Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00923/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 23 November 2015	**On 04 January 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR ABAYOMI JOSEPH OLOWO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Layne, Counsel, instructed by Lannex Immigration and Legal Advice Services
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria born on 4 February 1964. He is said to have arrived in the UK, according to the respondent's decision letter, on 30 January 2004. He was granted indefinite leave to remain on 22 May 2009.

2. On or about 9 May 2014 (the date is not clear) the respondent made a decision that the appellant should be deported, pursuant to section 32(5) of the UK Borders Act 2007. That decision was made in response to the

appellant's convictions for four separate offences of being concerned in the acquisition of or the acquiring or concealing of criminal property. He received a total sentence of four years and six months imprisonment, although that sentence was imposed in relation to one of the offences, with concurrent sentence of lesser terms in relation to the remaining three offences.

3. His appeal against that decision came before a Judge of the First-tier Tribunal on 25 September 2014 whereby the appeal was dismissed.

4. The grounds as originally drafted make a number of criticisms of the First-tier Judge's determination. To summarise, it is generally submitted that the determination betrays a lack of attention to detail and suggests a lack of proper scrutiny of the issues. It is said that the judge did not clearly set out the burden and standard of proof, and erred in referring to the appellant having been convicted "by judge and jury" when plainly at a trial in the Crown Court it is the jury that decides guilt or innocence. The judge wrongly referred to the "Borders, Immigration and Asylum Act 2000" when he should have referred to the Borders, Citizenship and Immigration Act 2009.

5. It is also asserted that the judge conflated legal tests and failed to recognise that the fact that the appellant has a wife and four children, two of whom are minors, does amount to compelling circumstances not sufficiently recognised under the Immigration Rules. Allied to this is the contention that there was no adequate 'best interests' assessment.

6. Lastly, it is argued that there is a perception of bias in terms of the judge's comments on the appellant's criminality.

Submissions

7. On behalf of the appellant certain grounds were abandoned, with reliance only being placed on [6]-[9] of the grounds. At [6] it is asserted that the First-tier Judge applied an incorrect legal test at [6] of the determination where he stated that he found nothing "so grave and compelling" which would persuade him that it would be disproportionate to deport the appellant. It is argued that that phrase is not to be found in the Rules where the phrase is "very compelling circumstances" over and above those described in paragraphs 399 and 399A.

8. At [5] the judge had said that the appellant had "abused the privileges afforded to him by Her Majesty's Government" by committing serious offences and at [8], with reference to family and private life, he said that "perhaps this is a matter that he should have thought of before embarking on his criminal activities in the UK." It was submitted that this did not demonstrate a dispassionate assessment of the issues and created the impression of "unconscious bias."

9. Furthermore, the judge had made no findings in relation to the evidence of the appellant's father or the two children who also gave evidence before

him. He had not indicated what weight he gave to their evidence. He should have stated whether he accepted or rejected their evidence.

10. As regards the welfare of the minor children, it was only at the end of the determination at [21] where the judge referred to the best interests consideration under 'section 55' (s.55 of the Borders, Citizenship and Immigration Act 2009).

11. As a general proposition, it was argued that the determination is not set out logically.

12. On behalf of the respondent Mr Avery submitted that there was no error of law in the judge's decision. It was accepted that the determination is not as well structured as it might be, but the grounds on behalf of the appellant in reality amount only to a disagreement with the judge's findings.

13. In terms of the judge's use of the expression "grave and compelling," the actual test in the Rules is "very compelling." However, that is not a material error. If anything, the judge was applying a higher test than he was required to. The appellant would need to demonstrate something over and above paragraphs 399 and 399A. The evidence was not such that he could demonstrate that that threshold had been reached.

14. As regards credibility, and the evidence of the witnesses, there was no real issue in relation to credibility. The judge concluded that the family would be upset by the appellant's deportation, but that would not be sufficient. This is nothing more than one would normally expect in a deportation case. He clearly had in mind that there would be disruption for the family and that it would be upsetting for the children.

15. As regards the comments made by the judge in relation to the appellant's criminality, he was entitled to take a dim view of the appellant's offending and to express that view.

16. There was a consideration of the best interests of the minor children.

My assessment

17. It does seem to me that in a general sense there is some merit in the criticisms made of the First-tier Judge's decision, at least in terms of its structure. It was more or less conceded on behalf of the respondent in submissions that the way the judge had structured his determination did leave something to be desired. In my view the determination as a whole does suffer from the lack of a logical structure, and the assessment is diffuse in the sense that it is unfocused in many respects.

