Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01510/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 17 February 2016	**On 16 March 2016**

Before
UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ERNEST ALI KARGBO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr K Norton, Senior Home Office Presenting Officer
For the Respondent: Mr R Ward, Counsel instructed by Hanson Young & Co, solicitors

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. There is no good reason to make an anonymity direction in this case.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier Tribunal Judge Lucas promulgated on 27 October 2015 ("the Decision") allowing the Appellant's appeal. Permission to appeal the Decision was granted on 18 November 2015 by First-tier Tribunal Judge Zucker on all grounds, albeit recognising that ground one was the stronger of the grounds. The matter comes before me to determine whether the First-Tier Tribunal Decision involved the making of an error of law.

2. The background facts so far as it is necessary to recite them are that the Appellant who is a national of Sierra Leone was born on 31 August 1989 in the UK to a mother from Sierra Leone. His mother was granted indefinite leave to remain on 5 September 1990 and the Appellant was granted leave as her dependent on 2 November 2005. It is common ground and the Judge so found that the Appellant has lived all his life in the UK (twenty-six years at the date of hearing). He has never left the UK. He has never visited Sierra Leone. His mother and two brothers live in the UK. Contact has been lost with his father and it is not clear where his father now resides. The Appellant's mother says that she lost contact with him in 2008. The Appellant's last living relative in Sierra Leone was his grandmother who died in April 2013. The Appellant's evidence was that he did not speak the language in Sierra Leone. Mr Norton accepted at the hearing before me that although English is the official language of Sierra Leone, the "lingua franca" is Creole and he was prepared to accept the Appellant's evidence that he does not speak that language. The Appellant accepted at the hearing before the First-tier Tribunal that he is a member of the Roman Catholic Church which has a network in Sierra Leone. His case is, however, that as a person who has been born, raised and educated in the UK with no family left in Sierra Leone that he has lost all ties to that country – if indeed he ever had any.

3. The Appellant was convicted and sentenced for two offences prior to the index offence which led to the deportation order, one of blackmail and one of possession of cannabis. The Appellant has been arrested for other offences but those arrests have not led to any convictions. On 17 January 2011, the Appellant was convicted of wounding contrary to section 20 of the Offences against the Person Act 1861 and sentenced to twelve months imprisonment. His co-defendant was convicted of the more serious offence under section 18 of the 1861 Act and sentenced to five years. That is noted at [5] of the Decision. The Judge there also set out the sentencing Judge's remarks. I will need to return to this in connection with the Respondent's ground two. The Judge noted at [22] that the Appellant has not re-offended since the index offence. That may be a slightly generous interpretation of the evidence before the Judge but it is correct to note that he has not been charged with any further offences and the offences which are disclosed in the evidence

after the index offence are recorded at [20] and [21] of the Decision so the Judge was clearly aware of them. The Judge also sets out at [7] and [8] of the Decision, the evidence produced by the Respondent of the Appellant's offending history.

Submissions

4. Mr Norton relied in his oral submissions on the three grounds as set out in the application for permission to appeal. Those are, in short summary, that the Judge applied the wrong test in relation to paragraph 399A of the Immigration Rules ("the Rules") (ground one), that the Judge sought to diminish the severity of the Appellant's offending (ground two) and that the Judge appeared to allow the appeal also outside the Rules, contrary to MF (Nigeria) v SSHD [2013] EWCA Civ 1192. Mr Norton appeared to accept by his submissions that ground one was the strongest and that ground two would not stand alone. He pointed however to [52] of the Decision and the Judge's comment that the public interest was satisfied by the sentence in this case which he suggested did show a fundamental misunderstanding of the public interest.

5. In relation to ground three, he submitted that the approach of the Judge at [52] and [53] of the Decision is contrary to MF (Nigeria). He accepted that taken alone, this might not be material but when read with the other grounds it was a material error of law as it had infected the Judge's thinking.

