Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/14047/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 December 2017	**On 30 January 2018**

Before

THE HONOURABLE MR JUSTICE MORRIS
UPPER TRIBUNAL JUDGE SOUTHERN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[O A]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Prosecuting Officer
For the Respondent: Mr Okunowo of Toltops Solicitors

DECISION AND REASONS

1. This is an appeal, brought with permission, by the Secretary of State for the Home Department ("the Secretary of State") against the decision of First-tier Tribunal Judge Miller promulgated on 15 August 2017 (the FTT decision). By the FTT decision, the judge allowed the appeal of [OA] (for convenience, here referred to as "the appellant") against the decisions of the Secretary of State dated 28 April to deport him and to refuse his human rights claim. The FTT Judge allowed the appellant's appeal both under the Immigration Rules and on human rights grounds. The Secretary

of State appeals on grounds that the FTT Judge erred in his assessment of the issues of social and cultural integration in the United Kingdom and of very significant obstacles to integration into the country to which deportation is proposed and further failed to give the required weight to the public interest in view of the seriousness of the appellant's offending.

The Factual Background

2. The appellant is now age 26 and a national of Nigeria. He came to this country in 1994 when he was 3 years old with his mother to join his father who had previously moved to the United Kingdom. Until today's hearing it had not been disputed that he had been lawfully resident in the United Kingdom for most of his life. However that is now in issue and we address that shortly. On 11 January 2013 the appellant was convicted of an offence of attempted robbery and sentenced to a suspended sentence of nine months' imprisonment. On 20 March 2015 he was convicted of robbery and sentenced to a term of two years and nine months' imprisonment. In addition five months of the previous suspended sentence was activated giving a total term of imprisonment of three years and two months. The facts of that offence are referred to in the sentencing remarks of His Honour Judge Saggerson. The victim of the robbery was a vulnerable woman on her own. On the other hand the appellant himself had been subject to bullying which, the sentencing judge found went some way to explaining him committing of the offence. As a consequence on 28 April 2016 the deportation order was made.

3. In making representations in response to that proposed order the appellant raised a claim based on Article 8, but that claim was refused and certified as clearly unfounded. As a consequence of that certification he had only an out of country right of appeal against that decision.

4. On 6 May 2016 the appellant then claimed asylum on the basis of his fear of mistreatment due to his sexuality. By a decision dated 5 December 2016 the Secretary of State refused both the protection claim and the human rights claim. In respect of the asylum claim the Secretary of State certified the claim under Section 72 of the Nationality, Immigration and Asylum Act 2002 and so the asylum claim fell to be refused on that account alone. The Secretary of State went on to explain why, even if it had not been certified, the asylum claim would have been refused. The Secretary of State did not accept the appellant's claim in relation to his sexuality and therefore was not, on that account on risk on return.

5. The Secretary of State went on to refuse the Article 8 claim because the appellant could not meet the requirements of the Rules and the Secretary of State saw nothing that demanded a grant of leave outside the Rules. By paragraph 136 of the decision of 5 December 2016 the previous certification of the human rights claim was withdrawn in the light of the protection claim. The decision of 5 December 2016 therefore gave rise to an in-country right of appeal against both aspects of the decision.

6. The appellant appealed to the First-tier Tribunal and that appeal was allowed by the FTT decision. The Secretary of State appealed to this Tribunal and First-tier Tribunal Judge Ransley granted permission to appeal to the Upper Tribunal on 5 September 2017 arguing that the three grounds of appeal then advanced involved arguable errors of law that might have made a material difference to the outcome of the appeal.

The Relevant Legislation

7. Some of the relevant provisions of the legislation are set out in the FTT decision. In particular we refer to Section 117C of the Nationality, Immigration and Asylum Act 2002 which I do not read out but which is to be treated as incorporated into this judgment. Section 117C(4) sets out something called Exception 1 and Exception 1 applies where three conditions are satisfied cumulatively. First the claimant has been lawfully resident in the United Kingdom for most of his or her life; secondly the claimant is socially and culturally integrated into the United Kingdom; and thirdly there will be significant obstacles to the claimant's integration into the country to which deportation is proposed. Those provisions are mirrored in paragraph 399A of the Immigration Rules. Paragraph A398 of those Rules provide as follows:

> "These Rules apply where:
>
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention."

