Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA 00725 2013

THE IMMIGRATION ACTS

Heard at Victoria Law Courts Birmingham	**Determination Promulgated**
On 7 May 2014	**On 23rd May 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUWATOSIN DAVID IFANSE

Respondent

Representation:
For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr M Azmi, Counsel instructed by Turpin & Miller Solicitors

DETERMINATION AND REASONS

1. The respondent in this case, hereinafter "the claimant", is a citizen of Nigeria who was born on 25 August 1992. He is therefore now 21 years old. He appealed against the decision of the respondent to make him the subject of a deportation order pursuant to Section 32(5) of the United Kingdom's Borders Act 2007 following his conviction of offences of conspiracy to kidnap, conspiracy to commit false imprisonment and conspiracy to blackmail.

2. The offences were committed when the claimant was aged 18 years and he was sentenced almost a year later when he was aged 19 years to a total of five years' detention in a young offender institution. Before these convictions he was of good character. Nevertheless the sentencing judge referred to the offences as "a very carefully planned conspiracy" and described the claimant as the "main perpetrator and organiser". In general terms the claimant bore a grudge against a 15 year old boy who owed him about £200. The claimant was satisfied that his

victim had gained financially from a series of scams on a well-known internet auction site and the claimant led a conspiracy to kidnap the victim. A ransom demand was made in the sum of £50,000 and threats were made that the victim would be killed or his toes and fingers cut off if money was not forthcoming. Although no actual harm was inflicted on the victim the incident was particularly frightening for the victim's family who, for a time, genuinely feared they would not see their son again. The claimant was given some credit for pleading guilty, belatedly, on the first day of the trial.

3. The decision to make the deportation order is dated 2 April 2013 and the claimant appealed that decision successfully to the First-tier Tribunal. It is not necessary for me to form any view about that determination because it has been found to be unsatisfactory at a hearing before Upper Tribunal Judge Southern and Deputy Upper Tribunal Judge Coates on 30 January 2014. Their decision has already been served on the parties but it must form part of this decision because this hearing is a continuation of the hearing before them. It is therefore set out as an Appendix.

4. Although there are many matters to consider in this case it is reasonably clear that the real issue here is whether removing the claimant pursuant to a deportation order is proportionate to the public interest served by his deportation bearing in mind the severity of the offences for which he was convicted and the fact that he has lived in the United Kingdom since arriving as a 10 year old boy in May 2003.

5. I have a bundle of papers prepared for the hearing and there are papers in the respondent's bundle. I confirm that I have considered the papers as a whole before reaching any decision on the case.

6. The bundle includes a statement from the claimant.

7. In that statement the claimant said that he lived in the United Kingdom for ten years which was over half of his life, that all of his family including his mother and siblings lived in the United Kingdom, that he had no ties to his country of birth, that he had never returned to Nigeria since arriving in the United Kingdom and that "England is my home".

8. He said he was born in Lagos in Nigeria and grew up with his parents and three sisters and two brothers. He was the youngest member of the family. He claimed not to remember much of his early years in Nigeria and that when he thought of Nigeria he felt "disconnected".

9. His early memories of life in Nigeria are largely overshadowed by his father's illness. His father died when the claimant was aged 7 years. The claimant's mother was very protective towards him. For example she tried to hide the fact that his father was terminally ill. He referred to an unhappy memory of his older brother Samuel physically carrying their father to the car on his trips to hospital and how this disquieted him. His father had been a fit, strong man who had served in the armed forces.

10. The claimant's education was interrupted when his parents could no longer pay his school fees because they were spending money on his father's medical treatment.

11. After his father's death his father's relatives began to taunt his mother blaming her for her husband's death.

12. On one particular occasion his father's relatives said to the claimant's mother "what you have done to our son, we will do to yours".

13. With his mother, he arrived in the United Kingdom on 31 May 2003. He was then reunited with his siblings. He found it a strange and stressful time. His mother advised him to make a new life away from Nigeria.

14. He adapted quickly to life in the United Kingdom.

15. He did well at school gaining eleven passes as GCSE including some at A and two BTEC additional qualifications. He did AS levels in law, business studies, philosophy and media.

16. He was a very promising young footballer and had been scouted by Crystal Palace FC but offered a scholarship with the option of a professional contract with Brentford FC.

17. He said that he regretted his criminal acts and accepted responsibility for what he had done, pointing out that he had pleaded guilty.

18. He claimed that he had no real intention of harming anyone and he had not appreciated the seriousness of the offences he had committed. He insisted that he now realised just how serious the crimes were and they were deeply regretted.