6. In relation to ground one, Mr Norton submitted that the Judge's reasoning at [44] to [48] was based entirely on the Appellant's ties to the UK and lack of ties to Sierra Leone. This did not properly address the question of whether there were very significant obstacles to integration in Sierra Leone. In response to a question from me about what more the Judge needed to do on the facts of this case, he submitted that the Judge needed to consider what would prevent the Appellant from integrating given that he is a young educated male with the resources to adapt to an unfamiliar environment. The Appellant as a national of Sierra Leone is entitled to the same assistance as any other national of Sierra Leone. Notwithstanding, as I have noted at [2] above, Mr Norton's acceptance that Creole is the "lingua franca" of Sierra Leone and that the Appellant may not speak this, he submitted that English is the official language and that the Appellant would be in a high percentile of the population who might be expected to communicate in that language given his education. He also submitted that the Judge had failed to note that the Appellant had been brought up in a household by a mother who spent her formative years in Sierra Leone and it was inconceivable in those circumstances that the Appellant would have no knowledge whatsoever of his cultural background.

7. In relation to ground one, Mr Ward submitted that the Judge had plainly adopted the right test. He referred in particular to [43] of the Decision. The reasoning which follows that paragraph has to be read in context of that self-direction. The real challenge, he submitted, is to the approach which the Judge has taken to the issue of whether there are very significant obstacles. He pointed out that there is no statutory definition of what constitutes very significant obstacles. The assessment of whether those exist is fact sensitive. He also pointed out that although Article 8 now has to be viewed "through the lens of the Rules", that did not change the position that what the Judge is required to assess is the proportionality of deportation albeit guided by what the Rules have to say about the public interest. In this case, the particular circumstances of this Appellant are his birth, upbringing and family life with his mother and brothers which the Judge found at [45] rendered him "indistinguishable from a UK national in all respects". The issue therefore of his ties in the UK and lack of ties to Sierra Leone is clearly relevant. He pointed out that, if the Appellant had retained ties in Sierra Leone, the Respondent would be relying on those as showing that there were no very significant obstacles to integration in Sierra Leone. In those circumstances, the lack of ties is clearly relevant in the opposite direction. Mr Ward pointed out that the other factors relied upon by the Respondent were that the Appellant is educated, resourceful and that English is the official language of Sierra Leone. The Judge dealt with those at [46] of the Decision.

8. In relation to ground two, the Judge put the offending in context at [40] and [44] of the Decision. There is a difference, Mr Ward submitted, between a section 18 offence and a section 20 offence, which goes to the intent to commit the offence and which is reflected in the difference between the two sentences meted out to the Appellant and his co-defendant. In response to a question from me whether the Judge had properly considered other aspects of the public interest in deportation, particularly the impact of deterrence and the public revulsion at such crimes, Mr Ward submitted that it was implicit at [42] that the Judge was aware of the general public interest in deportation. I noted that the Judge had not referred expressly to section 117 Nationality, Immigration and Asylum Act 2002, particularly section 117C. Mr Ward accepted this to be the case but said that the Judge had considered that in substance if not in form by his reference to the public interest at [42] and consideration of the level of offending.

9. In relation to ground three, Mr Ward submitted that any such error is immaterial. Simply because the Judge said that he allowed the appeal under Article 8 ECHR did not mean that he had considered this outside the Rules. He pointed out that the Judge could, at [53] have gone on to say that the appeal was allowed under Article 8 ECHR "when considered through the lens of the Rules" and no complaint could then be made. Further, the finding at [51] that the appeal should be allowed under the Rules would remain undisturbed by what is said at [52] and

[53] of the Decision, unless I found a material error in relation to ground one.

Discussion and conclusions

10. I begin with ground one since it appears to be accepted by the Respondent to be the strongest of her grounds. The issue for the Judge in this case was whether the Appellant could satisfy paragraph 399A of the Rules. At the date of the hearing, which post-dated 28 July 2014, that rule was in the following terms:-

> "This paragraph applies where paragraph 398(b) or (c) applies if-
>
> (a) the person has been lawfully resident in the UK for most of his life; and
> (b) he is socially and culturally integrated in the UK; and
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported"

11. The Judge did not set out the rule and accordingly did not address (a) or (b). However, there is no dispute on the facts of this case that the Appellant has lived lawfully in the UK for most of his life. He is now aged twenty-six years. He was granted indefinite leave to remain when he was aged six years. The deportation order was not made against him until he was aged twenty-two years. The Respondent does not challenge the evidence that he was born, brought up and educated in the UK. There is no challenge to the finding at [45] that the Appellant is indistinguishable from a UK national. Accordingly, it cannot be said that he is not socially and culturally integrated in the UK. The only issue therefore is whether there would be very significant obstacles to integration in Sierra Leone.