Paragraph 398 itself says:

> "Where a person claims that their deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention and
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least twelve months;
>
> (c) ... the Secretary of State in assessing that claim will consider whether paragraph 399 or paragraph 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

That means that, under the Immigration Rules, the Secretary of State considers in the first place whether the provisions of 399A as mirrored in Section 117C(4) apply and if they do apply, then the decision will be taken on the basis there set out. But if paragraph 399A does not apply and thus 117C does not apply, then the Secretary of State must consider the matter under the final words of paragraph 398 and must be satisfied that there

are very compelling circumstances over and above the circumstances described in the three conditions which I have just described.

The FTT Decision

8. In a detailed judgment the FTT allowed the appeal on human rights grounds, both under the Rules and under Article 8 outside the Rules. He addressed the first two conditions in Section 117C(4) and also paragraph 399A of the Immigration Rules in paragraph 42 of the decision, finding that the appellant had been lawfully resident in the United Kingdom for most of his life and secondly that he is socially and culturally integrated into the United Kingdom. In paragraph 43 the FTT Judge addressed the third condition, finding that in the circumstances of his case there are very significant obstacles to the appellant's integration into life in Nigeria which outweigh the public interest in deportation. Thus Exception 1 in Section 117C(4) of the 2002 Act applied and the public interest did not require deportation.

9. In his reasons, in paragraph 43 in relation to very significant obstacles, both there and in paragraph 40, the First-tier Tribunal referred to the following factors: the appellant's physical problems which caused him chronic pain; the fact that he would be likely to be picked on in a less sympathetic society as a result, both of his physical problems and his low IQ; his immediate family, all based in the UK, would not be able to offer much in the way of support; there was no evidence of family relatives in Nigeria; it would be very difficult, if not impossible for his mother to visit him in view of his father's medical condition; and finally the absence of the appellant would cause his siblings considerable distress.

10. In the grounds of appeal, upon which permission was granted, the Secretary of State puts forward three grounds. First that in relation to social and cultural integration the FTT Judge failed to give clear reasons as to why the appellant is socially and cultural integrated in the United Kingdom given his prior offending and further the judge failed to give proper or adequate consideration to the judgment of **Bossade [2015] UKUT 415 IAC.** Secondly the FTT Judge's reasons on very significant obstacles to integration are unclear. The factors of back pain, low IQ and his father's condition do not prevent integration in Nigeria. Secondly the FTT Judge's findings of family connections in Nigeria were confused and unclear, particularly since he had found that the appellant's mother had close friends who retained strong links with Nigeria and that the appellant's family had not been as candid as they should have been regarding their own connections with Nigeria. The Secretary of State submitted that the FTT Judge failed to make a clear finding on the assistance of family connections available in Nigeria. Thirdly, it is said that the FTT Judge failed at paragraphs 43 and 44 to give the required weight to the public interest and in particular failed to engage with the seriousness of the offence that involved violence and the length of that sentence.

11. However at today's hearing, the Secretary of State seeks permission to amend the grounds of appeal. The ground sought to be introduced is as follows. "The FTT Judge materially misdirected himself in law in that he failed properly to take into account the fact that the appellant claimed to have arrived in the United Kingdom in 1995 but was not granted any leave until being granted indefinite leave to remain on 20 February 2010 and therefore had remained in the United Kingdom unlawfully until 2010. The FTT Judge therefore failed to consider the first condition in Section 117C(4)."

12. The Secretary of State fairly accepts that in the original grounds of appeal it was conceded that the appellant had satisfied the first condition of Section 117C(4) but contends that that concession was factually inaccurate and cannot stand. Accordingly it is submitted that the FTT decision is vitiated by legal error.

13. In relation to the application to amend, the appellant very fairly, if we may say so, did not seek to adjourn the hearing of this appeal and accepted that, in fact, the facts now put before us by the Secretary of State are the correct facts and that the appellant did not have leave to remain in the UK until February 2010. More generally, going on to the submissions, the appellant submitted that Section 117C(4)(a) should be construed as reading that what is relevant is whether the claimant has been lawfully resident for majority of the Claimant's adult life and in this case this tribunal should not take into account the fact of unlawful residence during the period when the appellant was a child. Secondly the appellant submits effectively that any error of law was not material because the FTT Judge would have allowed the appeal anyway and could have allowed it under Rule 398(c), namely the threshold of "very compelling circumstances". The appellant submits that if you look at the facts of the case as recorded in the decision and you take into account also the current situation concerning the appellant's father's medical condition, the FTT Judge could and would have been satisfied, as we could that this is a case, that there are very compelling circumstances.

