Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00667/2014

THE IMMIGRATION ACTS

Heard at : Nottingham Magistrates Court
On : 13 May 2015

Decision and Reasons Promulgated
On 20 May 2015

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GEORGE DENNIS

Respondent

Representation:
For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondent: Mr C Lane, instructed by Rodman Pearce Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Dennis's appeal against the decision to deport him from the United Kingdom.

2. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Mr Dennis as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Ghana, born on 27 November 1965. He arrived in the United Kingdom together with his sister in November 1979, aged 11, with a settlement visa to join his father. On 7 June 2011 he was convicted of committing gross indecency with a child and indecent assault on a female and was sentenced to 40 months (three years and four months) imprisonment. His custodial sentence ended on 4 February 2012 and from that time he remained detained under Immigration Service powers. On 21 September 2011 he was notified of his liability to deportation. That was re-sent on 7 December 2012 as he claimed not to have received the notification. On 4 October 2013 the appellant claimed that his deportation would breach his Article 8 human rights.

4. On 1 April 2014 a deportation order was made against the appellant and on 8 April 2014 he was served with a decision that section 32(5) of the UK Borders Act 2007 applied.

5. The respondent, in making that decision, noted that the appellant had amassed 10 convictions for 31 offences from October 1987 until June 2011, including 5 offences against the person (2004-2009); 17 sexual offences (2011); 6 theft and kindred offences (1987-1999); 1 public disorder offence (2009); 1 offence relating to police/courts/prisons (1990); and 1 drugs offence (1987). Consideration was given to the appellant's Article 8 claim. The respondent considered that, since the appellant did not have a partner or children, he did not meet the requirements of paragraph 399(a) and (b) of the immigration rules. The respondent considered further that, whilst the appellant had lived in the United Kingdom for more than 20 years, he could not meet the requirements of paragraph 399A since he retained ties to Ghana. It was not accepted that there were very compelling circumstances which outweighed the public interest in his deportation. The respondent accordingly concluded that the appellant's deportation would not breach Article 8. The respondent also considered Article 3 on the basis of the appellant's medical condition and his diagnosis as a paranoid schizophrenic, but concluded that treatment was available to him in Ghana.

6. The appellant's appeal against that decision was heard in the First-tier Tribunal on 14 July 2014 by First-tier Tribunal Judge Gurung-Thapa. The judge noted that the appellant claimed to have no family ties in Ghana and to have returned there on only one occasion in 1988 and further that his whole family including his father and siblings were British citizens and lived in the United Kingdom. She took note of the medical evidence confirming that he was suffering from paranoid schizophrenia and that he had been receiving care for his mental illness in the United Kingdom since 1996, but concluded that his deportation would not breach his Articles 2 and 3 human rights. However she allowed the appeal under the immigration rules on the basis that the requirements of paragraph 399A had been met.

7. The respondent sought permission to appeal to the Upper Tribunal on the grounds that the judge had materially misdirected herself in law by allowing the appeal under paragraph 399A, in light of her findings that there were extended family members living in Ghana, albeit that there was no contact with them.

8. Permission to appeal was granted on 18 August 2014.

9. The appeal came before me on 13 May 2015. I heard submissions on the error of law and advised the parties that in my view the judge had erred in law in her consideration of paragraph 399A.

10. It was not a matter of dispute before the judge that the appellant had resided in the United Kingdom for more than 20 years and therefore the relevant question, in considering paragraph 399A, was whether or not he retained any ties to Ghana.

11. At paragraph 47 of her decision, Judge Gurung-Thapa found that the appellant had extended family members living in Ghana. She accepted that there was no continuing contact with those family members, but considered that that did not mean that contact could not be established in order to derive support from them in addition to the financial assistance of the family members in the United Kingdom, in the event of the appellant returning to Ghana. Although that finding was made in the context of the appellant's Articles 2 and 3 human rights claim, it was plainly relevant to her findings on Article 8 when considering the appellant's ties to Ghana for the purposes of paragraph 399A of the immigration rules.

12. However, when considering paragraph 399A, the judge, applying the principles in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60, concluded that the appellant had no "continuing connection" to life in Ghana, having been there only once since entering the United Kingdom, in 1988, and having no contact with his extended family. It seems to me that that was not a sustainable conclusion, given her finding at paragraph 47 of her decision. That is particularly so when considering the clarification and guidance given by the Upper Tribunal in Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 00042 in circumstances similar to those arising in this appellant's case. At paragraphs 15 and 16 of that case, the Upper Tribunal found that the First-tier Tribunal's decision was at odds with Strasbourg jurisprudence which required that an assessment of ties had an objective as well as a subjective dimension and that that assessment had to consider what lay within the choice of a claimant to achieve and whether dormant ties could be revived. It seems to me that, in light of her findings at paragraph 47 of her decision, Judge Gurung-Thapa made the same error as that of the First-tier Tribunal in Bossadi in making her assessment of ties in relation to the appellant and that her findings on paragraph 399A therefore cannot stand and must be set aside.

13. Having found that the requirements of paragraph 399A were met, Judge Gurung-Thapa did not go on to make any findings on "exceptional circumstances" pursuant to paragraph 398 and, as such, relevant findings need to be made. It is also the case, however, that since the judge's decision there have been significant changes to the immigration rules, including paragraph 399A, and the principles relating to deportation, which must now be applied in the appellant's case in re-making the decision. Accordingly there has to be a fresh consideration of the appellant's Article 8 claim, applying the new rules and the new statutory provisions in Part 5A of the Nationality, Immigration and Asylum Act 2002. For those reasons Mr Mills accepted that the decision could not simply be re-made in the Upper Tribunal but that the case ought properly to be remitted to the First-tier Tribunal.

14. Accordingly the case is remitted to the First-tier Tribunal for the appellant's Article 8 claim to be considered afresh. As agreed by the parties, the findings of fact made by Judge Gurung-Thapa are to be preserved. That is, of course, subject to findings made on any new evidence produced for the hearing before the First-tier Tribunal. The judge's decision in relation to Articles 2 and 3 has not been challenged and therefore stands. It is for the First-tier Tribunal to make fresh findings in regard to paragraphs 399A and 398 of the rules.

DECISION

15. The Secretary of State's appeal is allowed.

16. The making of the decision of the First-tier Tribunal with respect to Article 8 and the Immigration Rules involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2, to be dealt with afresh, before any judge aside from Judge Gurung-Thapa.

Signed
Upper Tribunal Judge Kebede