



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

Appeal Number: DA/00883/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 28 July 2014**

**Determination**

**Promulgated**

**On 22 August 2014**

**Before**

**UPPER TRIBUNAL JUDGE DAWSON  
UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR RICHARD BOLADE TALABI**

Respondent

**Representation:**

For the Appellant: Mr P Avery, Senior Presenting Officer

For the Respondent: Ms C Lloyd, instructed by Greenland Lawyers LLP

**DETERMINATION AND REASONS**

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Petherbridge who together with Mrs S Hussain allowed an appeal by the respondent (referred to as the claimant) against a decision that s.32(5) applied to the deportation order made 16 April 2013.
2. The conviction giving rise to the deportation order was made on 16 June 2011 at Woolwich Crown Court for one count of possession of a prohibited

firearm. The claimant was sentenced on the same day to the minimum sentence of five year's imprisonment. He completed his custodial sentence on 8 July 2013 and thereafter remained for a short period in immigration detention until 15 July when he was released on bail.

3. The panel found that the claimant who is a Nigerian national born 2 December 1991 arrived in the United Kingdom in 1998 when he was aged either 6 or 7. His mother had arrived two years earlier and remained after she had unsuccessfully applied for asylum. Both were granted indefinite leave to remain in 2004. The claimant has a daughter born 18 August 2009 and although they do not live together, the mother and the claimant share responsibility for her.
4. The panel noted that paragraphs 399 and 399A of the Immigration Rules did not apply and directed themselves that it would only be in exceptional circumstances that the public interest in deportation would be outweighed by other factors. They found that the claimant had a "significant relationship" with his daughter. Although he had no real connection with her whilst he was in prison, the relationship has now been "rekindled". Furthermore they found that there were no ties that either the claimant or his mother had with people still living in Nigeria although they noted that the claimant's grandmother is alive (but gravely ill) and that his mother had stayed with a cousin when she visited. The claimant had never returned to Nigeria since he came to the United Kingdom.
5. After directing itself in accordance with the law the panel set out their conclusions on proportionality in [74] of the determination in the following terms:

"74. In determining this appeal, it seems to us that we have to decide whether the length of time the appellant has been in the United Kingdom, bearing in mind that it covers a large part of his formative years - that is to say since he was aged 7 - to his age as he is now 23 and the fact that he is the father of a young child who we accept he has accepted full responsibility for, which he shares with that of his partner, the mother of the child and his own mother.

75. We find that these factors are, in fact exceptional circumstances and as such require us to set aside the deportation order and allow the appellant to remain in the United Kingdom. That is our finding under the Rules. We would therefore allow the appellant's [sic] under the Rules as we would have done under Article 8 of the ECHR."

6. The challenge by the Secretary of State is that:
  - (i) the panel had failed to establish that there were exceptional circumstances in the appeal that would preclude deportation;
  - (ii) the claimant's length of residence did not amount in itself to something very compelling but instead a factor that should be weighed in his favour;

- (iii) the claimant's paternal role towards his daughter was not one of primary caregiver and whilst he may have assumed full responsibility for his obligations towards her, this is not in itself an exceptional circumstance;
  - (iv) the panel had failed to balance the best interests against the public interest;
  - (v) the panel had failed to conduct any assessment of the wider public interest against the individual best interests of the child.
7. In granting permission to appeal, UTJ Kekic observed that it was arguable that despite the claimant's long residence, the panel had failed to properly identify the exceptional circumstances given that the contact with his daughter had only recently been re-established. It was also arguable that the public interest was not properly considered or assigned sufficient weight.
  8. Mr Avery relied on the grounds of application and drew our attention to *SS (Nigeria) v SSHD* [2013] EWCA Civ 550. Although the panel had stated it would have regard to exceptional circumstances, that exercise had not been undertaken. There was no analysis of any risk of reoffending and that the panel had not adequately engaged with the issue of proportionality.
  9. Ms Lloyd accepted that the reasoning was brief but did not consider any error material. She argued that the panel clearly had in mind the factors they were required to take into account. She accepted that there had been no analysis of the risk of re-offending. She invited us to take a "global view" based on the length of time the claimant has been in the United Kingdom coupled with the child as well as his attempts to rehabilitate himself indicated by his current pursuit of a degree course at university. It would clearly be difficult for somebody who has lived here for so long to resettle in Nigeria.
  10. At the hearing after reflecting on these matters we gave our decision that we were persuaded the panel had erred in law and set their decision aside. Both parties accepted that in the light of the need for rather more detailed factual findings to be made in the light of the changed approach now required under section 117A-D of the 2002 Act it would be appropriate to remit the case to the First-tier Tribunal.
  11. Our reasons for finding error of law are as follows. We consider that the panel failed to undertake the exercise it had directed itself to carry out between paragraphs [69] to [73] of the determination. Significantly there was inadequate emphasis on the fact that the presumption in favour of deportation was embodied in primary legislation and there is simply no reference at all to the power of that presumption in the briefly stated reasons in [74] and [75]. The panel failed to measure the positive factors which it considered militated against removal being the claimant's

daughter and his length of residence here against the general and specific public interest arising in this case having regard to the nature and seriousness of the offence. The public interest element appears to have fallen by the wayside.

12. The panel did not reach a conclusion on the best interests of the child. Even if it can be assumed that it proceeded on the basis that the best interests required the continuing presence of the claimant, there is no reasoned analysis how this factor was assessed against the public interest.
13. The panel's conclusions about the claimant's ties with Nigeria are also insufficiently reasoned particularly in the light of the evidence of surviving relatives. The panel was entitled to give considerable weight to the claimant's length of presence in the United Kingdom particularly formative years as a minor, but here too there is an absence of reasoning how this factor was assessed against the public interest.
14. As we observed at the hearing, there was no evaluation by the panel of the risk of reoffending. The panel had noted that between 2008 and 2010 the claimant had been convicted and sentenced to various offences including possession of offensive weapons in public places, theft from a person and assaulting a constable. The sentences given had ranged from community rehabilitation orders to 45 days in a young offenders' institution. It appears that no probation report was placed before the panel. Instead they simply had a letter from the claimant's probation officer dated 12 March 2014 explaining that he had fully complied with his licence since release and that there had been no evidence to suggest an increase of his risk of reoffending. The author does not explain what that risk had previously been. It was incumbent upon the panel to reach its own view on the risk of reoffending as part of the proportionality exercise.
15. For these reasons we are satisfied that the Secretary of State was correct to challenge this determination. We do not consider that on the material before them, even if the panel had undertaken an adequate and properly reasoned proportionality assessment that there could only be one answer. We are not persuaded by Ms Lloyd's submissions that the errors made were not material.
16. We therefore set aside the decision for material error and as discussed at the hearing remit the case to the First-tier Tribunal for its reconsideration pursuant to s.12 of the Tribunals, Courts and Enforcement Act 2007.
17. The findings of the panel as to the length of time the claimant has been in the United Kingdom and the role he plays in his daughter's life are preserved. We also preserve the finding that the claimant has not returned to Nigeria since coming to the United Kingdom. We do not preserve the findings the panel reached regarding the absence of ties with Nigeria.

Signed

Date 20 August 2014

A handwritten signature in blue ink, appearing to read "Dawson".

Upper Tribunal Judge Dawson