Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01248/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 March 2016	**On 19 May 2016**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

OYEWOLE OSIMLAU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Slatter, Counsel, instructed by MKM Solicitors
For the Respondent: Miss A Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by a citizen of Nigeria against the decision of the First-tier Tribunal dismissing his appeal against the decision of the respondent on 9 May 20123 to make him the subject of a deportation order.
2. The appellant has been in the United Kingdom since he was a few months old. He arrived in 1998 and was given indefinite leave to remain in 1999.
3. He has not behaved himself.
4. In May 2007 he was sentenced to two years six months imprisonment for robbery. On 28 April 2009 at the Crown Court at Blackfriars he was sentenced to an indeterminate sentence of imprisonment of “at least three years” before being considered for parole.

5. There is in decision letter a paragraph entitled “sentence length” and that set out the terms of paragraph 398 of HC 395. The material part is paragraph 398(a) which states:

> “The deportation of a person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of at least four years.”

6. Paragraph 398(b) applies to the deportation of a person who has been sentenced to a period of imprisonment of less than four years but at least twelve months.

7. There is a paragraph in the refusal letter entitled “Sentence of at Least Four Years Imprisonment”. It begins “You were convicted of robbery and sentenced to a period of indeterminate imprisonment, to serve a minimum total of three years’ imprisonment”.

8. It is not clear to me how the Secretary of State interpreted the Rules.

9. There is an obvious difficulty because on the plain reading of the Rules the appellant has neither been sentenced to “a period of at least four years” nor to “a period of imprisonment of less than four years but at least twelve months”.

10. The refusal letter also makes plain that there are limited grounds of appeal but at the material time they included a ground that the decision was not in accordance with the Rules.

11. However the Rules echo the amended provisions of Section 117 of the Nationality, Immigration and Asylum Act 2002. Section 117D includes definitions and Section 117D(4)(d) informs us that references to a person who has been sentenced to a period of imprisonment of a certain length of time

> “include a person who is sentenced to imprisonment to 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 ...”.

12. With respect to the First-tier Tribunal Judge who reached a different conclusion, I can see no room at all for argument about the meaning of the phrase in the Act. An indeterminate sentence almost by definition is capable of lasting for at least four years and so excludes a person from some of the provisions in the Act that would or might prevent his deportation.

13. I find nothing surprising about such an interpretation. Indeterminate sentences were intended as a protective measure and were only applicable in cases were people had behaved particularly badly. This was not argued before me and it is some time since I have practised in criminal law but I believe that an indeterminate sentence had to include a requirement that the person sentenced serve at least two years in custody. This is the same length of time that a person would have to serve as a minimum if he was sentenced to four years' imprisonment. It is clear to me clear both as a matter of plain reading and a matter of principle that any indeterminate sentence will be at least the equivalent of a sentence of four years’ imprisonment.

14. Thus although I am satisfied that the statutory definition makes the operation of Section 117 clear I am not aware of any comparable definition in the Immigration Rules.

15. Given that the Immigration Rules do not make sense, unless it is to be assumed that a person who is subject to an indeterminate sentence is completely outside the Rules, and given that the Rules can be expected to be drawn less rigorously than a statue, I am satisfied that for the purposes of paragraph 398(a) of the Immigration Rules a person who has been sentenced to an indeterminate sentence is a person who has been sentenced to "a period of imprisonment of at least four years". This is not within the plain meaning of the Rule but as such a person does not come within paragraph 398(b), that is a person who has "been sentenced to a period of imprisonment of less than four years" some construction beyond the plain meaning is necessary.

16. In this case the First-tier Tribunal noted that the sentencing judge decided that a sentence of six years was appropriate but as he was imposing an indeterminate sentence he addressed his mind to the minimum term a person would have to serve and decided that the appellant should be detained for at least three years. This is less than four years and the First-tier Tribunal Judge decided that the sentence was not to be regarded as a sentence of "at least four years".

17. For reasons which I have set out above, which I hope are clear, a sentence of at least three years imprisonment is to be regarded for the purposes of the rules as a sentence of at least four years.

18. This finding is very important because it means that much of the work of the First-tier Tribunal was unnecessary. The First-tier Tribunal Judge spent considerable time in ascertaining if the appellant could benefit from any of the exceptions under the Immigration Rules because, I find wrongly, the First-tier Tribunal Judge was a person who had not been sentenced to four years' imprisonment. The First-tier Tribunal, I am satisfied, made its decision for unsustainable reasons because of a fundamental misunderstand of the Rules and I set aside its decision.

19. I have the benefit of an extensive Rule 24 reply and a reply to the reply. I do not agree with Mr Slatter's contention that the Secretary of State is raising points that she is not allowed to raise in a Rule 24 notice. The appellant correctly refers me to the decision of **EG and NG (UT Rule 17: withdrawal; Rule 24; Scope) Ethiopia [2013] UKUT 00143 (IAC).** However, the Secretary of State succeeded before the First-tier Tribunal. She was under no obligation to raise anything in any kind of appeal. As I hoped we made clear in **NG**, a party to an appeal does not need permission to raise points in reply unless that party "seeks to persuade the Upper Tribunal to replace a decision of the First-tier Tribunal with a decision that would make a material difference to one of the parties". Here the appeal was dismissed and the Secretary of State wants precisely that decision upheld.

20. In the event because of the construction I have given above the grounds have not actually helped me very much.

21. The appellant and his partner gave evidence before me. The effect of their evidence is that they are not at present living together because that would be inconsistent with the terms of the appellant's immigration bail but they regard themselves very much as a couple and the appellant's partner was eight weeks into her pregnancy with a child conceived from her relationship with the appellant.

22. Clearly this is a case of a person who has lived for a large part of his life in the United Kingdom. It is not easy to see why the contrary view was reached.

23. However, the difficulty the appellant faces is that the Rules were applied properly by the Respondent, and section 117 of the Act which binds me when making an Article 8 analysis requires the Appellant's deportation unless there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" of section 117C.

24. In simple terms, close relationships formed in the United Kingdom and long residence there are not "over and above" the features identified in the Rules or the Act.

25. As far as I can see there are no "over and above" features in this case. There is nothing that can mount exceptional circumstances. It is an appeal that has to be dismissed.

26. I sat back a little and reflected on my decision. There is evidence that the appellant, who has had a very unpromising start in life, to which his own bad behaviour is a major contributing factor, has gained maturity. However this is not an EEA case. A change in his attitude is of limited if any assistance to him. Deportation is a way of showing societal disgust. Clearly his removal will be a wrench for his partner but none of these points are important given my findings under the Rules.

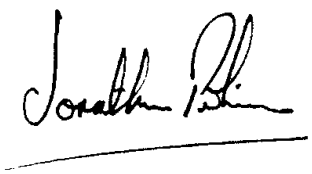
27. The plain fact is that the appellant's case cannot succeed under the Rules or on human rights grounds.

28. It follows therefore that having set aside the decision I must substitute a decision dismissing this appeal.

29. I realise that my route to this conclusion may come as a surprise to the appellant but the need for "reasons over and above" ought to have been apparent and I suspect were, at least to his advisors. The fundamental difficulty in his case is that his criminality puts him in a category where he can only succeed if circumstances exist of a kind that do not exist here.

30. In the circumstances the grounds identify no material error and I dismiss the appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 13 May 2016