Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09571/2017

THE IMMIGRATION ACTS

Heard at: Field House
On: 15 October 2019

Decision and Reasons Promulgated
On: 21 October 2019

Before

MR JUSTICE STUART-SMITH
SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A A
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr L Youssefian, instructed by Living Spring Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing AA's appeal against the respondent's decision to refuse his human rights claim further to the making of a deportation order pursuant to section 32(5) of the UK Borders Act 2007.

2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and AA as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Nigeria born on 20 August 1984. He first came to the UK on 5 February 1986, aged 18 months, with his mother, as a visitor, and was subsequently granted indefinite leave to remain on 30 June 1999 on the basis of his long residence in the UK, together with his family. From 18 March 2004 he amassed five convictions and nine offences. Those included a conviction on 2 February 2007 of possessing a Class A controlled drug - cocaine, with intent to supply, for which he was sentenced to 15 months' imprisonment, and in light of which he was served with a notice of intention to deport which he successfully appealed on human rights grounds in July 2007. His subsequent conviction, on 18 February 2015, was for the index offence, acquire/use/possess criminal property, for which he was sentenced on 20 March 2015 to 18 months' imprisonment. The offence was in fact money laundering, whereby the appellant was found with around £2000 which was mostly derived from the sale of Class A drugs. Following that conviction the appellant was served with another decision to deport pursuant to the UK Borders Act 2007. He submitted human rights grounds in response to that decision and on 7 September 2015 a deportation order was signed against him together with a decision to refuse his human rights claim. Subsequent to various challenges by way of judicial review and further submissions, the respondent made a new decision on 21 August 2017 to refuse the appellant's human rights claim, which is the subject of this appeal.

4. In that decision the respondent gave consideration to the appellant's relationship with his partner, Ms A, and his partner's son F from a previous relationship, the loss of the appellant's unborn child due in December 2016 and to his mental health. The respondent accepted the appellant's relationship with his partner and step-child, both of whom were British citizens, but considered that it would not be unduly harsh for Ms A to relocate to Nigeria with the appellant or for her to remain in the UK whilst he was deported. The respondent did not accept, therefore, that the requirements of the exception to deportation in paragraph 399 were met. Neither was it accepted that the appellant met the requirements of the exception in paragraph 399A on the basis of his private life as, although it was accepted that he had been lawfully resident in the UK for most of his life, it was not accepted that he was socially and culturally integrated in the UK or that there would be very significant obstacles to integration in Nigeria. The respondent did not accept that there were very compelling circumstances outweighing the public interest in the appellant's deportation.

5. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 3 April 2019 by Judge Black. The judge noted that the appellant and his partner had a son born in 2017 and that the evidence was that he had extensive family in the UK and no family or friends in Nigeria and had only visited Nigeria once with his mother for a holiday a number of years previously. The judge accepted that the appellant had a genuine and subsisting relationship with his partner and child and a close relationship with his partner's child F, albeit not a parental relationship. The judge accepted that it would be unduly harsh for the appellant's partner to relocate to Nigeria as she was a British citizen and her son F would be separated from his father but did not

accept that it would be unduly harsh for them to remain in the UK whilst the appellant was deported. The judge accepted that the appellant had lived lawfully in the UK for most of his life and that he was socially and culturally integrated in the UK, but she did not accept that there would be very significant obstacles to his integration in Nigeria. Having then gone on to consider the appellant's offending, the nine -year gap in convictions, the low risk of re-offending and low risk of harm, the appellant's mental health issues and his significant private life in the UK the judge concluded that, whilst she considered the case to be border-line, the circumstances were nevertheless very compelling and the appellant's deportation would be disproportionate. She accordingly allowed the appeal.

6. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had erred in law by finding that the appellant could meet the stringent test of very compelling circumstances and had failed to identify what made this a case where that threshold had been met, and that she had failed to give the requisite weight to the public interest.

7. Permission to appeal was granted in the First-tier Tribunal on all grounds.

8. In a skeleton argument submitted subsequent to the filing of a Rule 24 response, the appellant cross-appealed in a challenge to the judge's finding that there were no very significant obstacles to integration and that his deportation would not be unduly harsh on his partner. It was otherwise submitted that the respondent's grounds of appeal were no more than a disagreement with the judge's properly made findings on "very compelling circumstances".

9. At the hearing before us both parties made submissions. Mr Lindsay was content for the appellant to pursue the cross-appeal and we accept that he was able to do so, in light of the guidance in Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 216.