12. The Judge's findings in this regard at [43] to [51] bear repetition:-

> "[43] It is the view of this Tribunal that there are indeed in this case very significant obstacles preventing the deportation of this Appellant.
> [44] The Tribunal has noted, with some disquiet, that he maintains a stance of seeking to minimise his own role both in the Index Offence and his other offending. There is also evidence of him becoming involved in potential offending and being in conflict/aggressive situations that have not involved in actual convictions. However, there is now also evidence of insight and significant reflection about his offending. The Tribunal is quite content to conclude that this is genuine and considered. He has clearly rehabilitated during and since his sentence of imprisonment and the risk of reoffending is clearly low.
> [45] The Tribunal is, in fact, quite impressed with this Appellant and has had the opportunity to assess him throughout his evidence and during the hearing. He is quite clearly an intelligent and resourceful young man who has done his best to squander his obvious abilities. He has intellectual sophistication and addressed the Tribunal with measure and in perfect English. He is indistinguishable from a UK national in all respects.
> [46] The latter point is of relevance since to all intents and purposes, he is a UK citizen. He was born and educated in this country up to University

level. There is no evidence at all to show that he has any cultural or any other ties to Sierra Leone. The fact that it is said that English is the official language of Sierra Leone cannot, of itself, compensate for the significant cultural difference between that country and the UK.

[47] There is simply no evidence to suggest that this Appellant retains or has any cultural, social or family links with Sierra Leone – a country in which he has never lived.

[48] It would appear that his last surviving relative in Sierra Leone died in 2013 and there is no evidence of any other visits to that country from the Appellant or any of his family members.

[49] The Tribunal concludes that the Appellant's family and private life is based and centred in the UK. He has no links of any sort with Sierra Leone. It is reasonable to conclude that there are therefore very significant obstacles preventing his removal from this country where he was born and grew up, to a country to which he has simply no ties at all.

[50] The Tribunal therefore finds that while the decision to seek to deport this Appellant is statutorily made out, he falls within the category of exceptions that render that deportation to be unwarranted in all the circumstances of this case.

[51] The appeal is therefore allowed under the Immigration Rules."

13. Mr Ward pointed out that the Respondent's letter in this case pre-dated the change in paragraph 399A of the Rules and therefore did focus on whether the Appellant had any ties to Sierra Leone. He submitted that this may be one reason why the Judge focussed on ties. It is therefore convenient to consider the way in which the Respondent reasoned her rejection of the Appellant's case under paragraph 399A as it then stood and Article 8 ECHR as follows:-

"[34] It is not accepted that you have no ties to Sierra Leone, the Country of Origin reports for Sierra Leone state *"that English is the official language"*. It is therefore considered that language would not be an issue for you, upon your return to Sierra Leone.

[35] As you were born in the UK, it is expected that you would have studied and possibly gained qualifications and skills in the UK. It is therefore considered hat any skills you have obtained can be utilised upon your return to Sierra Leone and help you to re-establish a private life upon your return.

[36] It is argued that you have strong family ties with your parents and siblings being resident here.

[37] For the purposes of Article 8, relationships between an adult and their parents and siblings do not constitute family life without further evidence of elements above normal emotional ties. No evidence has been provided to confirm that you have a level of dependency upon your parents or siblings that would constitute being beyond normal emotional ties. It is considered that your parents and siblings could visit or communicate through modern means of communication. It is therefore not accepted that you have family life in the UK with these family members for the purposes of Article 8 of the ECHR.

[38] As you have been resident in the UK for over 20 years, it is accepted that you may well have established a private life with friends and acquaintances for the purpose of Article 8. However, it is considered that you could maintain your relationship with friends and acquaintances in the UK through modern methods of communication such as e mail,

> telephone, skype and letters. It is also believed that they could visit you in Sierra Leone or another country if they wish.
>
> [39] Therefore, having considered the factors in your case, it is not accepted that the right to private life outweighs the public interest in seeing you deported and therefore your deportation would not breach Article 8 of the ECHR."

The Judge had regard to that decision letter at [10] to [12] of the Decision.