19. Additionally he regretted very much the additional pain that his bad behaviour had caused his mother.

20. He was given enhanced prisoner status in May 2012 at HMYOI Aylesbury. He completed courses to enhance his skills and understanding and the restorative justice course had particularly made an impact because it had made him think about the harm his misconduct did to other people.

21. He also explained that whilst he was in custody, with the encouragement of prison staff, he had helped establish a business making sophisticated personalised greetings cards.

22. He said that if he was given bail he would live with his mother which was at an address well away from his victim.

23. He claimed that he had long wanted to be an aeronautical engineer or an IT engineer and he had completed a number of IT courses to prepare him to take an A level in IT when he was away from prison. He also claimed that Brentford FC had offered to give him another chance "subject to my immigration issues being resolved".

24. He talked about his extended family in the United Kingdom. He confirmed that all of his siblings were settled in the United Kingdom and all had children. He was closest to his older brother Samuel but was very close to his sister Esther.

25. He insisted that he had "absolutely no ties to my country of birth" and that the idea of being sent to Nigeria "absolutely petrifies me". He explained that he knew nothing about Nigeria and had no one to turn to for support.

26. He also said he was scared to go back because of the resentment shown to his mother. He believed that his father's family would try to harm him.

27. Additionally he described himself as a Christian from a Christian family and was afraid of the problems between Christians and Muslims in Nigeria.

28. The claimant gave evidence before me and adopted his statement.

29. In answer to additional questions he confirmed that the OASys Report was critical of him but he said that it was prepared a year into his sentence when he was ignorant and did challenge authority and was immature. Since then he had grown up. He learnt where bad behaviour could lead.

30. He also said that his mother had told him that Brentford FC had offered him another chance.

31. He was cross-examined. He was shown his statement of 9 October 2013 where he said:

> "I am aware that I had been convicted for kidnapping and false imprisonment. I have protested my sincere innocence but in the end I had been suffering the consequences of an association with bad company and friends."

32. It was suggested that this indicated that he had not faced up to his responsibilities. He replied that he had pleaded guilty but he insisted that the threats of violence were not made by him. It was pointed out that the sentencing judge did not accept the explanation that he had given to the Crown Court. The claimant insisted that he had started something that he could not stop and it "snowballed".

33. There is a suggestion on the papers that he had been disciplined in prison for striking another prisoner with a pool cue but he said, and it was accepted by the Secretary of State, that he denied the allegation and it was not proved against him. For the avoidance of doubt I accept this assertion and I mention it only to confirm that it has been discounted.

34. It was suggested that the entrepreneurial skills that he had shown in prison could be used in Nigeria. This suggestion was based on the greeting card making project set out in considerable detail in the documentary evidence. The claimant said he had been supported significantly in prison and could not have founded the business without that support.

35. He said he had not been to Nigeria since he was child he had no family there. He had two brothers and two sisters who were all in the United Kingdom.

36. It was put to the appellant that he came to the United Kingdom in 2003 and had not returned and he was asked to explain when his mother had returned. He claimed not to be able to remember.

37. He was then asked for how long his mother had left him after bringing him to the United Kingdom. He said that could not remember. He was pressed to say if it was a month or a year. He replied "I really honestly cannot say".

38. He assumed she had stayed in Lagos but he did not actually know.

39. He knew little about the problems his immediate family claimed to have experienced in Nigeria. He could not say anything about his half-brother being killed other than it had happened. He said the dead man was his father's son by a woman other than the claimant's mother.

40. He was not re-examined.

41. There is a statement from the claimant's mother dated 29 April 2014.

42. There she explained that she had been in the United Kingdom since 2007 and was given indefinite leave to remain in 2011. She was self-employed running a business in property development in Croydon. She and the claimant's father had lived in Colchester between 1981 and 1983 and their son Samuel was born in the United Kingdom.

43. She returned to Nigeria where her husband completed his studies and the claimant was born in Lagos.

44. She explained how her husband became sick in 1998 and died in 2000. She was vague about the nature of the illness and said the Nigerian hospitals could not assist and the church they attended raised money for her husband to go to Germany for treatment but it was not successful.

45. She explained that her husband's family had never accepted her because she was from the wrong part of Nigeria and did not speak their language. The family almost killed one of her sons before her husband died in a vicious attack so that he had to have his intestines sewn back and he fled to the United Kingdom after that incident.

46. She said her husband's family asserted ownership of the home where she lived with her husband.

47. She said the claimant was particularly close to his father.

48. She came to the United Kingdom in May 2003 because she saw it as the only way to get away from her husband's family members.