18. What the judge should have done was to set out the legislative framework in a coherent and logical fashion, applying the relevant deportation Immigration Rules and relevant statutory provisions.

19. It is only after certain findings of fact that one sees (brief) reference to the Immigration Rules, at [14]. Indeed, although not raised in submissions before me it appears that the judge's reference at [14]-[15] to "exceptional circumstances" under the Rules, is a reference to the former manifestation of the Rules at 398(c) whereas the version of the Rules substituted from 28 July 2014 refers to the need for "very compelling circumstances" over and above those described in paragraphs 399 and 399A. To repeat, this was not an argument relied on either in the grounds or in submissions before me.

20. Because of what I describe as the 'diffuse' nature of the determination, it is necessary to consider it in a linear fashion in order to determine whether the essential legal and factual issues have been addressed.

21. The judge recognised that this was an 'automatic' deportation under s.32(5) of the UK Borders Act 2007. Reference is made in the opening paragraphs to the Exceptions that apply in order for the appellant to resist deportation. At [2] the judge referred to having heard evidence from the appellant and his family members, including his wife, father and daughters, with the exception of his 8 year old son. He stated there that he had concluded that the appellant does not fall within any of the exceptions to automatic deportation.

22. At [4] the appellant's immigration history is set out, and his family circumstances described, including with reference to his children and their ages.

23. At [6] there is reference to the evidence that the appellant's father is in ill-health, referred to in more detail at [16] of the determination. Findings are made at [6] on the extent to which the appellant's family were able to manage without him whilst he was in prison, including in terms of his father being looked after by family members and the appellant's wife. There is reference to the children having been "going about their studies" and being looked after by their mother whilst the appellant was in prison. The conclusion at [6] was that it had not been established that the children's best interests made his removal disproportionate.

24. Again, at [7] there is a reference to the best interests "of the children both minor and adult" and those of the rest of the family.

25. In that same paragraph the judge referred to s.117C of the Nationality, Immigration and Asylum Act 2002 (albeit that the Act is wrongly described, referring to it as the Nationality and Asylum Act 2002). That said, the essential elements of s.117C are set out. The conclusion was that the evidence did not establish that the appellant had developed any "meaningful social and cultural ties to the UK and has integrated in the UK", indeed the reverse given his integration for some time with undesirable and "the wrong kind of people".

26. Again, in [7] the conclusion was that there were "no compelling circumstances that I have found over and above any lawful social and cultural ties and any integrations in UK society that there may have been."

The judge repeated that he could see "nothing compelling over and above this exception" (in s.117C). At [8] consideration was given to the appellant's relationship with his partner and children, again the conclusion being that there are no compelling circumstances over and above Exception 2 (in s.117C(5)).

27. The judge concluded at [8] that there was nothing to prevent the family in the UK maintaining contact with the appellant from the UK and even going to Nigeria to see him, commenting that the appellant ought to have thought of the implications for his family and private life before committing his offences.

28. He did accept that there would be an effect on the appellant's children, and the rest of the family (see [10]). In that same paragraph the judge made reference to evidence which established that he has a close relationship with his children and they with him.

29. The circumstances of the offence are described at [11] and the judge's sentencing remarks are referred to. In effect, the appellant participated in a scheme to launder 2.3 million pounds that was stolen from the Olympic Delivery Authority. The offence included the appellant drawing his "aged father" into the offences. The appellant used his money transfer business to give legitimacy to the movement of the principal sums in the case.

30. The First-tier Judge then turned his attention to Article 8 of the ECHR outside the Rules. He referred at [13] to the interference that there would be with the appellant's family and private life in his removal and concluded that that may not be in the best interests of his children. He then returned at [14] to the Immigration Rules, referring to "Section (sic) 398 of the immigration rules" and "Sections 399 or 399A."

31. There was further consideration of the appellant's family's circumstances from [16], the ages of the children (the elder children being adults and the younger being aged 16 and 8), the health issues of the appellant's father, and the extent to which family members could readjust to life in Nigeria if they returned there with the appellant. In the same paragraph there is recognition of the fact that the children are British and that the appellant's wife is the primary carer of the children.

32. With reference to his adult children, the conclusion was reached that their relationship with the appellant did not extend beyond "normal" emotional ties. The appellant was described as a resourceful person who had a business in the UK and in Nigeria and that there was no reason why he would not be in a position to set up a business on return there, and to be able to send funds to the UK if required.

