Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: HU/09633/2018

THE IMMIGRATION ACTS

At Field House
on 06.11.2018 & 04.03.2019

Decision & Reasons Promulgated
On 19.03.2019

Before:

Mr Justice TURNER (on 6 November)
John FREEMAN
(sitting as judges of the Upper Tribunal)

Between:

Solomon OFORI

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Jacques René* (counsel instructed by Access, Tottenham)
For the respondent: Mrs Ashika Fijiwala (on 6 November); Mr Paul Duffy (on 4 March)

DETERMINATION & REASONS

1. This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Mohd. Asif Khan), sitting at Harmondsworth on 2 August, to allow a human rights appeal against deportation by a citizen of Kenya, born 20 June 1992.

2. The appellant said he had arrived with his aunt on a visit visa in 2003; but it was not till 2010 that any application was made for him to have leave to remain. That was finally refused in 2014: though the First-tier Tribunal allowed an appeal against that decision in

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2015, the appeal was dismissed by the Upper Tribunal (deputy Judge Vinesh Mandalia) on 30 August 2016.

3. Meanwhile from October 2014 to January 2015 the appellant and a woman called Oprah Yeboah, with others, had been using her bank account to hold the proceeds of criminal activity on their part, amounting to £28,000. On 15 December 2015 the appellant and another man were arrested on suspicion of stealing from letter-boxes belonging to householders: he was found in possession of a master key capable of opening over 100 boxes on the estate in question, as well as a bunch of other keys which opened a number of them.

4. The judge was aware (see his paragraphs 13 and 15) that there had been two separate indictments; but this is how he dealt with the criminal proceedings against this appellant, at 42:

> The two offence [*sic*] for which the appellant was sentenced to 12 months imprisonment arose out of a single incident but there were two counts on the indictment. The appellant pleaded guilty to one count but was found guilty by the jury after a trial on the other count. All criminal activity is serious but there are degrees and persistency, which have to be considered. The appellant had not been before a criminal court, prior to these two convictions, he had a clean slate.

5. What had actually happened was this: on 16 June 2017 the appellant, who had been found guilty after trial on two counts of going equipped, on the first indictment, was sentenced to 12 months' imprisonment. On 26 October he pled guilty, late in the day, because the prosecution had already made a bad character application, to put in the facts of his previous conviction, to the money-laundering indictment, and was sentenced to 16 months, concurrently with the previous sentence. The sentencing remarks of both judges were listed as attached to the Home Office appeal bundle; but there was no sign of either.

6. The judge went on at 43 to say "I find that the appellant is truly remorseful for his actions and I accept the findings of the probation report that he is a low risk and is unlikely to offend again". What the judge seems to have failed to notice is that this was the report prepared for the June hearing, whose conclusions had clearly been overtaken by what was to happen in October.

7. The result is that the judge was wrong in law to decide the appeal on that basis. As it happened, Mr René and Mrs Fijiwala had already identified another error on his part. This involved the judge's acceptance at 45 that the appellant was entitled to the benefit of paragraph 399 of the Rules, on the basis of his relationship with his girl-friend. This was not the case, since 399 (b) required not only a 'genuine and subsisting relationship' with a partner who was British or settled here, but that (i) it should have been formed at a time when the person facing deportation was lawfully here.

8. While the presenting officer had accepted before the judge that the appellant could not personally be blamed for the period he had spent here without leave while he was still under 18, the fact remains that he never has had leave of any kind, and cannot benefit from paragraph 399 (b) at all; or, for the same reason, 399A. The result is (see A398 (c)) that in his case

> … 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.

9. Clearly a fresh hearing on that basis was required: I gave directions for filing and serving the missing sentencing remarks, which had not been done by 7 January, the first adjourned date: there is no answer to Mr Réné's claim for the costs of that hearing. By 4 March, there was a transcript of the October sentencing, but not of the June one. Mr Réné urged me to adjourn the hearing yet again; but there did not seem any need for such an extreme step: so far as the June hearing was concerned, a substantial part of the sentencing remarks appears in the refusal letter, and Mr Duffy undertook to file and serve the complete version by e-mail, in case there were anything in it to the appellant's advantage which Mr Réné wished to draw to my attention. I shall come to what happened on that in due course.