49. She explained that her eldest daughter was in the United Kingdom from 2001 with her husband and she was given a visitor's visa with the claimant and my other children to see them. The visit was to coincide with the birth of a grandchild.

50. She explained how she had settled the claimant into school in the United Kingdom and then returned to Nigeria. She used connections with the church to keep away from her husband's family. Her return to the United Kingdom was delayed by reason of the theft of her passport and other possessions and then an application for entry clearance was refused but allowed on appeal.

51. She lived with the claimant and her son Samuel from her arrival in 2007 until the claimant was detained in 2011.

52. She described his conviction as a "huge shock" but said he had accepted responsibility for what he had done and was remorseful and had learnt his lesson.

53. She explained that she had missed him very much whilst he was in prison and that she was desperate for him to return home. Her home in Croydon was well away from Catford where the claimant had got into trouble.

54. She believed that members of her late husband's family would hurt the claimant if they found him in Nigeria. She believed they would kill him like they had killed his half-brother.

55. She adopted her witness statement and was cross-examined.

56. She was shown a copy of her husband's death certificate. She did not know what had happened to the original. She accepted that although imperfectly copied the document showed that when her husband died on 28 May 2000 at the age of 60 he lived at and address beginning "3 Debo Aina Crescent". This was the address the claimant's mother gave as her "local address" when she applied for entry clearance to the United Kingdom as a visitor in April 2006.

57. It was the claimant's mother's case that she had last lived at that address in 2002. She claimed not to know what had happened to the property after she left but there were problems. She explained that it was the only permanent address she had in Nigeria but she was not in fact living there when she made her application. She said that mail sent there would find its way to her because it would be intercepted by a gatekeeper who would keep it until she collected it.

58. She was asked directly if she went to Debo Crescent to collect the post and said that she did not go back. She also used the church address.

59. Her attention was drawn to a statement she signed on 19 March 2014. At paragraph 2 of that statement began "I have been in the UK since 2003, for eleven years now. I never returned to Nigeria." She accepted that that was just not right. She said she had been in Nigeria from 2004 to 2007. She travelled to Bangkok to buy items to sell in Nigeria.

60. It was put to her that records showed that she entered the United Kingdom in 2006. She claimed not to remember. When prompted she said that an application made in 2006 was refused and she appealed and came in 2007.

61. She said that her son Abiola was now in the United Kingdom having been attacked. She confirmed that the appellant's half-brother had been killed in Nigeria

62. There is also a statement from Samuel Kayode Ifanse dated 30 April 2014.

63. He said that he was the claimant's brother and nine years his senior.

64. Mr Ifanse had two jobs. He was a "freelance accountant" and a lift supervisor in the construction industry.

65. He had lived in the United Kingdom since 1996.

66. He knew little about the problems with his father's family in Nigeria. He only knew what his mother had told him. He thought he knew the claimant better than anyone else in the family and the claimant had lived with him since 2003. They all missed their father's guidance.

67. He was shocked when he heard of the claimant's offences. He confirmed the claimant would have no one to support him in Nigeria.

68. Mr Ifanse gave evidence and adopted his statement.

69. He was cross-examined.

70. He was asked if it was really right that he did not know anything about the circumstances of his brother Abiola being attacked and left with a scar on his stomach. He said he had seen no need to ask. His brother was now safe.

71. He claimed not to be aware that the claimant's permission to be in the United Kingdom had expired. He was just concerned about his welfare and his going to school. He only found out that he had been in the United Kingdom unlawfully when he was arrested.

72. The witness said he had been to Nigeria in 2013 for the wedding of a friend and had stayed with the friend. He had no knowledge about what had happened to the family home which he had left in 1996.

73. There is a supportive letter dated 23 March 2014 from the claimant's older sister, Modupe Veronica Yusuf in which she expresses her confidence that the claimant will not pose a threat to anyone in the event of his release.

74. There are letters from the claimant's nieces. Whilst they may well have been encouraged to write the content suggests strongly that they have chosen their own words. They clearly want the claimant to return.

75. There is a character reference dated 24 March 2014 from one of the claimant's brothers-in-law Babatunde Yusef. He said that "in all the time I have known [the claimant], he has never given me any reason to question his personality and character." This is a decidedly enigmatic comment about a person who has been to custody for very serious offences and I am not sure what Mr Yusef meant.

76. There is another character reference from Pastor Femi James Matthew described as the regional overseer with Mount of Fire and Miracles Ministries Ilderton Region 3. Pastor Matthew did not think that the claimant would not be in trouble again.

