IAC-FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06172/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 July 2017	**On 27 July 2017**

Before

THE HONOURABLE MR JUSTICE JEREMY BAKER
DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

PA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Harding, Counsel, instructed by G Singh Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal (Judge Herlihy) dismissing his appeal against the respondent's decision of 25 February 2016 refusing his human rights claim following a decision to deport him dated 12 February 2015.

Background

2. The appellant is a citizen of Nigeria born on 23 November 1960. He entered the UK on 9 June 1996 for a two-week business trip and was granted six months' limited leave to remain. He overstayed but on 27 October 1997 he made an out of time application as a visitor for leave to remain for medical treatment and was granted leave on 13 March 1998 for five months. On 18 August 1998 he applied for residence as the spouse of a Portuguese national, exercising Treaty rights but this application was refused on 1 May 2001.

3. On 15 May 2004 the appellant married his wife, a naturalised UK citizen who had entered the UK from Nigeria in 1996. On 15 October 2004 he applied for leave to remain as her spouse and on 15 April 2005 their eldest child, a daughter, was born. Subsequently, they have had two further children, a son born on 14 March 2008 and a daughter on 8 January 2010.

4. On 23 May 2005 the appellant was convicted of conspiracy to defraud the Secretary of State by arranging or assisting in arranging false applications for residence documentation by providing false documents to support a claim that EEA nationals had been and were working in the UK when they were not. When passing sentence, the judge described the offence as a sophisticated conspiracy requiring a high degree of planning. Evidence had been produced to show some 27 instances over a period of two years when this conspiracy was carried out and on a number of occasions the Home Office was deceived and acted in the way they would not have done had they known the truth. The judge was satisfied that the appellant must have committed this offence for financial gain and that it was an offence which was operated for the benefit of strangers. The judge concluded that in all the circumstances the least sentence that he could properly pass was one of five years' imprisonment.

5. On 23 February 2007 the respondent decided to make a deportation order under s.3(5)(a) of the Immigration Act 1971. The appellant appealed against this decision but his appeal was dismissed by the Asylum and Immigration Tribunal following a hearing on 27 June 2007. An order for reconsideration was made on 3 August 2007 and at the first stage of the reconsideration on 22 February 2007 the respondent conceded that the decision contained material errors of law and following a hearing on 6 May 2008 the Tribunal found that the appellant had a valid outstanding appeal in respect of his EEA application, having married a national of Portugal on 13 December 1999, even though he had divorced her in September 2003. The Tribunal concluded that the respondent's failure to address the original EEA appeal impacted upon how the decision to deport was implemented and the appeal was allowed to the extent that it was returned to the respondent to address the EEA appeal.

6. On 8 October 2009 the respondent made a fresh decision to deport the appellant. A subsequent appeal to the First-tier Tribunal was dismissed in May 2010. Permission to appeal was granted by the First-tier Tribunal in November 2010. At a hearing before the Upper Tribunal on 16 February

2012 the decision of the First-tier Tribunal of May 2010 was found by consent to contain an error of law and was set aside. It was conceded that the First-tier Tribunal had failed to deal properly with the EEA aspect of the appeal. Directions were given to ensure that all relevant issues could be properly dealt with when the decision was remade by the Upper Tribunal.

7. That appeal was heard on 22 June 2012. The appellant did not seek to pursue the EEA appeal given difficulties in contacting his Portuguese former spouse and, therefore, the issue for the Tribunal was whether it would be a violation of article 8 for him to be deported. It was argued that the new Immigration Rules ("the Rules") due to come into force on 9 July 2012 should be applied. At [9] of his decision the judge recorded that, although Mr Melvin (who was also representing the respondent at that appeal) acknowledged that the new Rules did not apply to the appellant, he argued that the judge should take account of Parliament's view of where the public interest lay. The judge acknowledged that the public interest in deporting a person convicted of an offence of the kind committed by the appellant was very strong irrespective of the provisions of the new Rules. However, he found that the article 8 factors weighing on the appellant's side of the balance, although significantly involving the rights of others, were strong and cumulatively were such as to outweigh the interests of the respondent.

