IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01315/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 February 2015	**On 19 February 2015**
Determination given orally following the hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLALEYE ATANDA OLALEKAN OGUNRINDE

Respondent

Representation:
For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr Rahath Abdar, Legal Representative, Kesar & Co Solicitors

DETERMINATION AND REASONS

1. Ths is the Secretary of State's appeal against a decision made by First-tier Tribunal Judge Somal which was promulgated on 2 December 2014 following a hearing at Nottingham on 17 November 2014 to which I will refer below. For ease of reference I shall throughout this determination refer to Mr Ogunrinde (who was the original appellant) as “the claimant”

and to the Secretary of State, who was the original respondent, as "the Secretary of State".

2. The claimant is a citizen of Nigeria who was born on 15 June 1958 and he arrived in this country in August 1997 and following successive variations of his leave to remain was eventually in June 2000 granted indefinite leave to remain. His wife and one child joined him in 2009 and they were granted indefinite leave to remain in this country in April 2013. The couple also have another child, born in the UK, who is a British citizen. Other than in respect of the matters which now concern this Tribunal it is not suggested that this claimant has been other than of good character and nor is it suggested that anyone in his family has behaved in a way that he or she should not.

3. Very regrettably indeed, at the end of 2012, the claimant drove while unfit to do so and he drove very badly indeed. He was convicted of an offence of dangerous driving and driving while unfit because he was drunk, for which he was sentenced to fourteen months' imprisonment suspended for eighteen months. He apparently drove the wrong way down a one way street and hit a stationary car. Luckily, there was not more serious damage caused. As the judge who eventually sentenced him remarked, it was an appalling episode of driving while he was over the limit. While he was not immediately sentenced to imprisonment he was of course also disqualified from driving when sentenced in June 2014. What made this even more serious was that in December 2014, barely six months after he had received the suspended sentence of imprisonment and been disqualified, he again drove while disqualified, although it is not suggested that on this later occasion he was unfit through drink or drugs.

4. Driving while disqualified is a very serious matter indeed and the claimant was brought back before the judge who had originally imposed the suspended sentence who took a very dim view of the claimant's behaviour. The judge only activated ten months of the suspended sentence partly because the claimant had carried out some of the unpaid work he had been ordered to do (there having also been a community penalty imposed as part of the original sentence) and also he had paid costs and a fine. In addition to the ten months' imprisonment in respect of the original offence at the claimant was sentenced to a further two months' consecutive for driving whilst disqualified, making a total of twelve months to be served immediately. It is accepted (correctly) on behalf of the respondent that technically, because sentences cannot be aggregated for present purposes, the claimant has to be treated as someone who has not been sentenced to a period of imprisonment of at least one year.

5. Nonetheless, the respondent thereafter made a decision to deport the claimant in reliance upon the provisions contained within paragraph 398(c) of the Immigration Rules which at the time of her decision provided that deportation of a foreign criminal would be justified where:

> "The deportation of a person from the UK is conducive to the public good 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".

6. It was then stated within paragraph 398 as in force at that time that "The Secretary of State in assessing a 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 will be outweighed by other factors".

7. The claimant appealed against the decision and his appeal was heard, as I have already indicated, before First-tier Tribunal Judge Somal sitting at Nottingham on 17 November 2014 and in a "Decision and Reasons" promulgated on 2 December 2014, she allowed the appeal.

8. The Secretary of State now appeals with leave against this decision on two grounds. The first is that the judge within her determination had regard to the Rules as drafted at the time the Secretary of State had made her decision whereas in fact by the date of hearing the Rule had been changed. I set out for the purposes of this determination the new Rule as follows:

> "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
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> ...
>
> (c) the deportation of the person from the UK is conducive to the public good **and in the public interest** [my emphasis because these words have been added] 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 paragraph 399 and 399A** [my emphasis]"

9. The differences are first, the addition of the words "and in the public interest" and secondly, that where neither paragraph 399 nor 399A applies, it will only be where there are "very compelling circumstances" rather than in "exceptional circumstances" where an appeal could succeed under Article 8.

10. It is the Secretary of State's case as advanced both in the grounds and before me that because the Tribunal had regard to the wrong version of this rule it failed to have proper regard to the public interest and also (although this was not advanced with any force before me) that there is a distinction to be drawn between "very compelling circumstances" and "exceptional circumstances".