77. There was also examination results showing that the claimant had six GCSE passes at grades A to C of which only two were grade A.

78. There is a certificate to show he was a regional semi-finalist in a public speaking competition.

79. I have read the pre-sentence report prepared for the Crown Court. This does not particularly assist the claimant. There it asserts that the claimant tried to distance himself from what had happened by saying how the offences had escalated into something in which he wanted no part. This view was emphatically rejected by the sentencing judge, His Honour Judge Stow QC who said:

> "I do not accept for one moment that it was a case of you setting wheels in motion only to find that the machinery got completely out of control as a result of the intervention of others over whom you had no control."

80. Nevertheless I have the NOMS1 report and an OASys Report dated 11 March 2014 in the additional bundle. This shows the claimant had been placed in the "low" banding under the heading risk of reconviction (49 of bundle) although the risk to other people in the community was put at "medium" (59 in bundle).

81. The bundle also includes various certificates relating to courses undertaken in custody and includes a certificate from the Sycamore Trust awarded for "actively participating" in a programme entitled victim awareness restorative justice. Similar certificates were issued by the Open College Network.

82. On the morning of the hearing I was given an additional bundle from Mr Mills relating to the appellant's mother's immigration history and also a note from the probation officer at HMP Bullingdon showing that the appellant had been in trouble in custody on 10 May 2011 when he kicked another prisoner in the exercise yard.

83. The papers include a frustratingly incomplete note apparently from the offender management unit at HMYOI Aylesbury. It is unsigned and undated but purports to come from the claimant's personal officer in prison. It is dated after May 2013 when the claimant joined the wing. It refers to the claimant liking to be busy and being given enhanced prisoner status as a result. It also comments favourably on his maturity and respectful attitude to others. Although an unsigned document of that kind is of very limited evidential value it is consistent with the general picture before me and I do give it some weight.

84. There is also a letter from the claimant's mother dated 22 November 2012 addressed to the Secretary of State. Having introduced herself the appellant's mother says:

> "I am writing to say that the reason the [claimant] cannot be deported is that, I his mother and his other brothers are here, we lost their father twelve years ago and after a short while my in-laws rose up against me and the children they wanted to kill us, and I ran here for security and protection of me and my children, we have ever since been here ...".

85. There is a letter from Macartan & Co Solicitors dated 6 April 2011 to the Border Agency saying amongst other things:

> "We are further instructed that our client's brother Samuel Ifanse erroneously applied for British citizenship on [the claimant's] behalf in 2009 and that this application was refused. Our client has continued to reside in the UK ever since and upon seeking legal advice now wishes to regularise his status."

86. I found none of the witnesses to be particularly satisfactory. The claimant was clearly not telling the truth when he said he did not know if his mother had been out of the United Kingdom for a month or a year after he had arrived. I can understand his not knowing a precise time but his refusal to do better than that indicates to me somebody who is avoiding answering the question because he does not know where the answers will lead. More importantly, the claimant was seeking to minimise his involvement in precisely the way the Crown Court Judge rejected. This I find to be much more significant and, in a sense, disappointing.

87. I accept the claimant does have a better education than many prisoners. I accept that he is more than ordinarily articulate as is shown by his success in the public

speaking competition and he does have entrepreneurial skills which are reflected in the very detailed and apparently successful work done to create the greeting cards business within prison.

88. I do not read too much in his slightly blemished prison record. He is a sport loving fit young man in a very pressurised environment and although it would have been better if he had not given in to the temptation to be violent towards another prisoner the fact that he did on one occasion is not especially revealing.

89. I do not believe I have been told the truth about his foot-balling career with Brentford FC. I do not believe that a club of that standing would want to take on a person with the claimant's criminal record without first looking very carefully at his conduct and prospects of rehabilitation. It may be that some loose remark was made to his mother but it is unsupported by anything from the club and I do not regard that as a serious option. Rather, in advancing this point the claimant was clutching at straws and he did himself no good.

90. He did say favourable things in his evidence to the Tribunal and it is right to record that he was very respectful towards me and helpful when I had to ask him to give evidence from the dock in the secure hearing room that I had to use at Birmingham.

91. Although it is extremely easy to be cynical I have no good reason to think he will get into trouble again. I am wary about putting it any higher than that because his very serious introduction into criminal life was apparently out of character and a surprise to everyone. The best that I can say is that he probably will not reoffend.

92. He plainly came to the United Kingdom when he was quite young and really can have no knowledge of what led to his leaving or what family or other support there is available to him in Nigeria.