8. Having set out this finding the judge went on to say that he would not speculate on whether the appellant would have failed in his appeal had his case fallen to be decided by reference to the Rules which came into force on 9 July 2012 and emphasised that his decision was not to be taken by the appellant or his family as any permanent adjudication of his ability to resist deportation from the UK.

9. Following the Upper Tribunal's decision the respondent wrote to the appellant's solicitors indicating that she had decided not to take any deportation action against him on this occasion and that the appellant should clearly understand that the provisions of the Immigration Act 1971 as amended by the Immigration and Asylum Act 1999 relating to deportation continued to apply to him. The letter went on to say:

> "Under these provisions a person who does not have the right of abode is liable to deportation if the Secretary of State deems his deportation to be conducive to the public good or if he is convicted of an offence and is recommended for deportation by a court.
>
> I should warn your client therefore that if he should come to adverse notice in the future, the Secretary of State will be obliged to give further consideration to the question of whether you should be deported. If he commits a further offence, the Secretary of State would also need to consider the automatic deportation provisions of the UK Borders Act 2007. Your client should be aware that under such circumstances the Secretary of State may be legally obliged to make a deportation order against him."

10. The appellant was then granted two periods of discretionary leave on 23 April 2013 and 25 November 2013 covering the period 23 April 2013 to 25 May 2014. On 24 May 2014 the appellant applied for further leave to remain on article 8 grounds. On 12 February 2015 the respondent decided to make a deportation order under s.3(5)(a) of the 1971 Act and on 25 February 2016 the appellant's human rights claim was refused. It was the respondent's view that the application should be considered under the provisions of paras A398 – 399 of the Rules in force at the date of decision. The respondent was not satisfied that there were very compelling circumstances over and above those set out in the Rules. The respondent went on to consider whether there were very compelling circumstances why the appellant should not be deported and found that there none to outweigh the public interest in his deportation.

The Hearing before the First-tier Tribunal

11. The appellant appealed against this decision and his appeal was heard by the First-tier Tribunal on 3 October 2016, the decision being issued on 14 November 2016. The judge heard oral evidence from the appellant and his wife. It was argued that the starting point for the consideration of the appeal was the previous decision of the Upper Tribunal and the judge commented at [32] that there had been no direct challenge to the findings made by the Tribunal that the appellant had been a model prisoner, he was the main carer for his children to allow his wife to work full-time and he had not re-offended since the index offence. There had been no challenge by the respondent to those findings and no changes to the appellant's family life save that the relationships had become more entrenched [34].

12. The judge, however, said that there had been a change since the previous Upper Tribunal decision in that there was a new statutory landscape with the introduction of s.117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and the amendments to the Rules. She was required to look at the case through the lens of para 398 and she added that the respondent was perfectly entitled to assess the position in the light of the current Rules notwithstanding the previous grant of discretionary leave. The appellant sought to claim that the decision was in breach of para 398 and that there were very compelling circumstances over and above those described in paras 399 and 399A which outweighed the public interest in his deportation and that removal would be a breach of article 8.

13. The judge found that the appellant had failed to establish that very compelling reasons existed to outweigh the public interest given the seriousness of his crime. At [37] she said that the two grants of discretionary leave were plainly factors capable of bearing on the weight to be given to the public interest as facts which might reduce it but there could be no legitimate expectation that the appellant would not face deportation or removal in the future as clearly any further offending by

him or the loss of discretionary leave in other circumstances might lead to a decision to deport or remove him.

14. The judge went on to consider the appellant's close relationship with his children, his level of integration into the UK and the length of time that the various appeal proceedings had been continuing. She took into account s.117B of the 2002 Act summarising her findings at [43] by saying that, having considered the totality of the evidence before her including the strong evidence of the extent of the appellant's ties to the United Kingdom and his family life, she found that the appellant had not established the existence of compelling circumstances that would outweigh the public interest in maintaining the decision to seek his deportation. The appeal was therefore dismissed.

