



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00103/2013

THE IMMIGRATION ACTS

Heard at Field House

Determination

Promulgated

On 6 June 2014

On 10 July 2014

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

JM

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Wilford, instructed by Wilson Solicitors LLP

For the Respondent: Mr G Saunders, Senior Presenting Officer

DETERMINATION AND REASONS

1. The First-tier Tribunal made an anonymity direction in relation to the appellant. There has been no application before the Upper Tribunal for this direction to be discharged and consequently it continues. The appellant is granted anonymity unless and until the Tribunal directs otherwise. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.
2. The appellant is a citizen of Zambia born in August 1968. He arrived in the United Kingdom in August 1995 having been granted entry clearance until 4 February 1996. On 6 September 1996 he was granted exceptional leave to remain until 30 August 1997 as the carer for his stepsister, who is now deceased, and her son KCC. An application for further leave was refused on 19 March 2001 but an appeal against this decision was allowed

in September 2004 and the appellant was subsequently granted discretionary leave to remain as a carer until 20 January 2008. On 2 August 2008 he was granted indefinite leave to remain as a consequence of the length of his residency here.

3. On 13 January 2012 the appellant was convicted at Basildon Crown Court of (i) possession with intent to supply a class B drug, for which he was sentenced to two years' imprisonment and (ii) facilitating the acquisition of criminal property, for which he was sentenced to one year's imprisonment to run concurrently.
4. On or around 9 January 2013 the Secretary of State made a decision that Section 32(5) of the UK Borders Act 2007 applies to the appellant and, on the same date, signed a deportation order drawn in the appellant's name. The appellant lodged an appeal against the former decision to the First-tier Tribunal and, in a determination promulgated on 2 July 2013, First-tier Tribunal Judge Abebrese, sitting with Mrs Street (non-legal member) dismissed the appellant's appeal on all grounds. Thereafter, Upper Tribunal Judge Rintoul granted the appellant permission to appeal to the Upper Tribunal and in a decision of 28 October 2013 Deputy Upper Tribunal Judge Chana found error of law in the First-tier Tribunal's determination and set that determination aside. Full reasons for this conclusion are found in a separate document sent out to the parties on 11 November 2013. The core reasoning was as follows:

"4. After discussion, Mr Tufan accepted that the First-tier Tribunal's determination contained an error of law such that it should be set aside. In particular he accepted that the First-tier Tribunal had erred in failing to come to a reasoned conclusion on the issue of whether the appellant's marriage is genuine and subsisting. Mr Tufan further acknowledged that the First-tier Tribunal had erred in (i) failing to make a finding as to whether the appellant's wife was pregnant with the appellant's child, as claimed (ii) failing to take into account the prison visit records and (iii) for failing to state what it had made of the social worker's report, which indicates on its face that the appellant was in a subsisting relationship with his wife.

5. These errors are plainly material. In relation to paragraph 399(B) of the Rules, Mr Tufan accepted that the appellant's wife is a British citizen, but the appellant has lived in the United Kingdom for a period in excess of fifteen years prior to the decision under appeal, and that there would be insurmountable obstacles to her living in Zambia. Consequently the only issue left for consideration under the Rules was whether the appellant is in a genuine and subsisting relationship with his wife. It is this matter that each of the aforementioned evidence relates."

5. The appeal then came before Judge Chana and me on 14 January 2014, at which time the Tribunal raised issue with the reliability of the marriage certificate that had been provided by the appellant. This necessitated that the hearing be adjourned for further investigations to be undertaken by both parties. When the matter came back before the Tribunal on 27

February 2014 the Secretary of State had yet to finalise her investigations and the hearing was adjourned once again. By the time the matter came back before me on 6 June 2014 a transfer order had been made so as to enable the Tribunal to be formed of a single judge in order to avoid any further delay in the determination of this matter. Neither party took any objection to this course.

6. At the outset of the hearing Mr Saunders indicated that the Secretary of State's investigations into the marriage certificate had now been completed and she accepted that the certificate was a reliable and genuine document. As a consequence no issue was taken with the assertion that the appellant married EC in Arusha on 13 December 2008, as claimed.
7. The appellant and his wife (EC) were called in evidence before the Tribunal, adopting the contents of their witness statements of 4 April and 8 April 2014 respectively. Mr Saunders indicated that he had no questions for either of the witnesses, and their evidence rested there.
8. In submissions Mr Saunders stated that although the Secretary of State was not willing to concede the appeal, he had nothing else to add other than to rely on the Secretary of State's decision letter. I did not invite Mr Wilford to make submissions.

