Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: DA/00285/2014**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Promulgated**
On 17 November 2014	**On 18 November 2014**

Before

Upper Tribunal Judge Kekić

Between

Amit Naithani
(anonymity order not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: Ms H Short, Counsel
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Determination and Reasons

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission to appeal by First-tier Tribunal Judge Reid on 10 September 2014 in respect of the determination of First-tier Tribunal Judge Meah who dismissed the appeal against deportation of this Kenyan national.

2. The appellant was born on 1 April 1985 and arrived here aged 10 with his mother and sister as a visitor. Thereafter, the family sought asylum. This was refused on 17 March 2000 but exceptional leave to remain was granted for four years. Eventually, ILR was granted on 2 February 2005.

3. The appellant's offending commenced in 1998. He has received three cautions and has at least fifteen convictions between 2003 and 2012. A previous attempt to deport the appellant in 2009 was unsuccessful as the appellant's appeal was allowed in April 2010 by the Tribunal. The judge found that the case was finely balanced but was persuaded to give the appellant one last opportunity to show he had mended his ways. The judge gave a clear warning to the appellant that if he continued to re-offend, he would only have himself to blame if further deportation proceedings were brought. Regrettably, the appellant did continue with his criminality and on 20 January 2014 a deportation order pursuant to section 32 of the UK Borders Act 2007 was made.

4. The appeal came before the First-tier Tribunal at Taylor House on 12 August 2014. The appellant was detained and was not produced due to an outbreak of a contagious illness at the centre. His representative sought an adjournment which was unopposed but the judge refused it and proceeded to remit the appeal to the Secretary of State on the grounds that the decision was not in accordance with the law. The judge reasoned that the respondent had failed to consider section 19 of the 2014 Act or rule 399(b) and had also miscalculated the period of time the appellant had been resident here.

The Hearing

5. At the hearing on 17 November, I heard submissions from the parties. For the appellant, Ms Short submitted that the judge had erred in refusing the adjournment, that he should have considered the rules himself and if he found that the Secretary of State had miscalculated the period of residence, should have allowed the appeal outright. She conceded, however, that residence was not the only requirement and that there were other limbs to the rules.

6. Mr Melvin submitted that the respondent was ready to serve a fresh decision on the appellant which would generate a fresh right of appeal. He submitted that the judge was required to consider the rules at the date of the hearing and not the decision so irrespective of whether or not the appeal was reconsidered, the appellant could not succeed. He asked that the decision be upheld.

7. Ms Short repeated her earlier submission and maintained that the appeal should have been adjourned.

8. At the conclusion of the hearing I reserved my determination which I now give.

Findings and Conclusions

9. The appellant was not produced for his hearing through no fault of his own. Regrettably, the request for an adjournment is not dealt with in the determination and so I am unable to ascertain what reasons the judge had in mind when he refused to grant it. Regardless of the merits of his case, however, he was entitled to be present at the hearing and the judge erred in refusing to allow him that opportunity.

10. I now consider whether that error was material to the outcome of the hearing or whether there were any further errors such that would make it necessary for the determination to be set aside.

11. The judge based the need for the remittal on the coming into force of s.19 of the Immigration Act 2014 on 28 July. This occurred after the decision had been made by the Secretary of State but before the hearing. The judge appears, however, to have misunderstood the effect of section 19. That section, at 117B and C, sets out the factors which need to be considered in cases concerning the deportation of foreign criminals and at 117A makes it plain that consideration is in respect of the Tribunal. As argued in the grounds, the Secretary of State's 'failure' to comply with an obligation not placed upon her but on the courts and the Tribunal, cannot render her decision unlawful. The point is well made. I do not, however, agree with the ground which raises concerns over whether section 19 even applies to the appellant's case. This section requires the courts and Tribunals to consider certain matters when determining an appellant's case and that applies regardless of when the decision was made. The judge failed to undertake such an analysis.

12. It is also argued that the judge should have allowed the appeal outright once he found that the requirements of paragraph 399(b) were met. It is

unclear however whether the judge did make such a finding. Certainly the grounds do not point to a particular paragraph where this would be apparent and in any event, length of residence is not the only requirement to be met. I can see no consideration of the other requirements.

13. The judge should have considered the new rules. He was obliged to do so. Under A362, where Article 8 is raised in the context of deportation, the claim will only succeed where the requirements of the rules as at 28 July 2014 are met, regardless of when the deportation order was served. In that sense, the judge also erred in directing the Secretary of State to consider the old rules (see paragraph 8 of the determination).

14. I have considered Mr Melvin's submission that the appellant would not be prejudiced by reconsideration of his case by the respondent as he would have a full right of appeal against the fresh decision. That is an attractive submission. However, I am required to consider first and foremost, whether the judge made errors of law. For the reasons I have set out above, the judge did make such errors. In the circumstances, the fair and proper course of action is to set aside the determination in its entirety. The appeal shall be heard by another judge of the First-tier Tribunal, preferably a panel, and all matters shall be determined afresh.

15. The appellant should not take this decision as an indication of the merits of his substantive appeal. He has serious obstacles ahead particularly given his conduct following his last successful appeal.

Decision

16. The First-tier Tribunal made errors of law and the determination is set aside to be re-made by another judge/panel of the First-tier Tribunal.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

18 November 2014