



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00574/2014

THE IMMIGRATION ACTS

Heard at Field House
On 10 July 2018

Decision & Reasons Promulgated
On 14 August 2018

Before

**THE HON. MR JUSTICE GOSS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KOPIECZEK**

Between

**REMI AKINYEMI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Khubber Counsel instructed by Turpin & Miller LLP
(Oxford) Solicitors

For the Respondent: Ms A. Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant was born in this country on 21 June 1983. He is now 35 years of age. His parents, who were Nigerian nationals, first came to the UK as students. His father was given indefinite leave to remain here in October 1987 and became a British citizen in October 2004. His mother died in 1999 and was lawfully in the UK. The appellant

has two older brothers. The elder was born in Nigeria and became naturalised in 2000. The other was born in the UK and, by virtue of the legislation in force at that time, was a British citizen from birth. By the time of the appellant's birth, legislative changes meant that he didn't acquire British nationality automatically as a result of being born here and he has not acquired it since. He is a Nigerian national by reason of the original nationality of his parents. He has lived all his life in the UK. He has never been to Nigeria.

2. On 25 March 2014 a decision was made to make a deportation order against him pursuant to section 32(5) of the UK Borders Act 2007 following his conviction, in the Crown Court sitting at Aylesbury, of four offences of supplying a controlled drug of Class A, and one offence of possession of Class A drugs, committed between 23 October 2012 and 14 November 2012, for which he received a sentence of three and a half years' imprisonment on 31 January 2013. He had previously been convicted on 5th July 2007 of an offence of causing death by dangerous driving for which he was sentenced to 4 years' imprisonment.
3. His appeal against the respondent's decision was allowed by First-tier Tribunal Judge Thanki ("the FtJ") on 29 August 2014. The respondent appealed against the decision of the FtJ and the Upper Tribunal ("UT") upheld the respondent's decision to make a deportation order after a hearing before Upper Tribunal Judge Kekić on 19 January 2015.
4. The appellant's appeal to the Court of Appeal against the UT's decision was allowed on 4 April 2017 (Neutral Citation Number [2017] EWCA Civ 236) and it was ordered that the "the case be remitted to the Upper Tribunal for a re-hearing before a differently constituted tribunal which should hear the case *de novo*". We have heard the case in accordance with that direction on 10th July 2018.
5. We have received oral evidence from the appellant, his partner, [RL] and his father, [LA], each supplementing their respective written statements and the statement of the appellant's brother, [FA], and his cousin [AF]. In addition, there is an Independent Psychological Risk Assessment Report by Lisa Davies dated 02.01.18. We have also been provided with letters from Gary Kendall, Andrew Richards and Dave Eyeington of New Life Church, an OASys assessment, a CARATs Care Plan, certificates of courses completed by the appellant, and letters from the Learning and Skills Administrator, HMP Huntercombe and from Tony Spackman, a Mental Health Advocate. We have also been provided with documents in the form a letter from Specialist Epilepsy nurse Alison Taylor, his patient record and a letter relating to his counselling session appointments. We have also received the Progress Report of his probation Officer, Claire Easthope dated 29th June 2018.
6. We have been greatly assisted by the presentation of the respective cases of the parties and their written and oral submissions. They have helpfully provided a list of matters that are not in issue, which, in addition to those matters summarised in the opening paragraph of this judgment, include the following: -
 - (a) The appellant has never left the UK.
 - (b) He does not have any children of his own.

- (c) He is currently in a relationship with [RL], with whom he resides.
- (d) He has a number of relatives/extended family members who reside in the UK on a long term basis, namely his father and brothers, [FA] and [BA], his uncle, [O], and a cousin, [AF].
- (e) The appellant has been employed in the UK in the past. He is a Christian and churchgoer.
- (f) His offending history and list of criminal convictions as set out in the updated PNC printout is not disputed. His most recent offence took place on 11 December 2016 and he was sentenced on 31 August 2017.