Conclusions

14. We address, first, the new ground of appeal. As I have said, we are satisfied that there should be permission to amend the grounds to include this ground. Whilst this is very late in the day no prejudice has been shown by the appellant in allowing the amendment and no adjournment has been sought. As regards the substance of the new ground of appeal we consider that the Secretary of State's contention is well-founded. There is no doubt that the position in relation to the first condition under Section 117C(4) in this case, is subject to considerable confusion, much of which could be said to lie at the door of the Secretary of State. As a matter of fact however it appears that between arriving in about 1994 and 2010 the appellant was not lawfully resident in the United Kingdom. The April 2016 decision letter records at page 2 that the appellant's father applied for indefinite leave to remain under a seven year child concession

and included the appellant in that application. On 5 January 2006 the appellant and his family were found to be ineligible for leave to remain on that basis and on 28 April 2008 the appellant's family completed a legacy questionnaire. At page 4 of the decision the following was stated:

> "You have been lawfully resident in the United Kingdom for all of your life. This is because you claim to have entered the UK in 1995 age 4 and you were remaining here without leave until you were granted ILR on 20 February 2010."

15. Mr Melvyn very fairly accepts that the first of those two sentences contained a typographical error and should read: "You have not been lawfully resident in the United Kingdom for all of your life." It may be that that is where the error became compounded but Mr Okunowo for the appellant does not disagree and it is the second sentence of page 4 of that decision which accurately reflects the factual position, that the appellant was here without leave from the age of 4 until February 2010.

16. As regards the hearing before the First-tier Tribunal Judge, it is not clear how this issue of lawful residence risk was considered. Under paragraph 3 of the FTT decision and the immigration history, there is no reference, one way or the other, to the question of the appellant's immigration status in the United Kingdom. In fact the only reference to this issue is in the FTT Judge's conclusions at paragraph 42 where he states "I accept that he has been lawfully resident in the United Kingdom for most of his life".

17. Despite the oddity of the position and the procedural steps in the case, it does seem to us that, as a matter of fact, the appellant has not been lawfully resident in the United Kingdom for most of his life. We consider that the conclusion to the contrary in paragraph 42 of the FTT decision is one where the judge proceeded on the basis of a factual error and that it is the case that the FTT Judge was provided with inaccurate information on this issue by both parties and certainly was not provided with accurate information. That, in our judgment, amounts to a procedural error on the part of the FTT Judge through no fault of his own and therefore amounts to an error of law. We should add, that we do not accept the submission that Section 117C(4)(a) (or 399A is to be construed as meaning for most of the claimant's adult life as opposed to most of the claimant's life and it is plain that such a gloss on the statutory provision cannot arise. It follows therefore in Exception 1 that the appellant's case does not fall to be considered either under paragraph 399A of the Immigration Rules or under Section 117C(4) but rather fell to be considered under the higher threshold under paragraph 398 of "very compelling circumstances". Accordingly, the error of law that was made was one which was material to the outcome of the appeal.

18. Whilst we note the submissions, fairly put on the part of the appellant, that there is material in this case which might amount to or which the appellant says does amount to very compelling circumstances, in our judgment it is not for us to second guess how the FTT Judge would have assessed the matter under Rule 398 as opposed to under 399A/Section 117C(4).

19. Whilst there is reference to paragraph 398 in general at paragraph 33 we construe that reference, particularly the reference to containing similar provisions, as effectively, a reference, through 398, to 399A. We do not consider that the FTT Judge did consider the higher hurdle of very compelling circumstances over and above paragraph 399A in the FTT decision. For those reasons we consider that the FTT decision is vitiated by a material error of law and should be set aside.

20. We add two following observations, first we do not therefore go on to consider the initial grounds 1 to 3 of the Secretary of State's grounds of appeal since they do not arise for consideration. Secondly, on remission, it may be that the FTT Judge will consider all the factors to which he referred in his judgment as part of his assessment under "very compelling circumstances" under Rule 398 and the appellant will of course be at liberty to put forward all the facts and matters relied upon last time and any further facts in support of a submission. This is a case where there may be very compelling circumstances but that is not a matter for us. We will therefore remit the case to the First-tier Tribunal for reconsideration on the basis of a proper factual immigration history.

Summary of Decision:

(1) First-tier Tribunal Judge Miller made a material error of law and his decision to allow the appeal is set aside.

(2) The appeal to the Upper Tribunal is allowed to the extent that the appeal is remitted to the First-tier Tribunal to be determined afresh.

No anonymity direction is made.

Signed 

Mr Justice Morris

Dated 29 January 2018