93. The claimant's mother was an unsatisfactory witness. That she claimed earlier to have been in the United Kingdom since 2003 may well have been a mistake but at the best indicates a carelessness on her behalf that is discreditable.

94. I cannot regard her claim to have been forced out of the matrimonial home but to have then used the matrimonial home address as her local address when she made an application to visit the United Kingdom as anything other than in indication of unreliability on her part. She is not a woman who is anxious to tell the truth but a woman who will say what she thinks is expedient without too much regard to facts. This finding must impact adversely on her evidence generally.

95. I do not believe her claims that the appellant would be attacked by his late father's family or that he would otherwise be at risk in the event of return to Nigeria. I just do not know if there is anyone there to help him.

96. The claimant's brother was similarly unsatisfactory. If he was telling the truth when he said he did not know that the claimant had an uncertain immigration status in the United Kingdom at a time when he claimed to be responsible for his welfare including arranging his education then he, like his mother, was being remarkably casual.

97. A letter from solicitors suggests, but does not prove because it does not give the source of the information, that the claimant's brother did know that he had an uncertain immigration history before his arrest and was involved in an unsuccessful attempt to resolve his position.

98. I also find it beyond belief that he had never troubled to ask his brother what had happened that caused his brother to be involved in a life threatening attack that left him with a scarred stomach.

99. Overall he was a less than frank witness and I attach little weight to what he says.

100. I have worked my way through Mr Azmi's skeleton argument.

101. I do not accept that the claimant has shown that he needs international protection. I do not believe the evidence that the claimant's father's family would seek to do the claimant harm. Clearly there is something to think about here because there is evidence that the claimant's brother and half-brother have had severe difficulties but the evidence about the reasons for those difficulties is all from unreliable sources mainly the claimant's mother.

102. However I see no reason whatsoever to find that the claimant would have to go anywhere near his father's family if there was a genuine concern for his safety (which I do not believe).

103. Neither is there any reason to think that a person who is nominally Christian cannot live safely in Nigeria in the event of his return. Although there are troubling reports about violence between Muslims and Christians the suggestion that no Christian Nigerian is safe in the country is groundless.

104. If there is any truth in the claimant's case (which I do no believe) there is no risk established throughout the country and the case for international protection really does not begin to run even when I remind myself of the low standard of proof applicable to international protection cases.

105. With that finding the claimant's case becomes very difficult. Mr Azmi, correctly, reminds me of the decision of this Tribunal in **Kabia (FM: paragraph 398 – "exceptional circumstances") [2013] UKUT 00569 (IAC)** where this Tribunal confirmed that in cases of deportation the Immigration Rules provide a complete code. There the Tribunal was following the decision of the Court of Appeal in **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**.

106. According to paragraph 398(a) of HC 395 where, as is the case here, a person's deportation is conducive to the public good because he has been sentenced to a period of imprisonment of at least four years it will only be in "exceptional circumstances" that the public interest in deportation will be outweighed by other factors". For these purposes "imprisonment" includes detention at a Young Offenders Institution. The meaning of "exceptional circumstances" must, necessarily, remain undefined but they must exist in every case of this kind before an appeal can be allowed.

107. The claimant has not lived in the United Kingdom for at least twenty years and, although he is under 25 years old he had not immediately prior the immigration decision quite spent at least half of his life continuously in the United Kingdom.

It follows that even if paragraph 399A applied in this case the claimant does not come within it, but it does not apply because it does not apply when a person has been sentenced to more than 4 years in custody.

108. I do remind myself of what removal will mean for this young man. He will be required to leave the country where he has lived since he was a boy and establish himself Nigeria where he has not been shown to have any contacts.

109. Clearly he would find it difficult to adjust to a country in which he has never lived as an adult. However he has some knowledge of the local language and English is widely spoken in Nigeria. He is apparently a healthy young man with more than the ordinary wit. He could live safely in the country and does not have any of the exceptional ties such as a life partner or child who cannot reasonably be expected to remove.

110. There are no "exceptional circumstances" in this case.

111. Mr Azmi invites me to look at the claim on human rights grounds jurisprudentially as well as with reference to the Rules and properly reminds me of the approach to be adopted in the well-known case of **R v. SSHD ex parte Razgar** [2004] UKHL 27.

112. Notwithstanding the contrary view expressed in the Reasons for Refusal Letter it is plain that removing the appellant would interfere with his private and family life and it is frankly startling that the Secretary of State would suggest otherwise. I also find the Secretary of State's reasons slightly misleading because the OASys Report did not assess the appellant to be at medium risk of reoffending. Rather it found that if he offends then there is a medium risk of his causing serious harm. Neither do I accept the Secretary of State's contention that the appellant has ties with Nigeria and a strong foundation built upon the culture and customs of Nigeria in view of the fact that he lived there for the first ten years of his life.

