Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00660/2013

THE IMMIGRATION ACTS

Heard at Field House

14 November 2013

Determination Promulgated
25 November 2013

Before

Lord Matthews
Sitting as a Judge of the Upper Tribunal
Upper Tribunal Judge Kebede

Between

GOITOM KIFLE MEHAIRE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr Kam Mak, Solicitor
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born in Ethiopia and came to the United Kingdom in 1991. He is of Eritrean ethnicity but has never been to that country. At the time he came to the United Kingdom Eritrea was part of Ethiopia and did not exist as a separate country. He came to the United Kingdom in 1991 and unsuccessfully claimed asylum. Because he was an unaccompanied minor he was granted successive periods of exceptional leave to remain and in 2000 was granted indefinite leave to remain.

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2. He is married to Ms Juliana Lewis who has two children from a previous relationship. They are grown up and live separate lives from her and the appellant. He and Mrs Lewis however have four children who all live with them. As at 29 August 2013 they were aged 15, 3, 2 and 8 months.

3. On 15 October 2012 at Thames Magistrates' Court the appellant was convicted of five counts of theft and one for being in possession of Class A drugs. He was sentenced to eight months' imprisonment. On 30 October 2010 at Stratford Magistrates' Court he was convicted of theft and sentenced to two months' imprisonment. On 8 April 2010 at Horseferry Magistrates' Court he was convicted of four counts of theft and was sentenced to one month and two weeks' imprisonment. In view of these convictions the respondent deemed it to be conducive to the public good to make a deportation order against him and made such an order by virtue of Section 3(5)(a) of the Immigration Act 1971.

4. The Immigration Rules (paragraphs 396 to 400) applied. The relevant parts of those, for present purposes, are as follows:

> "396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.
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> 397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.
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> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and …
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> (c) the deportation of the person from the UK is 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, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.
>
> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
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> (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; or
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
> (a) it would not be reasonable to expect the child to leave the UK; and
> (b) there is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and
   (i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and
   (ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

399A This paragraph applies where paragraph 398(b) or (c) applies if –
(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK …;

399B Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate.

399C Where limited leave has been granted under paragraph 399B, the person may qualify for further limited leave, subject to such conditions as the Secretary of State deems appropriate. The requirements for further leave are that the applicant continues to meet the criteria set out in paragraph 399 or 399A".

5. The appellant appealed against the making of the deportation order and relied on Article 8 and the Immigration Rules. The appeal was heard on 20 August 2013 by the First-tier Tribunal and was refused in a determination promulgated on 29 August 2013.

6. It is not necessary to go into great detail about the findings of the First-tier Tribunal. Suffice it to say at this juncture that the Secretary of State accepted that the appellant had a British wife and children and that there were insurmountable obstacles to family life with them being continued abroad. It was not accepted that he had been living in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any periods of imprisonment) on the basis that he was granted ILR in February 2000 but prior to that had no leave from November 1996 to February 2000.

7. Inter alia the First-tier Tribunal agreed with that position, as set out at paragraph 25 of their determination. They found that the appellant did not fulfil the requirements of paragraph 399(b) because he could not show valid leave continuously for a period of 15 years, having had no leave from November 1996 to February 2000. They also found that after taking into account the time the appellant had spent in custody he had not lived here continuously for a period of 20 years immediately prior to the decision to deport him.

8. At the outset of the appeal before us Mr Tufan the Home Office Presenting Officer very fairly indicated that he had found documentation which

showed that in fact the appellant had had valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision. As it was conceded that there were insurmountable obstacles to family life with his partner continuing outside the UK the appellant fulfilled the criteria set out in paragraph 399(b).

9. In the circumstances without further ado we allowed the appeal and it is not necessary for us to look at the matter in any more detail.

10. We observed however that the First-tier Tribunal had proceeded upon a misconception. In finding that the appellant had not lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any periods of imprisonment) it appeared to us that there had been a miscalculation. The appellant arrived in the United Kingdom on 6 January 1991 and the date of the deportation order was 3 January 2013. By that time he had been in the United Kingdom for just short of 22 years and he had only been imprisoned for a total of 11 months and 2 weeks. The issue, accordingly, would have been whether he had ties with Eritrea, to which he would have to go if required to leave the UK. He had indicated that he was an ethnic Eritrean but he had never been to that country. Having regard to the case of Ogundimu it appeared to us, and we so indicated, that we would require a great deal of persuasion that it could properly be said that he had any ties to Eritrea. However since we did not hear any argument on the matter and since it is unnecessary in any event we make no decision on the point.

Decision

11. For the reasons set out in relation to paragraph 399(b) of the Immigration Rules the appeal is allowed.

LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)
Date: 20 November 2013