The Grounds of Appeal

15. The grounds of appeal raise three issues. It is argued firstly, that the judge failed to make a finding on the best interests of the appellant's three children and failed to explain why she had departed from the undisputed factual findings of the previous Upper Tribunal decision; secondly, she misdirected herself in law by failing to carry out an article 8(2) compliant proportionality assessment and thirdly, she failed adequately to consider the effect of delay and apply the relevant principles under article 8(2) in her proportionality assessment.

16. Permission to appeal was granted by the First-tier Tribunal as follows:

> "2 The appellant has had a previous appeal under number IA/29772/2009. By way of background the appellant had in 2005 been convicted of offences relating to a conspiracy to defraud by arranging and assisting in arranging false applications by EEA nationals to remain in the United Kingdom. As a result of that conviction the appellant had been given a five year term of imprisonment. With that conviction as a basis, a decision to make a deportation order had been made in or about 2008. There are then various appeals but ultimately the appellant's appeal was heard in the Upper Tribunal on 22 June 2012 by UTJ Peter Lane. Judge Lane allowed the appellant's appeal by reason of the appellant's pivotal status and importance to his children.
>
> 3 Subsequent to that application the appellant was granted various periods of leave for short periods of time. On 24 May 2014 the appellant applied for leave to remain on article 8 grounds. A new decision to deport the appellant was made again apparently based upon the conviction set out above and the fact that the provision of the Immigration Rules had changed and that section 117B had to be applied. The judge in considering the appeal indicated that the legal changes identified were a basis for the refusal of the appeal. The case of Hesham Ali [2016] UKSC 60 specifically paragraphs 39 – 45 has given guidance how to approach the issues in respect of deportation and the new statutory landscape.

> 4 It is submitted in the grounds of the application that the judge has failed properly to assess the best interests of the children. In the light of the guidance given in Hesham Ali the grounds may be argued. Leave to appeal is granted."

Submissions

17. Mr Harding focused his submissions initially on the issues arising from the fact that the appeal was dismissed despite the appellant's previous appeal being allowed, the appellant had committed no further offences and his family life had strengthened in the period since the hearing in 2012. He submitted that the judge had failed to take into account that the respondent, when granting discretionary leave, must have considered that the appellant at that stage met the requirements of the Rules that there were exceptional circumstances outweighing the public interest in deportation.

18. He submitted that the appellant was not covered by para 339C of the Rules (set out at [26] below) as his leave had not been granted under Part 13 but was simply discretionary leave. The respondent had not been under an obligation to make a deportation order and her decision was therefore discretionary. That fact should have been taken into account when assessing proportionality. In the light of the previous decision by the Upper Tribunal and the fact that the appellant had been granted discretionary leave it followed, so he argued, that the respondent must have accepted that there were exceptional circumstances and it was hard to see that what change of circumstances had taken place to justify dismissing the appeal. He accepted that the Tribunal had to apply the Rules in force at the date of hearing but submitted that there had been a failure properly to apply the principles in Devaseelan v Secretary of State [2002] UKAIT 702, or to consider the exceptional circumstances and the fact that the respondent must have considered that there were exceptional circumstances by granting discretionary leave.

19. Mr Harding confirmed that he adopted the grounds, which argued that the judge had failed to consider properly the interests of the three children as a primary consideration. The appellant's children were British citizens and the starting point should have been the undisputed findings of UTJ Lane that the appellant's removal could not possibly be said to be in their best interests. The grounds also argue that the judge's description of the appellant's family life fell short of an assessment of the children's best interests and the judge's conclusion that the appellant and his wife could decide whether or not the appellant returned to Nigeria with his family disclosed a failure to inquire how each child would be affected. The judge had not addressed the effect on the children of splitting the family as opposed to the effect on the appellant's wife and her work commitments.