113. A better way of looking at it is to say that there is no evidence that the claimant has any knowledge of life in Nigeria having only lived there as a child. However the evidence that he no contacts there is all from discredited sources and I just do not know if he would have anyone to help him there.

114. I do agree that the claimant's brother and mother and anxious to support him which is why they gave evidence. I am unsure about the claimant's mother's financial circumstances but I find that his brother could offer some limited financial support if he thought it appropriate.

115. The public interest here is in discouraging others and expressing revulsion. The offences that took this young man before the criminal court are extremely serious and must attract condign disapproval extending beyond the punishment that he has received from criminal courts.

116. The only counterbalancing factor is his unfamiliarity with Nigeria and his lack of known ties there.

117. Mr Azmi helpfully and properly reminded me of the guidance in the European Court of Human Rights in the case of **Maslov v Austria [2009] INLR 47**. This directs me to look at the nature and seriousness of the offence, the length of the

claimant's stay in the United Kingdom, the period of time that has elapsed since the offence was committed and his conduct during that period, the nationalities of the person concerned, the claimant's family situation, and then matters about his family life that do not apply here, concluding with the strength of the social, cultural and family ties with the host country and the country to which removal is to be made.

118. The claimant has no known ties with Nigeria and only has adult life experience in the United Kingdom. The offences are extremely serious. He has been in the United Kingdom for about half of his life. Although the offences were now committed some time ago he has not been at liberty since they were committed so that it is of little consequence in guiding me. He is not a British national. He is a national of Nigeria and ordinarily can be expected to live in that country.

119. I do not agree that he showed considerable remorse except about getting caught but I do find however that he has made some efforts to use his time in custody usefully.

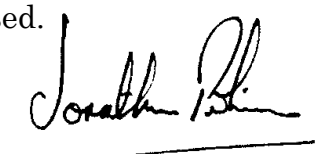
120. Really there is only one point in this case and it is the one identified at the start of the determination. It is whether the public interest in his removal is outbalanced by the blow to him of having to establish himself in the country with which he is unfamiliar but of which he happens to be a national. I find the offence is so shocking that the problems to the claimant and his family inherent on this removal do not amount to a disproportionate interference with his private and family life.

121. It follows therefore that the decision of the First-tier Tribunal having been set aside I substitute it with the decision dismissing the claimant's appeal again the Secretary of State's decision.

Decision

The Claimant's appeal is dismissed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 20 May 2014

APPENDIX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00725/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court
On 30 January 2014

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Before

Upper Tribunal Judge Southern
Deputy Upper Tribunal Judge Coates

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

OLUWATOSIN DAVID IFANSE

Respondent

Representation:

For the Appellant: Mr D. Mills, Home Office Presenting Officer
For the Respondent: Mr D. Balroup, instructed by Macarten & Co, solicitors

DECISION AND DIRECTIONS

1. Mr Ifanse, to whom for convenience we shall refer as the appellant, although strictly he is the respondent before the Upper Tribunal, is a citizen of Nigeria, who was born on 25 August 1992. He arrived in the United Kingdom in May 2003, as an 11 year old child, with entry clearance as a visitor. Plainly, in view of his age, others would have made the arrangements that secured the grant of entry clearance but it is clear that a brief family visit was not what was intended. When asked, as part of the process leading to the immigration decision that is now under challenge in

these proceedings, what was the reason for him coming to the United Kingdom, the appellant said (see F4 of the initial bundle):

> "The death of my father meant my mother could not care for me so she brought me to the UK for my brother to act as my guardian."

In line with that intention, the appellant and his mother overstayed their leave, living together in the home of the appellant's brother who had settled here previously. The appellant did not make an application to regularise his immigration status until May 2011, when he applied for leave to remain on human rights grounds, given that he had lived here with relatives since his arrival in 2003, had been educated here and had not during that period returned to Nigeria. However, that application was not made until after he had been arrested for the serious criminal offences in respect of which he was subsequently convicted and sentenced to detention in a Young Offenders Institution for a period of 5 years.

