the relevant threshold as set out in **KMO (Section 117 – unduly harsh) [2015] UKUT 543** at paragraph [26] and that it disclosed "a very high standard" and thus no consideration had been given as to how the Appellant's family life engaged that threshold and overcame the interests in deportation. She submitted in essence the judge had begun the consideration but did not finish the evaluative exercise.

21. In this context also she submitted that the judge demonstrated a flawed approach to this consideration and in particular the public interest. At paragraph [90] of the determination the judge made reference to the public interest being "lessened" when the offences did not represent other than a limited threat to the public at large. In this context, she submitted that the judge failed to take into account the persistent nature of his offending and that it was in the public interest to deport and that the judge had considered this in the wrong way as set out at that paragraph.

22. Furthermore, the judge's conclusion that it was in the child's best interests to "restore" the relationship also served to demonstrate that the judge had not properly considered or evaluated the issue of "it being unduly

harsh" because at the time of the hearing the Appellant was separated from his family and had not lived with them for a number of years. The judge had accepted that he had not reconciled with his partner and that at best the weekends they have spent together was historic (see paragraph [86]). Thus they had not been living as a family and that the function of the balancing exercise was not to "promote" or fortify the interests of the child but to weigh them in the balance (see paragraph 50) of the decision **BL (Jamaica) v SSHD [2016] EWCA Civ 357**.

23. She also relied upon other matters set out in the written grounds including the risk of re-offending and the lack of evidence in this respect.

24. The Appellant gave reasons as to why his partner had not been present at the hearing, namely that she had had an operation on her hand and that she had provided some evidence in her handwritten letter. He said that since the decision that they are reunited. He described his present circumstances in that he was completely drug free and that he had resumed contact with his family members. He also made reference to the up-to-date circumstances of his child and that since the decision had been made there had been difficulties in his behaviour.

25. He reiterated in his submissions that he had lived with his family for fourteen years and that in accordance with the history he had lived as a family until their separation as set out in the determination. He made reference to the judge's findings concerning the circumstances which had led to his offending history in 2013 and that the offences were committed as a result of his addiction to drugs and being homeless and having had no income.

26. He made reference to his relationship with the children as found by the judge at [86] and that his relationship with them was significant and fundamental to their lives. He further submitted that whilst it had been stated that the mother had full parental responsibility, that he also had parental responsibility.

27. The submissions in essence made by the Appellant were that the judge had considered all the relevant issues and that the decision should be upheld.

Decision on error of law:

28. I have given careful consideration to the submissions that I have heard from both the parties and in the light of the determination.

29. The effect of the provisions relating to the deportation of foreign criminals is that by Section 32(4) Parliament had decided that the deportation of foreign criminals is conducive to the public good. By Section 32(5), the Secretary of State is obliged to make a deportation order subject to Section 33. Section 33 identifies a number of exceptions, which if

applicable, have the consequences that sub-Section 32(4) and (5) will not apply.

30. On the present facts, the only exceptional relevant is whether removal would breach his rights under the ECHR.

31. The Immigration Rules reflect the statutory obligation to deport foreign criminals whilst recognising that there may be cases where the making of a deportation order would be incompatible with Article 8 (see Rules 398, 399 or 399A).

32. The correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider whether the Appellant is a foreign criminal as defined by Section 117D(2)(a), (b) or (c). If so, does he fall within paragraphs 399 or 399A of the Immigration Rules and if not, are there compelling circumstances over and beyond those falling within paragraphs 399 or 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors in Section 117B (see decision of **Chege (Section 117D, Article 8; approach) [2015] UKUT 165**.

33. On the facts of the case there is no dispute that the Appellant was a foreign criminal; he was not a British citizen and by reason of his offending history was properly characterised as a "persistent offender" (see determination at [73 and 74]). Thus the issue before the judge was whether he could fall within paragraphs 399 or 399A.

34. There is no dispute that the judge's findings demonstrated that he could not meet the requirements of paragraph 399A (relating to private life). The judge found at [75] and [83] and [84] that he had been lawfully in the UK since he was a child and was settled, having been granted indefinite leave to remain in 1996 and that he had lawfully lived in the UK for most of his life (see 339A(a)). The judge also found at [83] that he was integrated in the UK for the reasons given. However, the judge found that he could not conclude that there were very significant obstacles to his reintegration into the country to which he was to be deported for the reasons given at [84].

35. Thus the issue turned on paragraph 399(a). That section reads as follows:-

> "399 This paragraph applies if paragraph 398(b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British citizen: ...
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported;

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported ...”

36. On the findings of facts made by the judge, paragraph 399(b) did not apply as he did not find that he was in a subsisting relationship with his partner.

37. Insofar as the grounds that the Secretary of State submit that the judge failed to assess whether it would be unduly harsh for the child to live with the Appellant in the country to which he was to be deported, it is plain from reading the determination that as the judge did not accept that the Appellant and his partner were in a subsisting relationship (see [78]) and that they had not lived together since their separation, and that the judge proceeded on the basis that the best interests were for the child to remain with his mother and sibling in the UK [see 85].

38. Furthermore insofar as the grounds also make reference to whether the evidence amounted to “very compelling circumstances” to outweigh the public interest in deportation, this was a case in which the judge allowed the appeal under the Immigration Rules under paragraph 399(a) and therefore the question of compelling circumstances did not arise.

39. The points raised in the grounds and relied upon by the Secretary of State relate to the judge’s consideration of the issue of the public interest and that the judge erred in law when considering the issue of whether the removal of the Appellant would be “unduly harsh”.

