Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/15584/2018 (P)**

THE IMMIGRATION ACTS

Decided under rule 34
On 9 July 2020

Decision & Reasons Promulgated
On 21 July 2020

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

J K

(ANONYMITY ORDER MADE)

Respondent

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Rwanda, who arrived in the United Kingdom early in 2002 and applied for asylum. His application was unsuccessful, but he was granted exceptional leave to remain until 25 April 2006 and on 3 January 2007 he was granted indefinite leave to remain.

2. On 9 December 2016 he was convicted of one count of theft and sentenced to 12 months imprisonment. He was served with a deportation order on 21 December 2016 and on 17 July 2018 the Appellant refused his human rights claim.

3. He appealed and First-tier Tribunal Judge O'Rourke allowed his appeal in a decision promulgated on 9 September 2019. The Appellant appealed against this decision and on 1 October 2019 Upper Tribunal Judge Martin, sitting in the First-tier Tribunal, granted her permission to appeal to the Upper Tribunal.

4. The error of law hearing was listed for 16 April 2020 but was adjourned due to the restrictions imposed on account of the Covid-19 Pandemic. Upper Tribunal Judge Sheridan gave further directions on 29 April 2020. He said that his preliminary view was that it would be appropriate to determine whether there had been an error of law on the papers. The parties were invited to make further submissions in relation to the substance of the appeal and to indicate whether they considered that a hearing was necessary.

5. The Appellant filed and served written submissions in response on 14 May 2020 and the Respondent filed and served his submissions, which had been drafted by counsel, on 21 May 2020. Counsel submitted that the hearing could proceed on the papers unless the Upper Tribunal considered that there had been an error of law, when the appeal should be remitted to the Frist-tier Tribunal for a re-hearing in the light of up-to-date evidence. The Appellant had not objected to the error of law proceeding on the papers. Having carefully read both sets of written submissions, it is clear that the error of law hearing would turn on the competing interpretation of relevant case law. The submissions had addressed this case law in detail, as had First-tier Tribunal Judge O'Rourke. I have reminded myself of the need to ensure that the proceedings are conducted in a fair and just manner and that unnecessary delay is avoided. I have also taken into account the Respondent's human rights and the effect of further delay on his private and family life. Having considered all of this, I have decided that it is lawful and proper to proceed without a hearing.

ERROR OF LAW DECISION

6. First-tier Tribunal Judge O'Rourke's decision was very detailed and addressed all of the relevant legal issues which arose in the appeal before him. He also carefully referred himself to the appropriate law. He found that it would not be unduly harsh for the Respondent's wife and his youngest child to remain in the United Kingdom without him but that it would be

unduly harsh to expect them to join him in Rwanda in the light of the decision in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53.

7. However, he went on to apply MS (s.117C(6): 'very compelling circumstances') Philippines [2019] UKUT 122 (IAC) and other relevant case law and find that, in the particular circumstances of the Respondent's case, there were very compelling circumstances over and above those described in paragraph 399 of the Immigration Rules. In particular, in paragraph 28 of his decision he detailed the factors which amounted to such very compelling circumstances.

8. The Appellant submitted that no such very compelling circumstances existed but did not directly address the majority of the factors addressed by First-tier Tribunal Judge O'Rourke. She did not dispute his finding that:

> "The [Respondent] is clearly, despite his criminal convictions, a man of real standing in his community. The unchallenged evidence provided in this respect states that he stood in front of his whole congregation to admit his offence and apologise for it. It goes on to state that he is very supportive in visiting the sick, disabled and bereaved, providing practical support to them and is a *'key contributor to the community'*. A key indicator of that standing is the support provided to him by the victim of his crime and the fundraising by his community to refund the money".

9. In addition, the Appellant did not dispute that the Respondent was "a man of strong, Christian conviction and driven by that agreed to donate a kidney to a person he only obliquely knew" or that the evidence indicated that his offence "was driven by the dire financial consequences he suffered, stemming from the medical consequences of his kidney donation". In addition, she did not dispute the finding that the theft "was a 'one-off', out of character offence and he is extremely unlikely to re-offend".