7. We set out below a summary of the oral evidence and the submissions made by the parties.

The oral evidence

8. In examination-in-chief the appellant adopted his witness statements. He confirmed that he has struggled with issues of mental health and depression since he was young. He was badly affected by his mother passing away suddenly when he was young (aged 14) and being falsely accused of rape. Driving motor cars made him feel good. He is currently taking anti-depressant and anti-epilepsy medication. He had counselling sessions in May and June, which are now finished and have helped him. He has not offended since January 2017, which he attributed to his partner, [RL], with whom he has lived for 1½ to 2 years and who has helped him a lot, and to being closer to his father, who he now sees almost every day. He is opening up more than he used to and is trying to build up confidence. He said he hadn't considered what he would do if he was deported to Nigeria.
9. The appellant's father, [LA], having adopted his witness statement confirmed he had contact either face to face or by phone every day and said the appellant had improved a lot. In cross-examination he said nothing about the appellant's behaviour now gave him cause for concern: he was a very kind boy and had always followed any instruction he had given him. He also stated he had no friends or relatives in Nigeria.
10. [RL] confirmed her statement and described her relationship with the appellant as really good. She said they had been together for 3 years and he mainly moved in when he was released from custody in October 2017. He had been able to open up to her; he had finally grown into the man he wanted to be, has sought medical help and come to terms with his illness. She said they wanted to buy a house and live like a normal British couple. She said she couldn't follow him to Nigeria: she has worked for a family with a 5-year old child for 4½ years.

Written material

11. [FA]'s statements confirm the support provided to the appellant by his family and [RL], to whom he is very close.
12. The reported findings of Lisa Davies, Consultant Forensic Psychologist, following her 3 hour interview of the appellant on 20th December 2017, were that, using LS-CMI, the indicated risk of the appellant engaging in antisocial behaviour rather than offending

was considered to be moderate at that time and a moderate risk of further offences being accrued in relation to the possession of drugs or further driving offences (whilst disqualified). Assessment using HCR-20, a structured assessment of risk of violence indicated a low risk of violent reoffending. He presented as a moderate risk of serious harm to others, this relating to the possibility that he could cause serious harm in the event that he was to have an epileptic fit whilst driving. He reported having no intention to drive and acknowledged the risks of doing so. In her opinion, from the available documents and her own clinical assessment, he presented with a low level of risk for future violent reoffending and a moderate level of risk for general (non-violent) offending, presenting with a moderate risk of causing serious harm at the current time. The gaining of employment and the maintenance of familial relationships are considered to be an important protective factor. He also presented with a moderate risk of attempting suicide, which would increase significantly in the event of forcible removal to Nigeria.

13. The Progress Report of Claire Easthope reveals the appellant has spent a lot of time ruminating in the 2 months prior to 29th June 2018 as he had stopped walking as a means of coping as he had been anxious about having a fit in public. He is more positive since starting counselling.

Submissions

14. In his submissions Mr Khubber relied on his skeleton argument. He submitted that deportation to Nigeria requires careful justification. Deportation would breach the appellant's rights under Article 8 of the ECHR; his case exhibits very compelling circumstances over and above those described in Exception 1 or Exception 2 under s. 117C(6) of the nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Consideration and evaluation of the evidence leads to the clear conclusion that the factors in favour of deportation are clearly outweighed by the factors against deportation. He relies on the following facts: -
 - (a) The appellant having spent his entire life in the UK and never having resided in the destination state.
 - (b) The length of his period of residence, its quality and the extent of his integration in the UK. He is socially and culturally integrated in the UK.
 - (c) The obstacles he would face integrating in the destination state, lacking any meaningful ties there.
 - (d) The low risk of further violent re-offending.
 - (e) His age at the time of some of his offending.
 - (f) His conduct since the commission of his most recent offences in 2016 including his compliance with probation services for the purpose of rehabilitation.
 - (g) The extent of the damage to his current long term relationship with a UK citizen and the support that that and his family in the UK provides to his well-being and ongoing rehabilitation.