40. I have therefore considered those submissions. The judge correctly set out the law at paragraphs [10 to 14] of the decision and when considering the public interest at [88 and 89] made reference to the Immigration Rules as a “complete code”, which properly reflected the jurisprudence set out in **MF (Nigeria) v SSHD [2013] EWCA Civ 119** and the **SSHD v AJ (Angola) [2014] EWCA Civ 1636** at paragraphs [39 to 40].

41. Whilst the judge at [74] identified that the starting point is that the public interest requires his deportation, the judge at paragraph [90] made reference to the decision of **KMO (Section 117 – unduly harsh) Nigeria [2015] UKUT 00543** and in particular paragraph 9 of that judgment. The judge went on to state:-

> “Accordingly in **KMO** the Upper Tribunal held that in that case the First-tier Tribunal had accorded insufficient weight to the considerable fraudulent activity for which the foreign criminal received a single sentence of twenty months, the public interest should be increased, rather than diminished. My interpretation of this is that, conversely, it is open to a judge to conclude that the public interest may in fact be lessoned where the offences in question do not represent other than a limited threat to the public at large and consist in the main of petty offending involving the theft of items of small value from shops.”

42. I find that the paragraph above is inconsistent with the statement of principle set out in Section 117C that the deportation of foreign criminals

is in the public interest and the judge began the assessment having lost sight of the opening statement of principle set out in Section 117(C)(1). In effect by saying that it was diminished offended that principle and the starting point from which to begin.

43. There is also no consideration within the determination of the recent jurisprudence relating to the importance of the public interest. The context to the new Rules is the great weight to be attached to the public interest in the deportation of foreign criminals (see **SS (Nigeria)** and **MF (Nigeria)** as cited and **LC (China) v SSHD [2014] EWCA Civ 1310)**. The cases emphasise not only the great weight to be attached to the public interest in the deportation of foreign criminals and the importance of the policy in that regard given by Parliament under the UK Borders Act 2007 but also that the public interest includes the related questions of public confidence reflecting the protection of the public from re-offending, the issues of deterrence and public revulsion. This is not reflected in the judge's determination at [90] when it is considered only in the context of the offences representing a "limited threat to the public at large".

44. It also fails to take into account the relevance of the persistence of the offending as reflected in the description at paragraph [100] and the "lenient" view of his re-offending. It was not simply by reference to the individual characteristics but by the amount and the duration of the offences and the particular disregard as shown for the law.

45. The judge was not assisted in this case as when considering the offences themselves no evidence had been provided to the Tribunal of the circumstances of the offences, including the burglary offences and the value of the money/items stolen (see [95]) and thus the reference at [90] that offences consisted in the main of "petty offending involving the theft of items of small value from shops" did not necessarily accurately reflect the totality of the offending.

46. As to the risk of re-offending, there was no documentary evidence either to assist the judge in reaching any conclusion as to the likelihood of re-offending (see [83]). However, the judge did not provide reasons as to why, against the background of such persistent offending, that he would not re-offend, as at the time of the decision he was still in custody and this was a material consideration that had not been taken into account when reaching the conclusion at [97] that that was an issue which reduced the public interest.

47. The judge also did not address on what basis or why the separation of the child concerned from his father would be "unduly harsh". The separation of a child may in particular circumstances be harsh, but those circumstances do not approach on the findings of the judge to be "unduly harsh". The evidence set out at [87] was that the child was doing well at school, and that it had been his mother who had had the full responsibility for the children (since separation and whilst the Appellant had been in custody which was during the last three years) and that there was no

evidence that the Appellant's absence from the family home had had any detrimental impact upon the child. Thus the evidence did not identify anything other than that which normally would be the position of a child who was separated from a father with whom he had a close relationship. This is underlined by the fact that the phrase "unduly harsh" anticipates an evaluation being undertaken as it is not just the nature and quality of the relationship because paragraph 339(a) requires there to be a genuine and subsisting relationship before considering whether it would be "unduly harsh".

48. Furthermore, as the Secretary of State submits, the test of "unduly harsh" as set out in **MAB** and referred to in **KMO** at [26] is that it involves more than "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult or challenging consequences and imposes a considerably more elevated or higher threshold." The consequences for an individual will be "harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are "inordinately" or "excessively" harsh taking into account all the circumstances of the individual.

49. Whilst the judge sought to take into account some of those circumstances, for the reasons set out above, the judge erred in law when reaching the overall decision. I therefore set aside the decision of the First-tier Tribunal.

50. I have had to consider whether the decision should be re-made or remit the case to the First-tier Tribunal. In this respect I have considered the submissions made by each of the parties. The Presenting Officer submitted that further fact finding and analysis would be required and therefore the First-tier Tribunal should carry this out.

51. I have also considered the representations made by the Appellant who has stated that the circumstances are such that they have changed since the hearing in October; that he is no longer in custody, he states that he has re-established the relationship with his partner and the children and also makes reference to current material that is relevant to the circumstances of the child concerned which he would seek to rely upon.

52. Furthermore, I note that the judge did not have the advantage of information from the Probation Service or from the police/courts dealing with the circumstances of the offences themselves and that information should be obtained by the Secretary of State. Furthermore, the Appellant to date has been unrepresented and the adjournment would also provide him with time to seek to obtain representation. There is some reference in the determination to assistance given to him by a charity who may be able to provide further assistance to him if approached now.

53. For those reasons, I have reached the conclusion that the decision cannot stand and I therefore set it aside. The evidence given by the Appellant and the witnesses is a matter of record and is set out at paragraphs [45 to 61] and is preserved. The appeal will be remitted to the First-tier Tribunal for

an analysis of the issues and for further findings of fact to be made on any up to date evidence.

Notice of Decision

The decision of the First-tier Tribunal discloses an error of law and is therefore set aside. The decision is remitted to the First-tier Tribunal.

Signed   Date: 31/5/2016

Upper Tribunal Judge Reeds