Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00974/2014

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated**
On 13 November 2014	**On 15 December 2014**

Before

THE HON MRS JUSTICE ANDREWS DBE
UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR A H I A
(Anonymity Direction Made)

Respondent

Representation:
For the Appellant: Ms L Kenny a Senior Home Office Presenting Officer
For the Respondent: Mr A Reza a solicitor from Alexander & Partners

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Tanzania who was born on 20 August 1992 ("the claimant"). The Secretary of State appeals against the determination of First-Tier Tribunal Judge Creswell ("the FTTJ") who allowed the claimant's appeal against the Secretary of State's decision of 13 May 2014 to make a deportation order against him as a foreign criminal (as defined by section 32 (1)

of the UK Borders Act 2007) on the grounds that his deportation was conducive to the public good under 32 (4).

2. At the end of the hearing, we reserved our decision which we now provide together with our reasons.

3. On 2 April 2012 at Harrow Crown Court the claimant was convicted of handling stolen goods and driving without a licence and insurance. He received a community order, penalty points and a fine of £30. Whilst tagged for that offence he breached the tagging order which led to his arrest, and also to the Secretary of State serving him with a notice that he was an over-stayer. The subsequent and index offence was committed on the evening of 19 May 2012, when he was 19 years old, and led to his conviction after trial at the Central Criminal Court on 16 May 2013 for violent disorder. On 7 June 2013 he was sentenced to 30 months' detention in a young offender institution. He did not appeal against conviction or sentence. The claimant was part of a gang involved in an attack where two men, father and son, were stabbed and the son was killed. Two of his co-defendants were convicted of murder and one was convicted of manslaughter. Others, including the claimant's brother, were like him convicted solely of violent disorder. The offending and the part played in it by the claimant are described in greater detail in paragraph 16(xii) and (xiii) of the determination of the FTTJ. The sentencing judge was satisfied that he was "very actively engaged in the call to arms and played a clear role in the violent disorder."

4. The appellant appealed against the Secretary of State's decision and the FTTJ heard the appeal on 28 August 2014. Both parties were represented, the claimant by Mr Reza who appeared before us. The FTTJ heard oral evidence from the claimant, his partner and his mother and father.

5. The FTTJ applied the provisions of paragraphs 397, 398 and 399A of the Immigration Rules. He found that the appellant did not meet the requirements of paragraph 399 but did meet those of paragraph 399A. Excluding time spent in prison, he had spent over half his life in the UK, had no ties to Tanzania and his knowledge of the Swahili language would have ended sometime between ages six and nine. It was credible that he had spoken English at home in the UK because his stepfather was Ugandan and did not speak Swahili (paragraph [19])

6. The FTTJ concluded that it was unnecessary for him to go on and consider the Article 8 human rights grounds outside the provisions of the Rules. The new Rules were a complete code and there was no need to consider whether there were particular compelling or exceptional circumstances as the claimant met the requirements of paragraph 399A(b). The FTTJ allowed the appeal under the Immigration Rules.

7. The Secretary of State applied for and was granted permission to appeal, submitting that the FTTJ erred in law by failing to consider the provisions of the

Immigration Act 2014 and in particular paragraph 117C(4)(c), and failing to give adequate consideration to the Secretary of State's public interest policies given the severity of the offence and the strong public interest in favour of the claimant's deportation in pursuance of the legitimate aim of preventing crime and disorder and the deterrence of other foreign criminals.

8. Ms Kenny submitted that the provisions of paragraphs 117A, 117B, 117C and 117D of the Immigration Act 2014 had come into force before the FTTJ heard the appeal and therefore should have been applied. In reply to our question, she also accepted that the FTTJ had applied an earlier version of the Immigration Rules (Rules 399 and 399A) which had been superseded, rather than the later version which should have been applied. These were material errors of law. This was not an appeal which was bound to succeed had the correct provisions been applied. The decision should be set aside and remade. It could be remade on submissions only; no further evidence was needed.

9. In her submissions as to remaking the decision, Ms Kenny argued that, whilst the claimant could rely on paragraph 117C(4)(a) (because, as she accepted, he had been lawfully resident in the UK for most of his life) and 117C(4)(b) (because he was socially and culturally integrated in the United Kingdom), paragraph 117(C)(4)(c) did not apply because there were no very significant obstacles to his integration in the country to which he would be deported. English was spoken in Tanzania and both the claimant and his partner spoke English. His witness statement revealed strong cultural ties to Tanzania and his mother and her partner had been there on visits, even if he had not returned since he arrived in the UK. Of course the claimant's uncertain immigration status may have inhibited him from travelling outside the jurisdiction. Ms Kenny accepted that there was a genuine and subsisting relationship between the claimant and his partner but, nevertheless, she submitted that it would not be unduly harsh for him to be removed.

