Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09890/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 October 2019	**17 October 2019**

Before

THE HONOURABLE MR JUSTICE WARBY
UPPER TRIBUNAL JUDGE CANAVAN

Between

ADEKOLA [A]
(aka: TOSIN [A])
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. West, instructed by SLA Solicitors
For the Respondent: Ms S. Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 9 April 2018 to refuse to revoke a deportation order and to refuse a human rights claim.

2. The appeal was dismissed by First-tier Tribunal Judge Bart-Stewart ("the judge") in a decision promulgated on 25 March 2019. The judge considered the appellant's immigration history [2-6]. The appellant has never had leave to remain in the UK. He has been removed to Nigeria on two occasions since he first arrived in the UK in October 2001. When he

was removed to Nigeria on 17 July 2009 the appellant was subject to a deportation order, which excluded him from the UK for a period of at least ten years. The judge noted that the appellant returned to the UK the same year and remained here ever since. The judge considered the details of the offences committed by the appellant which led to the making of the deportation order [8-11]. She outlined the reasons given by the Secretary of State for refusing to revoke the deportation order with reference to the relevant provisions relating to the assessment of the appellant's private and family life under Article 8 of the European Convention. The judge then summarised the evidence given by the appellant and his partner at the hearing [30-50]. She made her findings from [51] onwards. At [56] the judge found that the appellant knowingly returned to the UK in breach of the deportation order. Not only did he return in breach, which is a criminal offence, but he used a forged passport to do so.

3. In considering whether there were any grounds for the deportation order to be revoked the judge referred to relevant provisions in the immigration rules. At [59] of the decision she set out the wording of paragraphs 391 and 399D of the immigration rules. At [60], she considered the substance of the test outlined in 391(a). She found that the appellant did not meet the requirements for ten years exclusion. She noted that he spent little time in Nigeria following his deportation before returning to the UK in breach of the deportation order. The judge concluded at [60] that the appellant had raised nothing that could be considered 'exceptional circumstances' to justify revoking the order. At [61], the judge went on to consider whether there were any circumstances to justify revoking the order on human rights grounds. In doing so, she referred to relevant aspects of the immigration rules at paragraphs 399 and 399A, which set out the Secretary of State's position as to where a fair balance should be struck in such cases. She directed herself to the correct test in those rules.

4. The appellant's case relied on his relationship with his partner and three children in the UK. The appellant's partner has two children from a previous relationship. The third child is the appellant's daughter, who was born in February 2017. The judge considered the best interests of the children at [66]. She went on to consider the family circumstances. This included the fact that his partner's older children had different fathers with whom they have no contact. The judge also considered the care the appellant gave to the children and the support he provided to his partner [67-70].

5. The appellant seeks to challenge the First-tier Tribunal's decision on three grounds:

   (i) The judge incorrectly applied the test outlined in paragraph 391 of the rules;

   (ii) The judge failed to consider paragraphs 390 or 390A of the rules;

   (iii) The judge failed to carry out an adequate assessment of the best interests of the children.

Decision and reasons

6. We find the grounds fail to disclose errors of law that would have made any material difference to the outcome of the appeal.

7. In relation to the first ground, it matters not that the judge considered the test in paragraph 391. The Court of Appeal in *SSHD v SU* [2017] EWCA Civ 1069 made clear that this provision is applicable to those making an application for revocation from outside the UK. That was not this case but, in any event, it makes no difference because the judge found that the appellant did not meet any of the requirements.

8. On behalf of the appellant it appears to be accepted that paragraph 399D of the immigration rules applied in this case. Paragraph 399D, which was quoted by the judge at [59] of the decision, applies where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order. The rule states that enforcement of the deportation order is in the public interest and will be implemented unless there are 'very exceptional circumstances'.

9. If paragraph 399D was applicable, it is immaterial that the judge did not make specific findings relating to paragraphs 390 and 390A. Paragraph 390 applies to all applications to revoke a deportation order. It requires the Secretary of State to consider the grounds on which the original order was made, any representations which were made in support of revocation, the interests of the community (including the maintenance of effective immigration control), and the interests of the applicant (including any compassionate circumstances). Paragraph 390A states that where paragraph 398 applies (Article 8 claims) the Secretary of State will consider whether paragraph 399 or 399A applies, and if it does not it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors. The Court of Appeal in *ZP (India) v SSHD* [2015] EWCA Civ 1197 made clear that paragraph 390A applies to those who had not yet been deported from the UK. In this case the appellant had been deported and returned in breach of the order, so paragraph 399D was the applicable provision.

10. Nevertheless, the judge did conduct an assessment with reference to paragraphs 399 and 399A, and made clear that she did not consider that the circumstances even met the lower threshold of 'exceptional circumstances' to justify revoking the deportation order [60]. It was open to the judge to conclude that the circumstances fell far short of the elevated threshold of 'very exceptional circumstances'. For these reasons we conclude that the first two grounds have no merit and do not disclose any errors of law in the First-tier Tribunal decision.

11. In relation to the third ground, Mr West pointed us to several factors relating to the children. He argued that it would be difficult for the children, who were not of Nigerian origin, to live in Nigeria with the appellant, but he identified no other factors to indicate that it would be unduly harsh for them to relocate as a family. Mr West highlighted the

general family circumstances, including the nature of the relationship the appellant had with the three children, the level of care that he gave to the children, and the assistance that his support provides to his partner. None of those facts were controversial and it seems clear to us that the judge considered the relevant circumstances, even if they were not considered in as much detail as the appellant might have liked: see [67-70]. None of those factors, either individually or taken together, came anywhere close to showing that there were 'very exceptional circumstances' such as to justify the revocation of the deportation order in the circumstances of this particular case.

12. The Court of Appeal in *NA (Pakistan) v SSHD* [2016] EWCA Civ 662 made clear that separation from a parent as a result of deportation is not usually in the best interests of children, but that was the usual negative effect of deportation. In *KO (Nigeria) v SSHD* [2018] UKSC 53 the Supreme Court said that something more than the usual negative effect of deportation is needed to show a breach of Article 8. Clearly, the appellant's removal to Nigeria might cause the family to be separated, if his partner chose to remain in the UK with the children, but the evidence showed nothing more than the usual negative effects of deportation.

13. In this case something more again is needed to reach the even higher threshold outlined in 399D of the immigration rules. Nothing in the circumstances of this case came close to the threshold required to revoke the deportation order, in circumstances where the appellant established a family life in the UK in the full knowledge that he was remaining unlawfully in breach of a deportation order. We are satisfied that the judge considered all the relevant factual circumstances, and that her findings were open to her to make on the evidence.

14. We conclude that the First-tier Tribunal decision did not involve the making of an error of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The decision shall stand

Signed  Date 15 October 2019
Upper Tribunal Judge Canavan