2. The details of those offences and the view taken by the sentencing judge as set out in his sentencing remarks are well known to the parties and the nature and seriousness of those offences of conspiracy to blackmail, kidnapping and false imprisonment are, of course, reflected in the imposition of what was, in the context of the appellant's age, a lengthy period of detention. The sentencing judge said "these are very serious conspiracies" involving subjecting the victim to "a terrifying experience" and leading the victim's parents to be "frightened that they may never see their 15 year old son again". The judge found that the appellant was "the main perpetrator and organiser"

3. The appellant's appeal against the deportation order made as a consequence came before First-tier Tribunal Judge Chohan sitting with a non-legal member, Ms Endersby, on 9 October 2013. By a determination promulgated on 22 October 2013 the panel, having had regard to paragraphs 398, 399 and 399A of the immigration rules, allowed the appeal, explaining at paragraph 29 of the determination that, although they regarded this as a "borderline case":

> "Having considered the oral and documentary evidence before us we find that there are compelling reasons, as outlined above, which tip the balance in favour of the appellant's interests. Accordingly we find that there are exceptional reasons which outweigh the public interest in deporting the appellant. Following from that, we find that any interference in the appellant's family and private life is not in the interests for any reason in article 8(2) of the ECHR."

4. In granting permission to appeal, First-tier Tribunal Judge Fisher said:

> "The grounds seeking permission assert that the Tribunal erred in law by failing to engage with his criminality when weighed against the Respondent's public interest policies, that the panel's conclusions on family life are flawed, and that inadequate consideration was given to the aim of preventing crime and disorder.
>
> It is arguable that the Tribunal failed to consider the legitimate public interest in deterring other foreign nationals in a similar position, and in preserving public confidence in the

> system of controlling crime and disorder. Although the appellant will have established private life in the UK, having arrived in 2003 at the age of 10 years, it is arguable that the Tribunal's conclusion that he has a strong family life with his mother is lacking in adequate reasoning.
>
> Accordingly, permission to appeal is granted. All grounds are arguable."

5. Mr Mills, for the respondent, adopted his grounds for seeking permission to appeal and responded to submissions by Mr Balroup on behalf of the appellant which were to the effect that the panel made no error of law and reached a conclusion that was open to them on the evidence. However, for the reasons that follow, we are in no doubt at all that the determination discloses a number of serious errors of law such that the decision of the panel cannot stand.

6. As Mr Balroup commenced his submissions we invited him to take us to anything said in the determination from which it could be deduced that the panel had had any regard at all to the public interest in deterring others, or indeed to anything said in the determination from which it could be drawn that the panel had carried out a proper assessment of the level of criminality involved in the appellant's offending. He was unable to do so, which reinforces our conclusion that these were matters that were simply left out of account altogether by the panel. The most that can be said that at paragraph 19 of the determination the panel said:

> "The strongest reason for deporting the appellant is the nature and seriousness of his offences. The gravity of the offenses is reflected in the five year prison sentence…"

   However, that paragraph appears to be concerned with the risk of reoffending by that particular appellant rather with any assessment of the significance of deterrence achieved by enforcing the deportation. Similarly, the reference in the following paragraph of the determination does not amount to an adequate engagement with these essential parts of the respondent's case, the particularly serious level of violent offending and the legitimate aim in deterring others.

7. That is of considerable importance because, as the panel considered this to be a borderline case, the effect of leaving out of account a material consideration meant that we cannot be sure that the outcome would have been the same had the panel adopted a proper approach.

8. There can be no doubt either that this was a material consideration that the panel were bound to factor into their assessment as they struck a balance between the competing interests in play. That has been made clear, consistently, in guidance given by the superior courts. In *N (Kenya) v SSHD [2004] EWCA Civ* Judge LJ (as he then was) said at para 83:

> "83. The "public good" and the "public interest" are wide ranging but undefined concepts. In my judgment (whether expressly referred to in any decision letter or not), broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence, to non-British citizens who are already

> here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that whatever the circumstances, one of the consequences of serious crime may well be deportation …"

At paragraph 64 May LJ said:

> "Where a person who is not a British citizen commits a number of very serious crimes, the public interest side of the balance will include importantly, although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality."

So that, in the case under consideration:

> "…I consider that a proper reading of the determination as a whole does not support the submission that the adjudicator took properly into account the public interest considerations. If he had, it is, in my view, plain that he would not have reversed the Secretary of State's decision as to deportation.".

9. More recently, in *AM v SSHD [2012] EWCA Civ 1634*, as is specifically relied upon in the grounds for seeking permission to appeal, Pitchford LJ, having referred to this *dicta* said at paragraph 24:

> "Deportation in pursuit of the legitimate aim of preventing crime and disorder is not, therefore, to be seen as one-dimensional in its effect. It has the effect not only of removing the risk of re-offending by the deportee himself, but also of deterring other foreign nationals in a similar position. Furthermore, deportation of foreign criminals preserves public confidence in a system of control whose loss would itself tend towards crime and disorder."