10. We have a skeleton argument from Mr Reza. Contrary to what is said in his skeleton argument, he accepted that the provisions of paragraphs 117A, 117B, 117C and 117D of the Immigration Act 2014 had come into force before the FTTJ heard the appeal and should have been applied. He argued, however, that this was not a material error. He submitted that the FTTJ applied the correct version of the Immigration Rules, namely those in force at the date of the Secretary of State's decision, rather than those in force at the date of the hearing. Exception 2 in paragraph 117(C)(5) applied and it would be unduly harsh to expect his partner to go with him to Tanzania. Even if the FTTJ had erred in law it was not a material error because, if the appropriate law was applied, the conclusion was bound to be the same.

11. Further or alternatively Mr Reza submitted that the claimant's mother and stepfather had made an application for settlement for the claimant as their dependant as long ago as May 2001. The supporting documents were supplied in

April 2002, but for reasons which remain unexplained, the Secretary of State had failed to deal with that application. The FTTJ was highly critical of that inactivity in paragraph 16(v) and (vi) of the determination but otherwise said nothing about it. Mr Reza submitted that if the application had been dealt with within a reasonable time, the claimant would at the very least have been granted a right to remain, probably indefinite leave in line with the leave granted to his mother. He contended that we could infer from the fact that the claimant's mother, who was granted indefinite leave to remain as the spouse of his stepfather, had been granted naturalisation in July 2003, that the claimant would have followed suit and that but for the Secretary of State's inactivity he would have been a British citizen at the time of the index offence and thus ineligible for deportation. Mr Reza submitted that this was a factor that we could and should take into account in determining his Article 8 application even if he did not meet the requirements of Exceptions 1 and 2 of what is now Paragraph 117C of the Immigration Rules, as very compelling circumstances for concluding that his removal would be disproportionate.

12. Mr Reza agreed that if we found that there was a material error of law then we could remake the decision on the basis of the FTTJ's findings of fact and no further evidence or submissions were needed.

13. As both representatives accepted and we find, the provisions of the Immigration Act 2014 set out where the public interest lies in paragraphs 117A, 117B, 117C and 117D. These provisions were in force at the date of the hearing and should have been applied whenever the claimant's application or the Secretary of State's decision had been made. The failure to mention or apply these provisions is, we find, an error of law and a material error. It cannot be said that any judge properly directing himself or herself was bound to have reached the same conclusion.

14. We find that there also is an error of law because of the application of an earlier version of the Immigration Rules rather than the Rules in force at the date of the decision. Contrary to Mr Reza's submissions, the new Rules and the 2014 Act mirror each other and need to be read together. The Rules provide in paragraph A362, quoted below, that "Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served." That puts the matter beyond argument. Even though the decision to deport the claimant was made in May 2014, the appeal was heard in August and it was incumbent upon the FTTJ to consider whether the requirements of the new Rules as at 28 July 2014 were met. He did not do so.

15. The failure to address the new Rules is also a material error of law. It cannot be said that any judge properly directing himself or herself was bound to have reached the same conclusion if the correct version of the Rules had been applied.

16. The provisions of the Immigration Act 2014 in force at the date of the hearing before the FTTJ and still in force now set out where the public interest lies in paragraphs 117A, 117B, 117C and 117D as follows;

"117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
   (a) breaches a person's right to respect for private and family life under Article 8, and
   (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—
   (a) in all cases, to the considerations listed in section 117B, and
   (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
   (a) are less of a burden on taxpayers, and
   (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
   (a) are not a burden on taxpayers, and
   (b) are better able to integrate into society.

(4) Little weight should be given to—
   (a) a private life, or
   (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—
"Article 8" means Article 8 of the European Convention on Human Rights;
"qualifying child" means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;
"qualifying partner" means a partner who—
(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).
(2) In this Part, "foreign criminal" means a person—
(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—
(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—
(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;
(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and
(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

17. Paragraphs A362, 398, 399 and 399A of the current Immigration Rules in force at the date of the hearing before the FTTJ and still in force now provide that;

"A 362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

A398. These rules apply where:
(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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 and in the public interest 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 and in the public interest 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 and in the public interest 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, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

….

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
    (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
    (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
    (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and
(b) he is socially and culturally integrated in the UK; and
(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

18. It has not been suggested that the FTTJ's findings of fact in paragraph 16 of the determination are flawed, and we adopt them.

19. We do not accept Mr Reza's contention that had it not been for the delay on the part of the Secretary of State in dealing with the claimant's application made in May 2001 he would have become a British citizen before the decision to make a deportation order. Whilst a decision on the first application was still awaited a further application was made in 2006 which was rejected for lack of a properly completed application form or payment of the fee. If the claimant (or his parents) had been interested in improving his status we would have expected him or his parents to have renewed the application at that stage. There is no evidence from him to say that he wished to pursue matters with a view to becoming a British citizen. During the period of delay he has been able to increase his assimilation into society and start and develop relationships, in particular his relationship with his partner.