10. Mr Lindsay expanded upon the grounds of appeal challenging the judge's findings on "very compelling circumstances", submitting that she had erred in her reliance upon Maslov v Austria - 1638/03 [2007] ECHR 221 and had failed to identify anything that was very compelling and had failed to consider the relevant issues including the strength of the public interest. Mr Youssefian, in his response, submitted that the judge had identified very compelling circumstances based not only upon the appellant's length of residence in the UK but also the low risk of re-offending, the nine year gap in convictions and other matters and was entitled to conclude that the appellant's deportation would be disproportionate, particularly given the factors set out in his skeleton argument and the period in which the appellant was entitled to apply for naturalisation as a British citizen. There was nothing perverse in the judge's findings.

11. Both parties made submissions on the cross-appeal, with Mr Youssefian submitting that the judge had failed to take into account material matters such as the appellant's vulnerability due to his mental health difficulties when concluding that there were no very significant obstacles to integration and failed to give proper consideration to all relevant

factors when concluding that it would not be unduly harsh for the appellant's partner to be separated from him.

12. We have no hesitation in concluding that both challenges are made out. Whilst the Court of Appeal held in NA (Pakistan) v Secretary of State for the Home Department & Ors [2016] EWCA Civ 662 that matters relevant to the exceptions in paragraphs 399 and 399A of the immigration rules may also be relevant to an assessment of "very compelling circumstances", that did not mean that the same matters which failed to meet the exceptions could then simply be used to succeed under "very compelling circumstances", which is what the judge appears to have done in this case. We agree with Mr Youssefian that the judge did not rely solely on the appellant's length of residence in the UK in reaching her conclusion on very compelling circumstances, but we fail to see any particular matters identified by the judge other than those relevant to the assessment of the exceptions in paragraphs 399 and 399A and certainly no identification of any circumstances that could be considered to reach the high threshold of being very compelling circumstances. That is particularly pertinent when considering that the judge found the appellant's case to be "border-line", a somewhat unusual term to be used when concluding that a case is very compelling. As Mr Lindsay submitted, the appellant's family ties in the UK and lack of meaningful ties to Nigeria are not matters setting this case apart, in the absence of any compelling features above the considerations in paragraphs 399 and 399A. We cannot accept that a gap in the appellant's offending and a low risk of re-offending are matters of a particularly compelling nature when considered together with the fact that he had offended again after previously being subjected to deportation proceedings. Whilst the judge acknowledged that that was a factor militating against the appellant, we agree with Mr Lindsay that the public interest was not fully appreciated or accorded appropriate weight by her in such circumstances.

13. We cannot agree with Mr Youssefian that the factor listed at [36(k)] of his skeleton argument before the First-tier Tribunal, namely the period in which the appellant was entitled to apply for naturalisation as a British citizen, was a matter accorded weight by the judge in her assessment of "very compelling circumstances", particularly as it is not clear from the last line of [26] of her decision that that factor was taken into account at all in her assessment and, in any event, there was no proper engagement with the issue and no explanation as to why that would be a compelling feature. The only other notable matter accorded weight by the judge in her paragraph 398 assessment is the appellant's mental health issues, yet there is again no proper engagement with that matter and no explanation as to the level of the appellant's difficulties in that respect such as to make his overall circumstances very compelling.

14. Indeed, it is particularly pertinent when observing that the judge included the appellant's mental health difficulties in her assessment of very compelling circumstances, that that did not feature at all in her consideration of whether there were very significant obstacles to integration under paragraph 399A. On that basis we find that the judge's findings on very significant obstacles are also not sustainable, having omitted consideration of what she went on to accord weight as a material matter for the purposes of paragraph 398.

15. For all of these reasons we agree with the respondent that the judge's reasons for concluding that there were very compelling circumstances were materially flawed. Likewise, we agree with the appellant that the judge's assessment of the exceptions to deportation was materially flawed. We therefore set aside the decision in its entirety. It seems to us that the appropriate course would be for the matter to be remitted to the First-tier Tribunal to be heard afresh, as indeed was the indication from both parties.

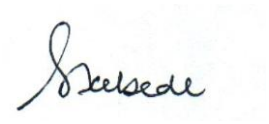
DECISION

16. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

17. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge GA Black.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. We continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed: 

Upper Tribunal Judge Kebede Dated: 17 October 2019