10. Instead, she focused on Frist-tier Tribunal Judge O'Rourke's finding that the Respondent may find it difficult to access treatment in Rwanda for his cancer and adequate monitoring as a result of having only one remaining kidney. I have not given too much weight to this submission as in his decision First-tier Tribunal Judge O'Rourke was careful to find that the Respondent "may" need treatment for a "potentially" serious medical condition and that there was "at least the potential for future decline in function" [of his remaining kidney]. From the wording of sub-paragraph 28(iii) of his decision, First-tier Tribunal Judge O'Rourke clearly understood and indicated that these particular findings were speculative.

11. The Appellant also submitted that "given the fact that deportation is in the public interest and hat the family life and private life exemptions do not apply, it is difficult to understand how the FTTJ has arrived at the finding that the appellant's rehabilitation, character, circumstances of the conviction and medical condition outweigh the public interest in deportation".

12 However, it was found in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 that:

> "… In principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves of in conjunction with other factors relevant to Article 8 …".

13. The Appellant also submitted that First-tier Tribunal Judge O'Rourke had used "the fact that the appellant was sentenced to 12 months imprisonment to dilute the public interest, which is contrary to the provisions under S117C which establishes the public interest". However, S117C has to be ready in conjunction with paragraph 399 of the Immigration Rules and paragraph 398 recognises that there will be circumstances where the public interest will be outweighed by very compelling circumstances. Furthermore, in MS the Upper Tribunal found that:

> "In determining pursuant to section 117C(6) of the Nationality, Immigration and Asylum Act 2002 whether there are very compelling circumstances, over and above those described in Exceptions 1 and 2 in subsections (4) and (5), such as to outweigh the public interest in the deportation of a foreign criminal, a court or tribunal must take into account, together with any other relevant public interest considerations, the seriousness of the particular offence of which the foreign criminal was convicted; not merely whether the foreign criminal was or was not sentenced to imprisonment of more than 4 years. Nothing in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 demands a contrary conclusion".

14. In Akinyemi v Secretary of State for the Home Department [2019] EWCA Civ 2098 the Court of Appeal also recognised that "the strength of the public interest will be affected by factors in the individual case, i.e. it is a flexible or moveable interest not a fixed interest". Therefore, First-tier Tribunal Judge O'Rourke was entitled to take into account the reasons why the Respondent was only sentenced to 12 months imprisonment even though the sum involved

was significant and the starting point for sentencing was usually two years. In her submissions, the Appellant sought to go behind the HHJ Heywood's decision as to the appropriate punishment for the Respondent's crime by singling out factors which had already been taken into account by the sentencing judge when reaching his or her decision.

15. The Appellant also submitted that rehabilitation is only one part of the deportation regime. It is correct that in Olarewaju v Secretary of State for the Home Department [2018] EWCA Civ 557 the Court of Appeal found that "the significance of rehabilitation is limited by the fact that the risk of reoffending is only one facet of the public interest". However, First-tier Tribunal Judge O'Rourke did not rely on any assertion that the Respondent had not re-offended since his release. The factors which he relied on related to the Respondent's general contribution to the community and were clearly relevant to an assessment of the totality of the Respondent's individual circumstances. In addition the last part of paragraph 28 of First-tier Tribunal Judge O'Rourke's decision indicates that he was taking into account the strong public interest in deportation alongside the public interest in recognising that justice was done in the wider sense.

16. For all of these reasons I find that there were no errors of law in First-tier Tribunal Judge O'Rourke's decision.

DECISION

(1) The Appellant's appeal is dismissed.

(2) First-tier Tribunal Judge O'Rourke's decision is maintained.

Nadine Finch

Signed Date 9 July 2020
Upper Tribunal Judge Finch