LAW

10. On 4 March I offered Mr Réné an opportunity to call oral evidence, especially as to the appellant's attitude to his offending, if he wished; but he did not. The only issue before me was whether there were the necessary 'very compelling circumstances' in the case. This appellant is a 'medium offender', in terms of *NA* (Pakistan) [2015] EWCA Civ 140, and the approach to be taken is set out at paragraph 36

> In relation to a medium offender, first see whether he falls within Exception 1 or Exception 2. If he does, then the Article 8 claim succeeds. If he does not, then the next stage is to consider whether there are "sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2". If there are, then the Article 8 claim succeeds. If there are not, then the Article 8 claim fails. As was the case under the 2012 rules (as explained in *MF (Nigeria)*), there is no room for a general Article 8 evaluation outside the 2014 rules, read with sections 117A-117D of the 2002 Act.

11. Exception 1 is defined in s. 117C (4) of the Act in the same terms as those used in paragraph 399A of the Rules, and formed the basis of Mr Réné's argument before me. Exception 2 appears at 117C (4) in slightly different form from the one in 399 (b): so far as relevant, since there is no child in this case, it is this

> Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner … and the effect of C's deportation on the partner … would be unduly harsh.

12. Although that does not impose the same limitation on the exception as that in paragraph 399 (b) (ii), Mr Réné did not seek to argue that the effects of the appellant's deportation on his girl-friend, presently at university, would be unduly harsh. There is however no suggestion that she is not a British citizen, or that they do not have a 'genuine and subsisting relationship' together: she was present, with several members of his family, at the hearing before me. That much has to be taken in the appellant's favour on Exception 2.

13. So far as Exception 1 is concerned, it applies where an appellant

(a) … has been lawfully resident in the United Kingdom for most of his life,

(b) … is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to his integration into the country to which he is proposed to be deported.

EXCEPTION 1

14. Dealing first with condition (a), this appellant has never been lawfully resident in this country at all: on the other hand, as already noted, he cannot personally be blamed for not taking any steps to regularize his position here till he reached 18. On (b), the decision-maker (refusal letter pp 7 – 8) reviewed the sentencing judges' remarks, and went on

> It is evident that your offences were committed for monetary gain. You do not appear to have given any thought to the effects that your crimes would have had on your victims, the stress caused and the frustration of loss they would have felt.
>
> It is not accepted that you are socially and culturally integrated in the UK. Your involvement with criminal activity indicates that you have chosen not to contribute to the wider society in a positive manner and have shown a serious disregard for British law.

15. Mr Réné did not challenge these conclusions; but he argued that a broader assessment was required, no doubt something along the lines of the 'broad evaluative judgment' (see *Kamara* [2016] EWCA Civ 813 , paragraph 14) needed as to prospects of integration into the destination country. The decision-maker went on to note

> You have not had permission to work in the UK and have not provided any evidence that you have undertaken any employment. Therefore you have been unable to demonstrate that you have made a positive contribution to the UK.

16. This is also right, though Mr Réné pointed out that the appellant had been able to produce a certificate (22 September 2017), showing he had successfully completed the 'Getting it Right' programme while in prison: there was also a letter (undated, but said by the appellant to be from 28 December 2018), from the manager of an Oxfam shop, describing him as a valuable volunteer in her team for the last four months (effectively since his release from prison on 22 August).

17. Besides that evidence about how the appellant has behaved in prison and since, there was a great deal of evidence before the judge to show how well he did at school, and especially at football (specifically mentioned by the judge who sentenced him in June). If the appellant had gone on in the same way after he left school, then I should not have considered it too hard to show that he was 'socially and culturally integrated' here.

18. However, that is not what happened. As Mr Réné suggested, some allowance has to be made for the appellant's frustration at being prevented by his immigration status from taking full advantage of work and study opportunities in this country; however his criminal activity was not the result of any momentary impulse. Each indictment involved a different period, and a different co-defendant. The money-laundering, towards the end of 2014, involved someone buying a Range Rover from an innocent seller with a cloned credit card: the £28,000 got by that was put into a bank account in the name of a woman, who the sentencing judge said the appellant had used. £10,000 was drawn out before a stop was put on it.