20. The second ground argues that the judge was wrong to apply article 8 through the prism of the Rules and by holding that the Rules were a complete code. The Supreme Court in Hesham Ali [2016] UKSC 60 had

held that proportionality in foreign criminal cases should not be conducted only through the prism of the Rules. The judge had failed to attach sufficient weight to the appellant's circumstances and in particular the position of his children and his post-conviction conduct. The judge had failed to take into account the appellant's rehabilitation, so the grounds argue, when assessing the weight to the public interest in the protection of the public. She had applied a proportionality assessment which was insufficiently flexible and had failed to consider the wider proportionality factors in Maslov v Austria [2007] 47 EHRR 496. In consequence, so it is argued, no full article 8 proportionality assessment was conducted. The third ground argues that the judge failed to consider adequately the effect of delay and the applicable principles under article 8(2). The judge had wrongly characterised the argument as amounting to whether the delay had prejudiced him in pursuing his family and private life.

21. Mr Melvin submitted that the judge had been right to approach the appeal on the basis that where the person to be deported has been sentenced to four years' imprisonment or more, the weight attached to the public interest remained very great despite the factors to which para 399 referred. Neither the British nationality of the appellant's children nor the likely separation from their father was an exceptional circumstance which outweighed the public interest. In the previous decision the judge had identified that the new Rules might make a great difference to the outcome of the appeal. The Supreme Court in Hesham Ali had confirmed that factors outweighing the public interest in deportation would need to be very compelling. In summary, he submitted that the decision by the First-tier Tribunal was sustainable in law and that the judge had reached a decision properly open to her on the evidence.

Assessment of whether the First-tier Tribunal erred in Law

22. There is no dispute between the parties that an appeal against the decision to make a deportation order must be assessed in accordance with the Rules at the date of hearing: YM (Uganda) v Secretary of State [2014] EWCA Civ 1292. This appeal therefore had to be determined in accordance with the provisions of A398 - 399. These provisions were set out by the First-tier Tribunal at [31] and need not be repeated. So far as the appellant is concerned he falls within the provisions of para 398(a), which reads as follows:

> "(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years."

The provisions of para 399 do not apply to the appellant as they only apply to those falling within paragraphs 398(b) or (c). Paragraph 398 then provides that "the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paras 399 and 399A".

23. In the light of Mr Harding's submissions, we note that the wording of para 398 from 9 July 2012 was that where the provisions of para 399 or 399A did not apply "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors." The current wording was substituted from 28 July 2014 and applies to article 8 claims from foreign criminals decided on or after that date.

24. The issue for the judge when considering the appeal under the Rules was therefore whether there were very compelling circumstances over and above those described in paragraphs 399 and 399A. We are satisfied that the judge correctly identified the approach required by the Rules in [14] and [37] of her decision. In this context it is important to note that the requirements of para 399 are themselves stringent in that where a person has a genuine and subsisting parental relationship with a child under 18 it must be shown both that it would be unduly harsh for the child to live in the country to which the person is to be deported and unduly harsh for the child to remain in the UK without the person who is to be deported and in respect of a genuine and subsisting relationship with a qualifying partner that the relationship was formed at a time when the deportee was in the UK lawfully and their immigration status was not precarious and it would be unduly harsh for that partner to live in the country to which the appellant was to be deported.

25. Mr Harding argued that weight should have been given to the fact that the respondent's decision to make a deportation order was a discretionary decision and not a mandatory decision under the provisions of the UK Borders Act 2007. The appellant had been granted discretionary leave rather than leave under the provisions of para 399B and therefore the provisions of para 399C did not apply to him. Para 399C provides as follows:

> "Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave."

26. We accept that the respondent's decision was discretionary and that the appellant did not fall within the provisions of para 399C as he was granted discretionary leave rather than limited leave under Part 13 of the Rules. However, we are not satisfied that these matters have any material bearing on the outcome of the appeal. Whether the decision was mandatory or discretionary does not without more affect the issues to be considered under the Rules and the fact that the appellant does not fall within the provisions of para 399C does not affect his position. His deportation remains conducive to the public good and in the public interest because of the provisions not only of para 398 but also of s.117C of the 2002 Act.