10. The importance of these considerations was emphasised also in *JO (Uganda) v SSHD [2010] EWCA Civ 10*, *per* Richards LJ at paragraph 29:

> "…the factors in favour of expulsion are, in my view, capable of carrying greater weight in a deportation case than in a case of ordinary removal. The maintenance of effective immigration control is an important matter, but the protection of society against serious crime is even more important and can properly be given corresponding greater weight in the balancing exercise…"

11. The same approach was taken by a Presidential panel of the Upper Tribunal in the reported decision of *Masih (deportation-public interest-basic principles) Pakistan [2012] UKUT 46 (IAC)*. The guidance is summarised in the head note as follows:

> *"The following basic principles can be derived from the present case law concerning the issue of the public interest in relation to the deportation of foreign criminals:*
>
> *(a) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place.*
>
> *(b) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.*

> *(c) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge. ..*"

12. If anything more were required to establish the significance if this issue, it may perhaps be found in the judgment of the House of Lords in *Huang* . Having made the point, at paragraph 16, that:

> "… There will, in almost any case, be certain general considerations to bear in mind…"

The Committee set out some key considerations which included:

> "…the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain;

13. As we have observed, there is nothing in the determination to indicate that any regard was had to this issue and so the balancing exercise carried out was legally flawed. That is sufficient in itself to establish that the panel of the First-tier Tribunal made an error of law such as to require their decision to be set aside. However, the determination discloses other legal errors which we can summarise briefly as follows.

14. Although the panel had before them the judge's sentencing remarks, from which it is unambiguously clear that he regarded the offences committed by the appellant to be particular grave, there is nothing to indicate that any regard was had to those remarks, the focus being mainly upon the case advanced by the appellant in support of his claim to have established a significant private and family life. Thus, there was no real or sufficient analysis of the criminality involved, which was an essential ingredient in any proper balancing exercise.

15. It was made unambiguously clear by the respondent that it was not accepted that this now adult appellant enjoyed a relationship with his adult relatives that demonstrated elements of special dependency such as to properly be considered to be family life. Yet the panel appear to accept the claimed family life relationship without offering any reasoning to support doing so. As this was a matter in issue between the parties to be resolved, a failure to give adequate reasons for rejecting the case advanced by one party while accepting that advanced by another also constitutes an error of law.

16. At paragraph 8 of the determination the panel misdirected themselves as to the requirements of paragraph 398 of the immigration rules. This being a case where paragraphs 399 and 399A did not apply, the focus was on the concluding sentence of paragraph 398:

> "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 would be outweighed by other factors."

In respect of this the panel said:

> "Hence, it can be seen that "exceptional circumstances" simply means compelling reasons…"

This is incorrect. As was made clear by the Court of Appeal in *MF v SSHD [2013] EWCA Civ 1192,* those circumstances have to be (with emphasis added):

> ".. sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation…"

Thus, the assessment of the circumstances is to be carried out in the context of the countervailing public interests arguments and not in isolation considered by themselves. One plank of the public interest argument had, in any event, been left out of account.

17. Thus the Panel made errors of law such as to require that their determination be set aside. The decision must be re-made by the Upper Tribunal. Having heard from the parties we accepted that, since the appellant had himself not been produced from detention, given that he had been successful before the First-tier Tribunal, it was inappropriate to remake the decision in his absence. Therefore, the appeal is adjourned to a resumed hearing for that purpose. We do not reserve the appeal to ourselves and so it may be listed before any constitution of the Upper Tribunal.

Directions

Not later than 21 days from the date upon which these directions are sent out:

a. Mr Ifanse's representatives are to file with the Tribunal and serve upon the respondent an indexed and paginated bundle containing all documentary evidence relied upon. If reliance is placed upon documentary evidence already served, there is to be a single composite index including reference to that material as well as any additional documentary material.

b. In respect of any witness who is to be called to give oral evidence there must be a witness statement drawn in sufficient detail to stand as evidence in chief filed with the Tribunal and served upon the respondent. The respondent will be asked to indicate, at the commencement of the hearing, whether any assertion of fact contained in any such statement is challenged.

c. Mr Ifanse's representatives are to file with the Tribunal and serve upon the other party a skeleton argument setting out all lines of argument to be pursued at the hearing.

Signed

Upper Tribunal Judge Southern

Date: 5 February 2014