Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00528/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Determination Promulgated**
On 12 March 2015	**On 23 March 2015**

Before

Upper Tribunal Judge Pitt
Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Oluwaseyi Adeniyi
[No anonymity direction made]

Claimant

Representation:
For the claimant: Not represented
For the appellant: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Russell promulgated 7.10.14, allowing the claimant's appeal against the deportation order made on 14.3.14 pursuant to section 32(5) of the UK Borders Act 2007. The Judge heard the appeal on 1.10.14.

2. First-tier Tribunal Judge Ford refused permission to appeal on 27.10.14 but when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Warr granted permission to appeal on 15.12.14.

3. Thus the matter came before us on 12.3.15 as an appeal in the Upper Tribunal.

4. For the reasons set out below we found an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Russell should be set aside and remade.

5. The relevant background to the appeal can be summarised as follows. The claimant claims he first came to the UK in 1987. In 2004 he applied for indefinite leave to remain on the basis of 14 years mixed continuous residence in the UK. The application was refused in 2008 and he was served with notice of liability to be removed as an illegal entrant. His appeal against this was allowed and on 31.10.08 he was granted indefinite leave to remain. However, on 9.10.12 he was convicted on his own admission of several counts of possession of Class A controlled drugs with a street value of some £15,000 with intent to supply and sentenced to 3 years imprisonment concurrent on each offence. On 20.11.12 he was served with notice of liability to deportation.

6. The family background is that the claimant has three children of his own and prior to imprisonment lived with his partner and her two children, regarded as his step-children. The Secretary of State accepts that he has a genuine and subsisting relationship with the four children who were under the age of 18 at the date of decision, 14.3.14. Two children and one step-daughter are still under the age of 18, the youngest being 14. Each of the children is a British citizen.

7. There is no dispute that the claimant is not a British citizen or that the length of his sentence brings him within the 'foreign criminal' automatic deportation provisions of section 32(5) of the UK Borders Act 2007 and that the Secretary of State was therefore obliged to make a deportation order, subject only to section 33 and paragraphs 398, 399 and 399A of the Immigration Rules, the Article 8 ECHR exceptions.

8. Judge Russell found that the claimant did not meet either the parental relationship exception under paragraph 399(a), or the long residence exception under 399A. However, the judge concluded at §34 that it would be unduly harsh either for the claimant's partner to follow him to Nigeria, or to remain in the UK without him, pursuant to paragraph 399(b), and the appeal was allowed on that basis.

9. In granting permission to appeal, Judge Warr noted that Judge Russell allowed the appeal on the basis that it would be unduly harsh for the claimant's partner to live in Nigeria, although he had not heard or seen any evidence about the problems that she would face in adapting to a new life in Nigeria. "In the premises the respondent's grounds appear to raise an arguable legal challenge."

10. The Rule 24 response on behalf of the claimant avers that there is no arguable material error of law in the decision of the First-tier Tribunal and it is submitted that the first ground of appeal is fundamentally flawed as the claimant met the exceptions to deportation under paragraph 399(b) of the Immigration Rules. "It is obvious that it

would be unduly harsh for his partner Pauline Vassel and his children who are British citizens to relocate to Nigeria after living all their lives in the UK."

11. Somewhat lengthy submissions are made in the Rule 24 response as to the effect on the children of the claimant's removal, but it ignores the fact that the decision of the First-tier Tribunal found that the claimant did not meet the exceptions in relation to parental responsibility. There has been no cross-appeal by the claimant or grant of permission to appeal that part of the decision of the First-tier Tribunal. In the assessment as to whether there is a material error of law in the decision, those considerations are not directly relevant.

12. It follows that the findings of the First-tier Tribunal in respect of the children (§24-29) and in relation to long residence (§35-39) must stand. The only ground on which the claimant's appeal succeeded in the First-tier Tribunal was in respect of his relationship with his partner (§30-34). It is that finding which is challenged by the Secretary of State.

13. Although at §22 of the decision the judge referenced the public interest considerations applicable to cases involving foreign criminals under section 117C of the 2002 Act and noted that the deportation of foreign criminals is in the public interest, the decision contains no reference to either of the two exceptions under section 117C. The claimant cannot meet the requirements of exception 1, as he has not been lawfully resident in the UK for most of his life. The test under exception 2 is whether the effect of the claimant's deportation on his partner or child is unduly harsh, which overlaps with the consideration under 399(b). Following Dube (ss117A-117D) [2015] UKUT 0090 (IAC), it is not an error of law to fail to refer to ss 117A-117D considerations, if the judge has applied the test he was supposed to apply according to its terms; what matters is substance not form. In the circumstances, there is no material error in failing to specifically address the exceptions under section 117C.

14. However, we find that there were errors of law in the decision of the First-tier Tribunal at both §33 and§34. The relevant parts of the test under paragraph 399(b) at issue as applied to the facts of this case are whether it would be unduly harsh for the partner to live in Nigeria because of compelling circumstances over and above those described in EX2 of Appendix FM, and unduly harsh for the partner to remain in the UK without the claimant. EX2 defines insurmountable obstacles as very significant difficulties which would be faced by the claimant or his partner in continuing family life together outside the UK and which could not be overcome or would entail very serious hardship for the claimant or his partner. It follows that something more than very serious hardship is required.