15. In his oral submissions Mr Khubber emphasised that the appellant had committed no offences since November 2016. He had shown a genuine desire to change. He had formed a significant relationship with [RL] and his father, and they are helping him through the rehabilitation process. He referred to paragraph 7.2.2 of the report of Lisa Davies in which she stated that the appellant demonstrated reasonable insight into his offending and risk factors, acknowledging the need for him to continue to abstain from problematic peer associations and maintain his abstinence from substances, and appearing to be genuinely remorseful regarding the death of a cyclist. Mr Khubber submits the appellant's own stress, illness and depression have had an impact on his behaviour and he is making gradual progression through rehabilitation and developing insight.
16. Ms Holmes, on behalf of the Respondent, also relied on her Skeleton Argument. She referred to the appellant's convictions since 2000, the serious conviction in 2007 for causing death by dangerous driving, since which he has acquired 3 convictions for driving offences and possession of Class A drugs with intent to supply in 2012. Her primary submission was that although the appellant has made efforts to improve and has committed no offences since 2016, there is nothing really solid that shows real improvement or empathy towards the victim of the serious driving offence, referring to the October 2017 OASys report and the assessment of his still being a medium risk to the public. She relied on paragraph 70 of the judgment of Lord Wilson in *Hesham Ali* [2016] UKSC 60. She submits that not a great deal of weight can be placed on the relationship that the appellant has developed with [RL] because they were aware of the pending deportation when it developed. She also submits that the appellant will have access to medication in Nigeria and "a level of support from [RL]". The case boils down to the narrow issue of whether the seriousness of his offence and offending is sufficient to overcome the points in his favour. The respondent's case is that there is too much risk to the public and not enough evidence of a profound and lasting change in the appellant's behaviour.

Assessment and Conclusions

17. The relevant deportation provisions of the 2002 Act Section 117A-C provide:

"PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
- (a) breaches a person's right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
- (a) in all cases, to the considerations listed in section 117B, and

- (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
- (3) In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where –
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C’s deportation unless Exception 1 or Exception 2 applies.
 - (4) Exception 1 applies where –
 - (a) C has been lawfully resident in the United Kingdom for most of C’s life,
 - (b) C is socially and culturally integrated in the United Kingdom, and
 - (c) there would be very significant obstacles to C’s integration into the country to which C is proposed to be deported.
 - (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C’s deportation on the partner or child would be unduly harsh.
 - (6) 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.
 - (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted...”
18. The applicable Immigration Rules are paragraphs 398 and 399. They provide -
- 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
- (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 4 years;
 - (b) 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 less than 4 years but at least 12 months; or
 - (c) the deportation of the person from the UK is conducive to the public good and in the public interest 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 paragraphs 399 and 399A.

- 399.** This paragraph applies where paragraph 398 (b) or (c) applies if –
- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (iii) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (iv) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
 - (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
 - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
 - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

- 399A.** 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.

Lastly, in terms of the Rules, paragraph 398(c) states that:

“...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 paragraphs 399 and 399A.”

19. The appellant is a foreign criminal who has been sentenced to a period of imprisonment for at least 4 years. The tribunal must (in particular) have regard to the statutory provision that the public interest requires his deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2.