20. We apply paragraphs 117A, 117B, 117C and 117D of the Immigration Act 2014. The Secretary of State's decision and the claimant's appeal engage paragraph 117A. The provisions of paragraph 117B establish that maintenance of effective immigration control is in the public interest. The claimant's relationship with his partner was established at a time when he was in the UK lawfully because at all material times he had an outstanding application for settlement (as Ms Kenny now very properly concedes). As a British citizen, she is a qualifying partner.

21. The appellant is a foreign criminal and paragraph 117C means that his deportation is in the public interest. The index offence was a serious one and needs to be viewed in the context of the trial judge's sentencing remarks. However, sub-paragraphs 117C (3) to (7) do not apply, because the claimant was not sentenced to imprisonment for 4 years or more.

22. Paragraph A398 (a) of the Rules applies, as does 398(b). As a result, we must consider whether paragraphs 399 or 399A apply. We find that the claimant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen. Whilst the point has been in issue, it is now accepted by the Secretary of State that the claimant is and has been in the UK lawfully. We find that the claimant's relationship with his partner was formed at a time when he was in the UK lawfully and his immigration status was not precarious. The relationship also commenced before any of his convictions, whilst the claimant and his partner were still at school.

23. However we find that it would not be unduly harsh for the claimant's partner to live in Tanzania because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM. That exception refers to insurmountable obstacles to family life with his partner continuing outside the UK. In the light of the relevant Strasbourg and domestic jurisprudence, "insurmountable obstacles" means very significant difficulties which would be faced by the claimant or his partner in continuing their family life together outside the UK and which could not be overcome, or would entail very serious hardship for the claimant or his partner.

24. The claimant's partner is training to be a teacher, and wishes to complete her training. She would have to leave her family behind. She said in evidence that she would be prepared to go to Tanzania with the claimant if there was no other choice but it would ruin her hopes for the future. We do not accept that this is necessarily the case. There is no evidence as to whether enquiries have been made as to whether she could continue her training in Tanzania. Even if she could not, she is in to the second year of a four-year course and could join the claimant at the end of her studies. At that stage her qualifications are likely to be of benefit to her in Tanzania. She has been there before on holiday and might be able to afford to visit the claimant whilst her studies continue. She speaks English, which is one of the languages spoken in Tanzania.

25. We also find that it would not be unduly harsh for her to remain in the UK without the claimant. It need not be an indefinite separation if she joins him at the end of her studies, and there is nothing to prevent them keeping in touch through modern means of communication in the meantime.

26. In relation to paragraph 399A we find that the claimant has been lawfully resident in the UK for most of his life and is socially and culturally integrated in the UK. However, we conclude that there would not be very significant obstacles to his integration into Tanzania. Whilst the claimant's Swahili is likely to be rusty because it has not been used on a regular basis since he was a child, we do not accept that he would not be able to become proficient within a reasonable time. He is still young enough to be able to adapt, and in any event he speaks English which means that he is unlikely to face any significant communication difficulties in Tanzania. He does not have any remaining family in Tanzania, but there is no reason why members of his family should not visit him there. They have visited that country in the past. He is in good health.

27. The FTTJ found that there was a risk of re-offending, although the evidence before the trial judge had been less than satisfactory in terms of the assessment of that risk. The author of the pre-sentence report had concluded that the claimant did not represent an immediate risk of significant harm to others, but had also stated that the potential for violence in the type of offence he had committed was a real concern. He had attempted to minimise his involvement in the events which led to his conviction, which did him no credit, but he had also expressed remorse for his actions and he had received a positive report from the prison service about his behaviour in prison.

28. We find that deportation of the claimant would not be contrary to the UK's obligations under Article 8 of the Human Rights Convention. He is a foreign criminal and deportation of foreign criminals is in the public interest. He committed a serious offence. There are no very compelling circumstances which outweigh the public interest in deportation. Even if there had been evidence that he would have become a British Citizen before he committed the offence, that

factor would not have amounted to a sufficiently compelling reason to conclude that his removal would be a disproportionate interference with his Article 8 rights.

29. The FTTJ made an anonymity direction because of "sensitive issues". We consider that it is appropriate and necessary to renew this. We make an order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the claimant, his partner or any member of his family.

NOTICE OF DECISION

30. For the reasons stated above we find that the First-tier Tribunal made material errors of law in its determination. We allow the Secretary of State's appeal to the Upper Tribunal, set aside the decision of the FTTJ, remake that decision and dismiss the claimant's original appeal under the Immigration Rules on Article 8 human rights grounds.

Signed:..... Date: 14 November 2014

Upper Tribunal Judge Moulden