33. The fact that the appellant still maintained his innocence at the hearing before the First-tier Judge was a matter that was referred to at [19], as well as the fact that he had shown no remorse for his offences, being keen to blame others. The judge in that same paragraph then reverted to a consideration of the appellant's father's circumstances, whereby he is looked after by Social Services and by the appellant's wife and family.

Evidence of the children was referred to in terms of the significance that he plays in their lives.

34. In the next paragraph the judge rejected any suggestion that the appellant would be in danger on return to Nigeria, in the light of the evidence given by the appellant's wife, albeit that that was not an issue raised by the appellant. It is not a matter that is relied on in the grounds of appeal.

35. Lastly, at [21] the judge stated that he had considered the best interests of the children "under section 55 of the Borders, Immigration and Asylum Act 2000 (sic)" (the statute correctly entitled the Borders, Citizenship and Immigration Act 2009) but concluded that those best interests did not outweigh the public interest in deportation of the appellant.

36. That narration of the contents of the First-tier Judge's determination serves to illustrate what I have described as its diffuse and unstructured nature. That is apart from the obvious errors in nomenclature.

37. Nevertheless, it does seem to me that it is possible to identify in the determination a consideration of all the essential issues that needed to be determined. At various points the judge referred to the evidence that he had heard, that evidence to a large extent focussing on the effect on various family members of the appellant's removal. Although it was submitted that the judge did not make findings on the evidence that he had heard, I was not directed to any specific feature of the evidence which had been left undetermined by the judge. He accepted that the relationship between the various family members and the appellant was close and that his removal would have an adverse emotional impact on them. He made findings on the extent to which the appellant and other family members would be able to return to Nigeria with him and integrate into society there. He noted the health issues of the appellant's father and the extent to which the appellant's absence would affect him.

38. In relation to the specific grounds which were relied on before me which, to repeat, are confined to [6]-[9] of the grounds, I do not consider that the judge's use of the expression "grave and compelling" at [6] of the determination reveals an error of law. More than once at [7] the judge referred to there being no compelling or very circumstances over and above the exceptions to be found at S.117C such as to make his removal disproportionate.

39. I do not accept that the judge's comments on the appellant's criminality reveal any actual or apparent bias. The extent to which a judge thinks it appropriate to comment on an individual's criminality, as distinct from a mere recitation of the circumstances of the offence, is a matter for individual judgement depending on the circumstances of the case. It does seem to me that the judge was entitled to point out that although the appellant had been granted indefinite leave to remain, he had abused the advantages of that status by committing serious offences. That was relevant to the public interest issue.

40. Similarly, he was entitled to observe at [8] that the appellant's family and private life was a matter that the appellant should have considered before committing the offences. Stating that the appellant only had himself to blame for the position he found himself in was, in reality, nothing more than a statement of fact. I do not consider that in this case the judge overstepped the boundaries of legitimate observation or comment on the appellant's offending.

41. I have already indicated that in my view there is no arguable merit in the ground alleging a lack of credibility findings in respect of the evidence of the witnesses.

42. So far as the best interests of the children are concerned, this issue, as is clear from my summary of the determination, is not evidently self-contained in the determination. However, the phrase "best interests" is used at [6], [7], [13] and [21]. In various paragraphs the children's situation is considered with reference to their best interests. The position in relation to the family members in general is considered in terms of the proportionality of removal, as already explained.

43. The judge's assessment of the 'best interests' issue could undoubtedly have been undertaken in a way that was much clearer to the reader. That is not to say however, that the way in which this matter was addressed reveals any error on law on the part of the First-tier Judge.

44. The determination contains many deficiencies, as already explained. However, I am not satisfied that there is any error of law which requires the decision to be set aside. The seriousness of the appellant's offences is manifest. His circumstances in the UK and as they would be on return to Nigeria, and his family circumstances and the children's best interests, are not revealed by the evidence to be such as to mean that the appellant's is able to resist deportation under the Immigration Rules or with reference to s.117C of the 2002 Act. No amount of restructuring, refocusing, re-ordering or correcting of errors in the determination would reveal this to be a case where the appellant could succeed in his appeal.

45. Notwithstanding the deficiencies of the determination, the judge's factual findings are findings which he was entitled to reach. On the basis of those findings he was entitled to conclude that the appellant's deportation was proportionate.

Decision

The decision of the First-tier Tribunal does not involve the making of an error on a point of law. The decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek 21/12/15