19. The judge said it was a significant aggravating feature that the appellant had used the woman, who trusted him, in this way: she had neither known nor suspected the fraud, but had been prosecuted herself. The appellant had exposed her to that risk, and to a prison sentence, if convicted, and the judge regarded that as a feature of the appellant's high culpability, added to by the amount of money involved, and the loss to the owner, involving a total of £38,000 owed on a car he no longer had.

20. As for the going equipped in December 2015, the appellant and the other man both denied the purpose for which they had the keys to the letter-boxes in their car, and in the case of the master-key, on the appellant himself. However the jury rejected the suggestion that they had been seen on the estate concerned by mere coincidence. These too were clearly offences planned for gain.

21. This was something the appellant admitted to the author of the June pre-sentencing report [PSR]; but only after he had been convicted. His explanation was that "times were hard": he was having problems with immigration and wanted to become a professional footballer, but had no money. He still did not explain how he had come to be in possession of the keys, though he did now admit what he had had them for. The report-writer said he took responsibility for what he had done, and expressed what appeared to be genuine remorse, though in terms of ruining his career and letting his family down.

22. The appellant was already serving his sentence for those offences by the time he was dealt with for the money-laundering. There was no further PSR this time, and the sentencing judge said in terms that he had entered his guilty plea very late in the day, only when the case was before the court for trial. The judge allowed him a reduction of little more than the 10% normally carried by a plea on the day of trial.

23. The OASys 'Basic Risk Review' report of 24 January 2018 does not relate to the money-laundering at all: it refers only to the sentence passed on 16 June 2017, and the facts of the going equipped case. There is also a letter from the appellant's probation officer of 3 January 2019, saying that "Using an actuarial tool …" he had been assessed as 27% likely to re-offend within one year, and 43% within two. However he had been "… fully compliant with probation instructions and has engaged within supervision sessions and is working hard to address his offending behaviour".

24. I asked Mr Réné why, if the appellant was truly gripped by remorse, at least by the time he went to prison, he had not pled guilty to the money-laundering till a very late stage in that case. Mr Réné's explanation, so far as it went, was that there had been previous proceedings on that case, abortive owing to defects in the prosecution evidence. While that may be so, this appellant was the principal, in fact the sole offender in the money-laundering, and there does not seem to have been anything to stop him pleading guilty to the charge on which he was sentenced, as soon as it was put to him.

25. I very much take into account the appellant's obvious closeness to his own family, and their presence and support at the hearing; nor is there any question about his 'genuine and subsisting relationship' with his girl-friend. However, for 'social and cultural integration', wider factors have to be considered. The appellant might have been able to show it, if the question had arisen before the end of 2014; but at both ends of the following year, he was committing serious planned offences for gain. While he was prepared to admit having the keys for that purpose, after he had been convicted of it in 2017, he did not say how he had come by them. If he had been brought up sharp by that conviction, and genuinely decided to mend his ways, then it is hard to see why he did not plead guilty to the money-laundering till a very late stage.

26. I do give the appellant credit for the course he did in prison, and for the voluntary work he has done since; and he has not got into any more trouble since his release. However, that was only just over six months ago, and, based on his record, his risk of re-offending within two years is not low at 47%. I cannot regard him as 'socially and culturally integrated' as things stand.

27. Turning to condition (c) ''very significant obstacles'', this question was addressed at some length by Judge Mandalia, who described it at the central issue on the appeal before him. As he explained, the appellant had not by the date of his then application spent more than half of his life here, so that was the test he had to meet, under paragraph 276ADE (vi). While Mr Réné sought to argue that this is not so now, the question of 'very significant obstacles' now arises directly under s. 117C, and so remains the test the appellant has to meet. As Mr Réné accepted, Judge Mandalia's decision stands unappealed, and represents the last word on the facts before him: see *Devaseelan* (Second Appeals - ECHR - Extra-Territorial Effect) [2002] UKIAT 702*.

28. Judge Mandalia noted that the appellant had no immediate family to return to in Ghana; but found that he could take steps to establish contact with his maternal uncle, and get short-term help from him. It might not be easy for the appellant there; but his aunt in this country (Mrs Asamoah) had kept in touch with friends in Ghana, and been to visit his mother's grave herself: the appellant would not be without help on that side either.