Findings and Reasons

9. Pursuant to Section 32(5) UK Borders Act 2007 the SSHD is required to deport the appellant unless one of the exceptions set out in Section 33 apply. One such exception is where removal of the foreign criminal in pursuance of a deportation order would breach that person's Convention rights. In the present case it is contended by the appellant that deportation would infringe his Article 8 rights. The applicable Immigration Rules state as follows:

"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

- (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
- (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (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 -

- (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; or
- (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK 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."

10. The relevant provision for consideration in this appeal is paragraph 399(b). It is now accepted by the Secretary of State that (i) EC is a British citizen, (ii) the appellant has lived in the UK with valid leave in excess of fifteen years immediately preceding the date of the immigration decision and (iii) there are insurmountable obstacles to family life between the appellant

and EC continuing outside of the United Kingdom. This appeal therefore turns on the single issue of whether the appellant and EC are in a genuine and subsisting relationship. I have no doubt that they are.

11. First, it is accepted that the appellant and EC married in Arusha in December 2008. I have been provided with witness statements from the appellant, EC, EC's 17 year old British citizen son and the appellant's nephew, all dated in November 2012. Each of these statements identify in some detail the strength of the relationship between the appellant and EC. Both the appellant and EC gave evidence before the Upper Tribunal, adopting statements from April 2014 which, again, set out the nature of their relationship. EC is now said to be pregnant and due to give birth in September 2014, a matter which is supported by medical evidence before me. It is said that the appellant is the father of the unborn child. Mr Saunders did not seek to cross examine either the appellant or EC as to their evidence.
12. I also have before me documents relating to telephone calls made by the appellant whilst he was in detention, EC being identified on the "controlled numbers - prisoner listing" document as the appellant's partner - her mobile telephone number being identified thereon and a breakdown of the telephone numbers called with the duration and cost of each call also being provided. From this one can readily identify that there were a significant number of calls made from the appellant to EC during the time the appellant spent in detention. I, also, have before me detailed prison visit records relating to the appellant, which identify a significant number of visits by EC during the appellant's time in prison, as well as visits by the appellant's nephew and EC's son.
13. Further, EC is also identified as the appellant's partner in a document authored by the Offender Management Unit at HMP Norwich, completed on or around March 2012. In addition there are two reports authored by a Diane Jackson before me, who identifies herself as an Independent Social Worker. The former report is dated 12 June 2013 and the later supplementary/addendum report, 8 January 2014. Miss Jackson has had contact with the appellant, EC, EC's son and daughters, EC's son's Social Worker and Year Tutor, as well as a Carer Support Officer from the London Borough of Newham familiar with the family. Miss Jackson opines, having taking into account information from the above sources, that the appellant and EC are in a genuine and subsisting relationship.
14. I finally observe that the appellant is on immigration bail, this having been originally granted by the First-tier Tribunal on 26 March 2013 but thereafter maintained by the Secretary of State, or at least one of her Immigration Officers. The material matter to be taken from the grant of bail is that one of the conditions of bail requires the appellant to live and sleep every night at EC's address.

15. Looking at all the evidence before me in the round, including, but not limited to, that which I identify above, I have no doubt in concluding that the appellant and EC are in a genuine and subsisting relationship.
16. Consequently, given the concessions in relation to the other aspects of paragraph 399(b) of the Immigration Rules, I find that the requirements of that Rule are met. The appellant's appeal is to be allowed on the basis that the Secretary of State's decision leads to a breach of the appellant's rights under Article 8 of the Human Rights Convention.

Decision

The First-tier Tribunal's determination contains an error on a point of law and is set aside.

I substitute a decision allowing the appellant's appeal for the reasons identified above.

Signed:

A handwritten signature in black ink, appearing to read 'M. O'Connor', written over a faint, illegible stamp or background.

Upper Tribunal Judge O'Connor

Date: 11 June 2014