11. The second ground is that the First-tier Tribunal's findings at paragraph 20 that this claimant was not a persistent offender and nor did he cause serious harm was "wholly inadequate". It is said with regard to serious harm that "there was the potential for it to cause much more serious

harm". He was, it is said, "extremely fortunate" that he did not hit another motorist or pedestrian, or cause another motorist, pedestrian, himself or his children serious harm. It is also said by Mr Bramble on behalf of the Secretary of State that because the judge wrongly stated that the offences were fourteen months apart whereas they were in fact only twelve months apart, and further did not appear to have had regard to the fact that the second offence was committed only six months or so after the imposition of the suspended sentence, the finding that the claimant was not a "persistent offender" is not sustainable. Mr Bramble sensibly did not repeat the argument set out in the grounds that the claimant had "gone on to commit a much more serious offence" because although driving whilst disqualified is undoubtedly a serious offence it cannot realistically be argued that it is "much more serious" than the original offence and indeed it is plain from the sentences which were imposed which were ten months' imprisonment for the earlier offence and two months for the later that the sentencing judge regarded the earlier offence as the more serious.

12. In my judgement the grounds are not realistically arguable. As I have already indicated, the offences of which the claimant was convicted were serious ones and it may well be that had the judge imposed a sentence of imprisonment of twelve months or more, which he might very well have done had he activated more of the original suspended sentence, the claimant would have had difficulty in arguing that he should not be deported by virtue of the automatic deportation provisions pursuant to paragraph 398(b) of the Rules which provide that the deportation of someone from the UK "is conducive to the public good because they have been convicted of a offence for which they have been sentenced to a period of imprisonment of ... at least twelve months". However, it is not suggested in this case, as I have already noted, that this subsection applies in respect of this claimant.

13. I do not consider the changes within the Rules to be material in any event. Insofar as it is now asserted that there is a valid distinction which can be made between the old and new Rule because it is now the case that it is not just to the public good but also "in the public interest" to deport offenders, it is clear (see paragraph 4) that the judge did understand the public interest which was involved.

14. So far as it is now argued that there is a meaningful distinction which can be made between "exceptional circumstances" and "very compelling circumstances", as the judge noted in her determination, the Court of Appeal in *MF (Nigeria)* [2013] EWCA Civ 1192 explained at paragraph 43 that the meaning to be given to the word "exceptional" was that "very compelling reasons will be required to outweigh the public interest in the deportation" and that "these compelling reasons are the 'exceptional circumstances'". There is accordingly no material difference between these expressions in the context of the present case.

15. Moreover, in my judgement it is not even necessary to consider whether there is any material difference between the relevant rule as previously drafted and the rule which was in place at the date of the decision,

because this claimant could only fall to be deported under paragraph 398(c) (on either version) if it could properly be said either that his offending "has caused serious harm" or that he is "a persistent offender who shows a particular disregard for the law". I say at once that I entirely endorse the observations made on behalf of the Secretary of State that his appalling driving *could* have caused serious harm, but the fact is that luckily for the community and for the claimant the offences which he committed did not actually cause serious harm. The Rules do not provide that the deportation of a person is conducive to the public good and in the public interest because somebody commits an offence which might have caused or had the potential to cause serious harm but because it did cause serious harm, and as I have said, this offence in fact did not.

16. Accordingly I entirely agree with the finding made by the First-tier Judge which was entirely open to her that the offence did not cause serious harm. Indeed, had she found that it had, on the facts of this case such a finding would arguably have been unsustainable.

17. As to her finding that the claimant was not a persistent offender, the judge stated at paragraph 20 that he had not shown a pattern of offending over a period of time. The judge had in mind that the claimant had been convicted on two occasions only for offences which were committed 12 months apart (and I do not consider the judge's erroneous statement that the offences had been committed 14 months apart to be of material importance) and she also noted that the claimant had not committed any other offence during the seventeen years he had lived in the UK.

18. In these circumstances I consider the judge was again entirely justified in finding that this claimant was not a persistent offender and indeed were I remaking the decision, on the facts of this case I would feel obliged, using ordinary language and usage to construe the meaning of "persistent offender", to reach the same conclusion.

19. It follows that the Secretary of State's appeal against the decision of the First-tier Tribunal must be dismissed and the effect of that is that the earlier decision allowing the claimant's appeal against the Secretary of State's decision to deport him will be affirmed.

20. I would, however, make this one further observation. This claimant might consider himself extremely fortunate that the Rules are such that on this occasion the Tribunal has in accordance with the law been obliged to find that the decision to deport him was not sustainable and that he was not liable under the rules to be deported. However, should he now go on to commit any further offences he might find it very hard indeed to argue in the future that he was not a persistent offender and he should appreciate that one of the consequences which would be likely to follow if he did is that he would then find himself the subject of a deportation order which he would be unable to appeal against successfully. So the claimant's future to that extent is in his own hands because he must take these proceedings as a very serious warning to him as to the consequences that would very likely follow were he to commit further offences.

Decision

There being no material error of law in the determination of the First-tier Tribunal this appeal by the Secretary of State is dismissed and the decision of the First-tier Tribunal allowing the claimant's appeal against the decision of the Secretary of State to deport him is affirmed.

Signed:

Date: 17 February 2015

Upper Tribunal Judge Craig