15. The Secretary of State accepted that it would be unreasonable to expect the children to leave the UK, but pointed out that it was a matter of choice for the claimant as to whether she would relocate to Nigeria or remain in the UK without him. The only reason proffered by the First-tier Tribunal Judge for concluding at §34 that it would be unduly harsh for the claimant's partner to follow him to Nigeria or remain in the UK without him is that she would have to leave her children behind in the UK, which the judge considered to be an insurmountable obstacle. There was no

explanation as to why it would be unduly harsh for his partner to remain in the UK without him. The judge had already found at §29 that the claimant played a minimal role in the lives of the children and that it would not be unduly harsh for the children to remain in the UK without him. There was no evidence that the partner would be unable to care for herself or the children without his presence in the UK.

16. In the circumstances, neither the evidence before the Tribunal nor such reasoning as is provided at §33 could justify the conclusion at §34 that the requirements of paragraph 399(b) were met as regards it being unduly harsh for the partner to remain in the UK without the appellant. The reasoning is inadequate, if not entirely absent. The evidence before the Tribunal did not demonstrate that the threshold to meet the test of unduly harsh was met.

17. We therefore set aside that part of the decision only, preserving the findings and conclusions in relation to the claimant's relationship with his children and the long residence claim. The claimant was not legally represented, because of the financial cost, and thus there was nothing to be gained by adjourning the remaking of the decision. In remaking the decision we went on to consider whether it would be unduly harsh for the claimant to return to Nigeria with his partner remaining in the UK.

18. In addition to their witness statements, we heard oral evidence from both the claimant and his partner Ms Pauline Vassell, and took into account all the other documents in the claimant's bundle.

19. Ms Vassell is expecting a further child to the claimant, with whom she has been in a relationship since 2010. She had a stillbirth of an earlier child, following the claimant's imprisonment. She said that the stress of losing that child was unbearable and felt it important that the expected child she is now carrying should be able to bond with its father. She said that both she and the children needed the claimant's emotional and financial support. He provided support in helping look after the children in the home. He has also been working since completion of his sentence. She said that she had never been to Nigeria, knew no one there and explained that all her family is in the UK. She did not know how they would be able to survive without the claimant as she would effectively be a single parent. The claimant said that it would be difficult for him not to be able to see his new child growing up.

20. Mr Whitwell drew our attention to the Immigration Directorate Instructions (IDI), dated 28.7.14, which, at 2.5, relies on the dictionary definition of 'unduly' as 'excessive' and 'harsh' as 'severe, cruel.' At 2.5.3 the IDI states, "The greater the public interest in deportation, the stronger the countervailing factors need to be to succeed. The impact of deportation on a partner or child can be harsh, even very harsh, without being unduly harsh, depending on the extent of the public interest in deportation and of the family life affected."

21. As explained to the claimant and Ms Vassell, she is not required to leave the UK but the appeal can only succeed if it can be demonstrated that, although they have a genuine and subsisting relationship, it would be both (1) unduly harsh for her to live in Nigeria, because of compelling circumstances over and above the test in EX2 of very significant difficulties which could not be overcome or would entail very

serious hardship for the claimant or his partner; and (2) unduly harsh that she should remain in the UK without him. As stated above, something more than very serious hardship and which would be akin to excessive and cruel is required.

22. Whilst the claimant would be deported from the UK and separated from Ms Vassell and their children, she has a choice as to whether to accompany him to Nigeria or remain in the UK. If she decided to remain, she would be left in the same sort of position as she was when he was in prison, although she may then have had limited visiting rights. Contact between the claimant in Nigeria and Ms Vassell in the UK can be maintained through occasional visits and by telephone and/or Internet technology. She would be effectively a single parent, raising the children by herself; a situation not uncommon in society, and she would have such State financial and other assistance to which she may be entitled. Taking all the evidence before us into account, whilst it would be very sad for the claimant, Ms Vassell, and the children, the circumstances of this case do not demonstrate that the high threshold of unduly harsh under paragraph 399(b) can be met.

23. It is not necessary to consider Article 8 ECHR separately, as it has been held that the Immigration Rules in relation to deportation are a 'complete code.' However, we are satisfied that any consideration of Article 8 ECHR family life following the Razgar stepped approach would have reached the same conclusion for the same reasons on an assessment of all the evidence before us. Balancing on the one hand the very high public interest in the claimant's removal as a foreign criminal against the rights of the claimant and Ms Vassell on the other, we would have found that the deportation decision is entirely proportionate.

24. In the circumstances, and for the reasons stated we find that the appeal must fail under the Immigration Rules and on human rights grounds.

Conclusions:

25. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

We set aside the decision.

We re-make the decision in the appeal by dismissing it.

Signed: Date: 12 March 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

We make no fee award.

Reasons: No fee is payable in this case and thus there can be no fee award.

Signed: Date: 12 March 2015

Deputy Upper Tribunal Judge Pickup