27. It is further argued that the judge erred by failing to take into account the fact that by granting discretionary leave for six months in April and November 2013, the respondent had by necessary implication accepted that the appellant's circumstances were exceptional as required by the Rules in force at that time. However, even assuming that to be the case, the fact remains that the Rules were amended with effect from 28 July 2014 requiring an appellant to meet the higher test of showing very compelling circumstances over and above those described in paragraphs 399 and 399A as opposed to showing that there were exceptional circumstances that the public interest in deportation was outweighed by other factors. The amendments to s.117 of the 2002 Act also came into force on 28 July 2014, S.117C(6) providing that in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2, which reflect the provisions of para 399 of the Rules.

28. It was therefore for the judge to assess on the evidence before her whether the appellant was able to meet the test of showing compelling circumstances within para 398. There is no reason to believe that the judge did not take into account the decision of the Upper Tribunal in 2012: she specifically refers to that decision when setting out the background to the appeal and, when setting out her findings, that the change since that decision was the new statutory landscape with the introduction of s.117 and the amendments to the Rules. So far as any argument based on Devaseelan is concerned the judge accepted at [32] that there had been no direct challenge to the findings made in the previous decision including the fact that the appellant had been a model prisoner, had been the main carer of his children so as to allow his wife to work full-time and had not reoffended since the index offence.

29. The judge also took into account the grants of discretionary leave after the appeal was allowed, describing them in [37] as plainly factors capable of bearing on the weight to be given to the public interest. She went on to say that there could be no legitimate expectation that the appellant would not face deportation or removal in the future as clearly any further offending by him or the loss of discretionary leave in other circumstances might lead to a decision to deport or remove him.

30. We were referred to the letter the appellant received prior to the grant of discretionary leave warning him that if he came to adverse notice in the respondent would be obliged to give further consideration to the question of whether he should be deported but again that letter written on 6 October 2012 pre-dated the amendments to the Rules but even so contains a reminder that a person who does not have the right of abode is liable to deportation if the Secretary of State deems his deportation to be conducive to the public good or if he is convicted of an offence and is recommended for deportation by a court. In the light of the current law

and Rules the respondent has deemed his deportation to be conducive to the public good in accordance with the terms of statute.

31. In assessing whether there were very compelling circumstances the judge had to consider all relevant matters. It is clear that she was fully aware of the previous appeal, the subsequent grants of discretionary leave and the fact that the appellant had not reoffended and took them into account. Mr Harding submitted that the judge failed to give proper weight to the fact that the appellant's appeal had been allowed by the Upper Tribunal in 2012, the judge finding that the article 8 factors weighing on the appellant's side of the balance were sufficiently strong to outweigh the public interest. There is no substance in this argument or in the submission that the judge failed to follow the approach in Devaseelan. The judge was fully aware of the basis on which the appeal had previously been allowed and was the context in which she made the point that there was now a new statutory landscape.

32. Mr Harding also sought to rely on the issues raised in the grounds. The first ground argues that the judge failed properly to consider the best interests of the children as the appellant's removal could not possibly be said to be in their best interests. We are satisfied that the judge did consider these factors in [38] of her determination. She found that the appellant's relationship with his children and the level of support he provided was not so exceptional that it should outweigh the public interest in his deportation.

33. There can be little doubt that the children's best interests would be for them to remain living with both parents in the UK. However, as the Court of Appeal said in EJA v Secretary of State [2017] EWCA Civ 10 at [30]:

> "There must be relatively few cases in which there is a meaningful relationship between a parent and children where deportation of the parent, with consequent physical separation, would not have an adverse impact on the children."

We are satisfied that the judge did consider the best interests of the children and there is nothing to indicate that she took a different view from the previous Tribunal but, nonetheless, it was open to her to find the appellant had failed to show very compelling circumstances over and above those described in pars 399 and 399A.

