



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA/02181/2013

**THE IMMIGRATION ACTS**

**Heard at Nottingham Magistrates' Court  
On 21 May 2014**

**Determination  
Promulgated  
On 30 June 2014**

**Before**

**UPPER TRIBUNAL JUDGE KING TD  
UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**FRED EFOSA**

Respondent

**Representation:**

For the Appellant: Mr Mills, Senior Presenting Officer  
For the Respondent: No representation, appeared in person

**DETERMINATION AND REASONS**

1. The appellant, a citizen of Nigeria born 12 November 1991, has been granted permission to appeal the decision of First-tier Tribunal Judge Holt and Ms S Hewitt JP (the panel) who for reasons given in a determination

dated 26 January 2014 allowed the appeal against the decision to make a deportation order dated 11 October 2013.

2. The Secretary of State had deemed the respondent's deportation to be conducive to the public good based on her policy. This was in terms that criminal behaviour which results in a custodial sentence of twelve months or more, or a total aggregate sentence of twelve months or more over a period of five years was serious enough to initiate deportation action. The convictions which the Secretary of State considered resulted in the respondent being liable to deportation were a conviction at Preston Crown Court on 15 March 2013 for one count of robbery for which the respondent was sentenced to nine months' imprisonment, five counts of theft leading to a sentence of four months' imprisonment concurrent for each count making a total of nine months' imprisonment. Furthermore on 2 September 2013 the respondent was sentenced to three months' imprisonment at Liverpool and Knowsley Magistrates' Court for having been convicted of handling stolen goods.
3. The panel heard evidence from the respondent who, as was the case before us, was unrepresented. It concluded that the presumption in favour of deportation was triggered by paragraph 398(c) of the Immigration Rules although it did not consider that that a letter from Lancashire Social Services referring to a police record of fifteen incidents of domestic abuse between July 2009 and 2012 to be evidence of further criminal activity by the respondent in addition to the above convictions. The panel concluded that the respondent satisfied 399(a) and 399(b) of the Rules in relation to his partner Y G and their two children J and P. The panel also found that the respondent had spent more than half his life living continuously in the United Kingdom and as he was under 25 paragraph 399A applied and so allowed the appeal.
4. The Secretary of State's challenge is on these bases:
  - (a) The panel failed to give adequate reasons for disregarding the Social Services report regarding the relationship between the respondent and his partner in 2012. It had erred materially by failing to take into consideration that report. There was no evidence the respondent had any contact at all with his children or had made any effort through any legal channels to obtain such access. He had provided no evidence that he was in a genuine and subsisting relationship with the mother of his children and had not lived in the United Kingdom with valid leave for fifteen years. Thus the findings under paragraph 399(a) were flawed;
  - (b) The panel had failed to give any or adequate reasons for accepting at face value the respondent's evidence that he had arrived in the United Kingdom around 2003 and thus its conclusions under 399(b) were flawed. The panel's acceptance of evidence from the respondent was perverse;

- (c) The panel had failed to conduct a rounded assessment of the possibility of the respondent reintegrating in Nigeria;
  - (d) The panel had failed to give adequate consideration to the risk of the respondent reoffending.
5. In a letter dated 4 May 2014 the First Law Partnership explained that they had been instructed by the respondent and sought an adjournment in order for them to obtain the sentencing remarks, OASys Report, the file of papers from the respondent's previous solicitors or any presentence reports that were in existence. They explained that they were acting pro bono and argued that if the hearing before us on 22 May were to proceed it was likely that we would find the respondent again unrepresented and unprepared for a complex hearing without essential papers.
  6. The respondent explained he was unrepresented because of lack of funds. We did not consider an adjournment justified. The First Law Partnership had indicated that they were instructed on a pro bono basis and there was no satisfactory explanation why they had not attended in the light of their evident willingness to undertake representation without a fee. Subject to argument, if we were persuaded to set aside the decision, it would be on the basis that the matter would be remitted to the First-tier Tribunal for starting afresh. Accordingly we considered in the interests of justice that we should proceed.
  7. The respondent explained that his partner Y G telephoned him every day. He gave us the dates of birth of the three children with whom he had a relationship. Y G had also provided a new reference about him.
  8. In his submissions, Mr Mills argued that in addition to the grounds of application, the panel had erred in its assessment of the letter from Lancashire County Council Children's Social Care Team in finding that the relationships were extant. Without giving adequate reasons for not taking that letter into proper account, the panel had been perverse in deciding to accept the oral testimony of the appellant. The further failure by the panel related to a failure to address the question whether there was any other family member who was able to care for the child in the United Kingdom.
  9. As to paragraph 399(b) it was not just the absence of reasons regarding the length of time the respondent had been in the United Kingdom but there also was the legitimacy of its finding that there was a genuine and subsisting relationship.
  10. As to the respondent's private life addressed under paragraph 399A, Mr Mills argued there was an absence of adequate reasons why the panel had reached its conclusion as to the length of time the respondent had been to the United Kingdom. He also submitted that the panel had given inadequate reasons for its conclusions regarding the absence of any ties in Nigeria.