29. I invited Mr Réné to let me know any changes for the worse in the appellant's situation on return to Ghana. He cited the passage of time itself, which he said would make things harder for him. Mr Réné also referred me to *Kamara* [2016] EWCA Civ 813 paragraph 14

> … the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and

to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

30. Mr Réné went on to argue that the appellant, having only lived in Ghana till he was ten, when he would still have been at primary school, could not be considered an 'insider' there, and would find life correspondingly difficult. This point, like the appellant's family situation, was fully considered by Judge Mandalia, and I was not referred to any evidence to show that things would have changed for the worse for him on either front. Another 2½ or 3 years away from Ghana are likely to have made less difference in that direction than the added experience of life he will have had here in the other.

31. In view of Mr Duffy's offer to file and serve the two sets of sentencing remarks by e-mail, I gave the parties till 15 March to make any further submissions on those, or on *Olarewaju* [2018] EWCA Civ 557, which I drew to their attention, especially paragraph 26. Olarewaju was a young man who had had leave to be here, for just over a year before he reached 18. Even before he reached that age, he had been given 18 months' detention for possession of class 'A' drugs with intent to supply, following convictions for other criminal offences: while he had received a considerably longer, but still medium sentence later on, that did not form part of the decision under consideration by the Court of Appeal (see their paragraph 4). As a result, he too needed to show the necessary 'very compelling circumstances' over and above those set out in Exceptions 1 and 2 or paragraphs 399 and 399A.

32. I received a copy of the sentencing remarks in the money-laundering case, but those in the going equipped are only available to the extent set out in the decision letter, which does however appear to include most of them.. As I made clear, that was enough for me to decide this appeal; but the Home Office should realize that a copy of the complete sentencing remarks ought to be made available in their appeal bundle in every deportation case. If nothing else, it might save the kind of mistake made by the judge in this one.

33. On *Olarewaju*, I received submissions by e-mail from Mr Duffy, which are reflected in my conclusions. There was nothing further from Mr Réné by the date set, so I went on to decide this appeal.

CONCLUSIONS

34. As Mr Réné agreed, the only arguable 'very compelling circumstance' over and above Exceptions 1 and 2 in this case concerns the age at which the appellant came here from Ghana, and the length of time he has been away from there. Youth on its own cannot amount to a 'very compelling circumstance' (see *Olarewaju*, paragraph 26); nor it seems, did the time spent away by the appellant in that case, who had come here when he was nine.

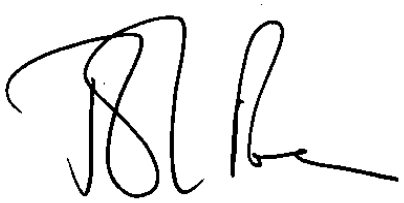
35. Judge Mandalia considered this appellant's situation in 2016, though in terms of 'very significant obstacles' to return. It does not seem to me that anything has happened since Judge Mandalia reached that decision to show that there are now the 'very significant obstacles' to this appellant's return to Ghana which there were not then. The result is that, even though the appellant himself cannot be blamed for his residence here up to

2010 not being lawful, he cannot establish any of the conditions for Exception 1 to apply, and exception 2, realistically, was not argued.

36. So far as the other general points made at paragraph 26 of *Olarewaju* are concerned, the Court of Appeal referred back to the passages already cited from *Hesham Ali (Iraq)* [2016] UKSC 60: "great 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 12 months"; "in any event the significance of rehabilitation is limited by the fact that the risk of reoffending is only one facet of the public interest"; and, where paragraphs 399 and 399A of the Rules do not apply, in general "only a claim which is very strong indeed … will succeed".

37. The evidence of rehabilitation here, or difficulties on return in this case, if anything go even less far than in *Olarewaju* . This was by no means a claim which could be described as 'very strong indeed', and the appellant's appeal against deportation must be dismissed.

Home Office appeal allowed: first-tier decision set aside
Fresh hearing in Upper Tribunal: appellant's appeal dismissed



(a judge of the Upper Tribunal)

18.03.2019