34. Secondly, it is argued that the judge misdirected herself on the assessment of proportionality. The judgment of the Supreme Court in Hesham Ali has confirmed that the Rules cannot be regarded as a complete code and in consequence do not alone govern appellate decision-making (see [51] and [52]). If an appellant cannot bring himself within the provisions of the Rules, the Tribunal is still required to assess whether the respondent's decision to make a deportation order is proportionate to a legitimate aim within article 8(2).

35. In [46] of his judgment Lord Reed said:

> "These observations apply a fortiori to Tribunals hearing appeals against deportation decisions. The special feature in that context is that the decision under review has involved the application of Rules which have been made by the Secretary of State in the exercise of a responsibility entrusted to her by Parliament, and which Parliament has approved. It is the duty of Appellate Tribunals, as independent judicial bodies, to make their own assessment of the findings of proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law. But where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, they should attach considerable weight to that assessment: in particular, that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life; that greater weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than twelve months; and that, where the circumstances do not fall within Rules 399 or 399A, the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling, as explained in paras 37 - 38 above."

36. In [38] Lord Reed had said that the implication of the new Rules was that Rules 399 and 399A identified particular categories of case in which the Secretary of State accepted that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not falling within para 399, foreign offenders who have received sentences of at least four years, would be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders but it could be outweighed, applying a proportionality test, by very compelling circumstances, in other words, a very strong claim indeed. The countervailing considerations must be very compelling to outweigh the public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State.

37. We are not satisfied that the judge erred in her approach to the assessment of proportionality. She referred to looking at the case through the lens of the Rules but when read in context, this can only indicate that she was taking the Rules into account as setting out the respondent's policy in cases of serious criminal offending and she considered whether there were very compelling countervailing considerations. Her approach was consistent with the approach subsequently set out in Hesham Ali where the Supreme Court was dealing with an appeal decided before s.117 of the 2002 Act came into force. Those provisions confirm in statutory form the provisions of the Rules and add further strength to the comments of Lord Reed.

38. We are not satisfied that the judge left any matters out of account when assessing proportionality as the grounds assert or that her proportionality

assessment was insufficiently flexible or failed to take wider issues into account as set out in Maslov. The judge was required to consider the provisions of s.117B and C and did so. She was entitled to comment that the appellant had developed his family life after he had begun the commission of his offending and that, in such circumstances, he should have been aware that his immigration status was precarious. She considered the length of time the appellant had been living in the UK together with his status. She also considered the fact that he had been educated to degree level in Nigeria and had strong links to that country and that his wife was also of Nigerian ancestry.

39. In so far as the issue of delay is concerned arising from the EEA appeal and whether it prejudiced the appellant and his family, in EB (Kosovo) v Secretary of State [2008] UKHL 41, the House of Lords held that delay could be relevant in three ways, firstly the applicant may during the period of delay develop closer personal and social ties and establish deeper roots in the community, secondly, an applicant in a precarious situation where there was a long delay might have an expectation that would grow that if the authorities had intended to remove him they would take steps to do so and thirdly, where the delay was due to a dysfunctional system yielding unpredictable, inconsistent and unfair outcomes, that could impact on the weight to be accorded to requirements of firm and fair immigration control. It is only the first way which has any potential bearing on this appeal. The delay has meant that the appellant and his family have become more settled by the passage of time but the judge was clearly aware of that and took the length of residence into account. There is no substance in the submissions based on delay.

40. In summary, we are not satisfied that the judge erred in law in her assessment of this appeal either under the Rules or article 8. We are satisfied that she took all relevant matters into account and came to a decision properly open to her for the reasons she gave.

Decision

41. The First-tier Tribunal did not err in law and its decision stands. The anonymity order made by the First-tier Tribunal remains in force until further order.

Signed H J E Latter Date: 25 July 2017

Deputy Upper Tribunal Judge Latter