20. It is relevant to set out some more detail of the history of the appellant's life in the UK. As was noted and summarised in paragraph 22 of the judgment of Underhill LJ in the Court of Appeal in this case, there was a 19 year window when the appellant was aged between 4 and 23 years when application could have been made for him to acquire British citizenship. From the age of 18-23 it would have been for him to apply.
21. The appellant has committed a large number of offences from his teenage years. At the time of the decision appealed against he had 20 sets of convictions for 42 offences. He has been convicted of further offences during the course of these proceedings. The most significant offences are his conviction for causing death by dangerous driving on 5th July 2007, when he was 23 years old, for which he was sentenced to four years' imprisonment (he was a disqualified driver at the time) and for four offences of supplying a Class A controlled drug (heroin) on 4th February 2013 for which he received concurrent sentences of 3 years 4 months' imprisonment with a suspended sentence of 2 months of which he was in breach being activated and ordered to be served consecutively, making the total sentence one of three and a half years' imprisonment. The majority of his other convictions were for driving offences. However, he has two convictions in 2000 and 2012 for possession of a bladed or sharp pointed article, conspiracy to rob and possessing a bladed article in 2001. Following his conviction for a further offence of driving whilst disqualified on 4th February 2011 (with an associated offence of taking a motor vehicle without consent), for which he received a total sentence of 16 weeks' imprisonment, he was written to by the Home Office and informed that although consideration had been given to make a deportation order in his case, it had been decided not to make one at that stage but that if he committed further offences he would be at risk of such an order being made. Thereafter, he was convicted of the possession of cocaine and heroin on 19th August 2011, driving whilst disqualified and whilst uninsured on 5th July 2012, possessing a knife blade or sharp pointed article in a public place on 5th December 2012. After his conviction of the offences of supplying heroin in February 2013, the order for his deportation was made.
22. Subsequent to the service of the deportation order the appellant was convicted on 18th March 2016 of driving whilst disqualified and sentenced to 20 weeks' imprisonment suspended for 2 years; on the same occasion he was fined for driving whilst uninsured. Thereafter, on 15th June 2017, he was convicted of another offence of driving whilst uninsured and fined for committing a further offence during the operational period of a suspended sentence, then, on 31st August 2017, he was ordered to serve the balance of the suspended sentence having committed further offences of possessing heroin and cannabis resin.
23. The recent OASys report dated 30th October 2017, refers to the appellant driving to relieve stress (paragraph 2.1). In evidence he accepted this had been the case, but he was now able to cope without resorting to driving. The assessment writer stated that the appellant "enjoys driving and it would appear that he does not believe that the law should apply to him" (paragraph 2.8). Under the heading 'Accommodation' the writer refers to the appellant residing with his partner but informing him that "he also has his own council flat... which he said he is keen to get back to (paragraph 3.6)." Under the heading 'Education, Training and Employability' it is reported that the appellant

informed the writer that he “graduated with a degree from university with a degree in Business Studies” and “mentioned during the custody assessment that he had previously run his own property business which had a turnover of £50,000” (paragraph 4.10). The appellant in his evidence disputed that any of this was accurate. The full risk of serious harm analysis to a known adult in the community was indicated to be medium and to others to be low.

24. We have also taken account of the more recent assessment of Lisa Davies. We are satisfied that there is a medium risk of further reoffending by the appellant. We note that although there is evidence of a change of attitude by the appellant, as referred to by his partner and father, we note that he was still prepared to continue to commit offences after he formed the relationship with [RL], so it is very early days to be satisfied of a fundamental change.
25. The risk of reoffending is not the only, or even the most important factor, to be taken into account in terms of the public interest. Whilst Lord Wilson in *Hesham Ali* disavowed the phrase “public revulsion” that he used in *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694, the depth of public concern about the facility for a foreign criminal’s rights under article 8 to preclude his deportation is a significant factor to be taken into account (see [70] of *Hesham Ali*).
26. We have also considered all the matters and authorities referred to by Mr Khubber in his written and oral submissions.
27. The factors against deportation are set out in paragraphs 14 and 15 above. We accept that the appellant is socially and culturally integrated in the UK, although the extent of that integration is marred by his repeat offending. His relationship with [RL] is not particularly longstanding and was formed at a time that the appellant was subject to the deportation proceedings and therefore his status was precarious. It is also of note that, certainly in its early stages, the appellant wanted his own space (and flat) and continued to offend. It may well be that the relationship has developed over recent months and we are prepared to accept that it has. We accept that the appellant has never been to Nigeria and has no family or personal connections with the country and that it would be very difficult for [RL] to continue the relationship without relocating with the appellant and that she would not relocate. We also accept that he has family connections here that have, particularly in relation to his father, strengthened in recent times and that, although he has not acquired British citizenship, his presence in the UK has not been unlawful.
28. ‘Mere’ separation of a deportee from his spouse and/or children is manifestly not a sufficient basis from which to conclude that deportation would be unduly harsh. To decide otherwise would be to neutralise the effect of the Rules and the deportation provisions of s.117 of the 2002 Act (see also [34] of *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662). In *MM (Uganda)* in relation to the expression “unduly harsh, at [26] the court said that:

“The expression ‘unduly harsh’ in section 117C(5) and Rule 399(a) and (b) requires regard to be had to all the circumstances including the criminal’s immigration and criminal history.”

29. Albeit that the appellant needs to show very compelling circumstances because of the sentence of imprisonment of four years, we have considered whether removing him would be unduly harsh in terms of separation from his partner. However, we are not satisfied that it would be *unduly* harsh.
30. For many years as an adult, the appellant has committed serious offences. Even when warned of the potential consequences of continuing to offend, he went on to commit further serious offences and to drive unlawfully. He has not had a settled work history and there are puzzling anomalies in relation to what he is reported as having said about his history, for example, his qualifications and previous business. We note that he must have some cultural ties with Nigeria, where English is the official language. He will be able to gain employment opportunities. Like the writer of the OASys report, we were impressed by the appellant's 'personable' character. We acknowledge that the appellant has health issues in the form of epilepsy and depression but there is no reason to doubt treatment will be available to him in Nigeria.
31. We note what is said in the report of Lisa Davies as to there being a moderate risk of "suicidal ideation" or of "attempted suicide" as at the date of her report in January 2018, further stating that the risk would increase significantly in the event of forcible removal to Nigeria. We also note the evidence of previous suicide attempts or self-harm. However, when we enquired of Mr Khubber in the course of his submissions as to whether a risk of suicide was a matter relied on, we were reminded that his skeleton argument does not rely on an Article 3 free-standing claim in terms of suicide. No submissions were made to us in relation to the approach to an assessment of such a risk as set out in *J v Secretary of State for the Home Department*. We also bear in mind that the OASys report at 8.1 states that there were no "current" concerns about suicide. In addition, no oral evidence was led from the appellant in examination-in-chief in relation to any asserted risk of suicide. We are not satisfied that the evidence does establish that there is a real risk of suicide in the event of his being removed to Nigeria or at any stage prior to that event and that there is thus a real risk of a breach of Article 3 in that respect. Even if there is a risk of a suicide attempt, such was not relied on in advancing an Article 3 case.
32. We accept that the appellant has made efforts recently to improve his attitude and desist from offending. However, despite warnings and at a time he was in a precarious position, he continued to offend and we did not find his recently asserted empathy with the victim of his driving offence to be convincing. We have no doubt that he still presents a significant risk of continuing to offend, including driving unlawfully. In these circumstances he remains a significant risk to the public. The very strong public interest in deportation is manifest.
33. In considering whether there are very compelling circumstances over and above those described in the Rules, as well as the parallel provisions of s.117C of the 2002 Act, we have looked at matters collectively (see [30]-[32] of *NA (Pakistan)*). We bear in mind that in order for the public interest to be outweighed there would have to be "a very strong claim indeed" ([38] *Hesham Ali*). We cannot see that there are such circumstances in this appeal, reflecting again on all the matters that we have considered and there being no additional relevant factors to be taken into account.

34. Accordingly, the appeal must be dismissed.

Decision

35. The decision of the First-tier Tribunal having been set aside, we re-make the decision by dismissing the appeal.

The Hon. Mr Justice Goss
Sitting as a Judge of the Upper Tribunal

06 August 2018