14. As to the test which the Judge applied which is the basis for the Respondent's ground one, I am quite unable to accept that there is any error in the Decision. The section dealing with paragraph 399A which I have cited at [12] above, quite clearly starts and ends with a statement that what the Appellant had to show were "very significant obstacles". The challenge then becomes, as Mr Ward submitted, one about the way in which the Judge interpreted that test and whether there was undue focus on the ties which the Appellant has to the UK and lack of ties to Sierra Leone. I have cited at [13] above, the way in which the Respondent dealt with paragraph 399A in the reasons for refusal letter. I accept of course that the Respondent was herself dealing with the "no ties" test since that is what paragraph 399A mandated at that time. However, the basis of the Respondent's case was in short summary that the Appellant could return to Sierra Leone, a country where she accepted he had never lived and never visited, because his education and skills acquired in the UK as well as his age would enable him to adapt to that country. Those factors are considered at [45] and [46] of the Decision. The Judge accepted that the Appellant is "intelligent and resourceful". However the way in which the Judge took account of those factors was by noting how high his level of integration in the UK was as a result of those factors. That was not legally impermissible. Having found that he was to all intents and purposes in the same position as a UK national, the Judge went on at [46] to note his complete lack of any cultural or other ties and that the fact that English may be the official language of Sierra Leone did not "compensate for the significant cultural difference between that country and the UK". There is no misdirection by the Judge and no misunderstanding of the evidence. He was clearly aware that the test was a high one but the assessment that it was met in this case is one which was open to him.

15. I can deal with ground two more shortly in light of Mr Norton's acceptance that this was not a stand alone ground unless account were taken also of [52] of the Decision and the finding that the sentence in this case served the public interest. That is not a point taken in the grounds. I have however considered it. I confess to some initial concern about this Decision by the Judge's failure to expressly have regard to section 117C, particularly in light of the evidence produced by the Respondent as to the background to the Appellant's offending. However, the Judge has had regard to that evidence at [7] to [9] of the Decision. Although the Judge has noted the difference in treatment of the Appellant and his co-defendant twice at [5] and [40] of the

offending which is the point taken in the Respondent's written grounds, I am satisfied that this was a relevant consideration for the Judge and that undue weight has not been placed upon it. In spite of the Judge's failure to note the wider public interest in deportation, in light of the Judge's self-direction to the public interest in deportation at [42] and the Judge's finding based on seeing the Appellant give evidence that he was genuinely and clearly rehabilitated [44], I am satisfied that any error in failing to make express reference to that wider public interest is not material. In relation to the finding at [52], that finding may be otiose in any event since it follows the finding in relation to paragraph 399A. In any event, I am satisfied that this is a finding which was open to the Judge in light of his findings on the evidence as to the Appellant's risk of re-offending and rehabilitation and also when viewed in context. At [52], the Judge is considering the proportionality in deportation which required the weighing of the public interest in deportation against the findings which the Judge had by that stage made about the impact of deportation on the Appellant. Read in that context I am satisfied that this was a finding which was open to the Judge and does not show any minimising of the public interest.

16. Finally, in relation to ground three, I can dispose of this very succinctly on the basis that any error, if there were one, would not be material. It may well be that the Judge was misled into approaching the case under Article 8 in this way by the Respondent's decision letter which adopts precisely that approach (see citation at [13] above). Whilst that decision letter does deal with Article 8 ECHR under the heading and therefore through the prism of paragraph 399A, the Judge's approach chimes with the way in which the decision deals with the proportionality assessment at [36] to [39] of the Decision. Be that as it may, as I observe above at [15], the Judge's finding that the Appellant met the exception in paragraph 399A was sufficient to dispose of the appeal and, for the reasons I have given at [14] above, I am satisfied that this was a decision he was entitled to reach.

17. For the foregoing reasons, I am satisfied that there is no material error of law in the Decision and I uphold it. The conclusion may not have been one I would have reached but I am satisfied that the Judge cannot be said to have reached a conclusion which was not open to him for the reasons he gave. The Decision contains no material misdirection as to the law or misunderstanding of the evidence.

DECISION

The First-tier Tribunal Decision did not involve the making of an error on a point of law. I therefore uphold the First-tier Tribunal Decision promulgated on 27 October 2015 with the consequence that the Appellant's appeal is allowed under the Rules.

Signed  Date 18 February 2016

Upper Tribunal Judge Smith