11. We gave our decision at the hearing that the panel had erred in law. We set aside its decision and decided to remit the case to the First-tier Tribunal for hearing afresh with none of the findings of fact by the panel being preserved. As the respondent is detained we direct an expedited hearing. However, we did also explain to him the opportunity he had to make an application for bail.
12. The relevant provisions of the Rules are paragraph 363, 397, 398, 399 and 399A with reference to 399B. For our purposes it is sufficient to set out 398 to 399A as follows:

*“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 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 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 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, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.*

*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*
    - (a) it would not be reasonable to expect the child to leave the UK; and*
    - (b) there is no other family member who is able to care for the child in the UK; or*

- (b) *the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and*
  - (i) *the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and*
  - (ii) *there are insurmountable obstacles to family life with that partner continuing outside the UK.*

399A. *This paragraph applies where paragraph 398(b) or (c) applies if -*

- (a) *the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or*
- (b) *the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."*

13. As we have observed above, the panel concluded at [20] that the presumption in favour of deportation was triggered by paragraph 398(c). At [29] it noted that the appellant did not accept that the respondent was in a genuine and subsisting relationship with any of his children. There are three children altogether: J and P whose mother is YG and a third child, L, from a different mother. J was born on 23 June 2008 and P on 13 January 2010. The determination is silent as to the date of birth of L. The respondent explained that she had been born 19 May 2008. As to this child the panel observed at [31] that there was scant evidence the respondent had ever had much contact with this child or that he intended to pursue a relationship and explained that the respondent's status as biological father did not influence their decisions.
14. In reaching its conclusions on the relationship between the respondent and J and P, the panel did so based on the oral testimony of the respondent, an unsigned statement of YG, a signed statement by the respondent, birth certificates and the above letter from Lancashire County Council.
15. Although the birth certificates did not show the respondent as the father, the panel noted that both J and P had been given his surname. They also had regard to YG's witness statement. The absence of a signature did not appear to trouble the panel on the basis that solicitors had seen fit to submit it to the Home Office. This was evidence that YG had given the information contained in that statement to the solicitors there being no

suggestion of dishonesty. The panel observed that having regard to the respondent's very poor literacy skills, he would not be capable of creating this document himself. Accordingly the panel gave weight to that statement and were satisfied with the respondent's testimony that he had the intention to seek legal advice and assistance in getting contact with his children. His attempts to do so had been thwarted and the process had been brought to an end when he had been caught handling stolen goods and sent to prison. The statement from YG explained how she had met the respondent and how they had moved into their own flat in 2008. She refers to the respondent's affection for his children and his patience with them. She refers in very positive terms to the respondent's role as a father and that they were "good together" and that they loved each other.

16. The letter from Lancashire County Council is dated 22 October 2013. The following points are made:

- (i) YG and the children had not seen the respondent since they had moved in approximately October 2012.
- (ii) YG and the respondent are not in a relationship and the respondent has no involvement with the upbringing of J and P.
- (iii) The respondent's details were not fully known to Lancashire Children's Social Care. He had informed Blackpool Children's Social Care that he had come to England when he was 10 years of age with an unknown female.
- (iv) Between July 2009 and 2012 the police had recorded fifteen incidents of domestic abuse between YG and the respondent many of which were witnessed by the children. There was reference to the children having witnessed severe domestic abuse and that the incidents were characterised by drugs and alcohol consumption by the respondent.
- (v) An s.47 enquiry was initiated and YG agreed to sign a written agreement stating the children would not have contact with the respondent until a further risk assessment of him was completed.
- (vi) At a review child protection conference in July 2012 it was noted that Blackpool Children's Social Care could not recommend a plan of protection which could safely allow the respondent to have any unsupervised contact with the children.

"Freddie was unable to identify anyone suitable to supervise the contact and YG expressed her wishes that Freddie would no longer have any contact with the children."

- (vii) At a review held in January 2013 YG had made significant improvements to prioritising the needs for her children. They remained on a plan of emotional harm as the children's father remained an unassessed risk and had made contact with them over Christmas 2012 by letter.

- (viii) At a review held in June 2013 YG had been to court with the support of Women's Aid to get a non-molestation order against the respondent. She had been very cautious about whom she had given her new address to so as to minimise the risk of the respondent locating her.
- (ix) Since finding out the respondent was in prison YG had been back to her solicitor to try to obtain a restraining order to prevent him being in contact.
17. The panel accepted the respondent's evidence that he had not been served with a non-molestation order. This undermined the Secretary of State's reliance on the letter from Lancashire Social Services and added, in their view, credence to the respondent's assertion that when he had bumped into YG on the street she was friendly and exchanged information with him. She had been receiving money from him as and when he was able to send her modest sums. The panel was concerned that the letter from Lancashire Social Services used loose, imprecise and unhelpful language which they contrasted with the respondent's detailed oral evidence. They found his description of his relationship with YG and the children credible which they contrasted with the significant concerns over the reliability of the Lancashire Social Services letter and they lacked confidence regarding the overall judgments about the respondent and his relationship with YG and the children.
18. The panel were clearly impressed by the respondent but we are not persuaded that they have given adequate or sufficient reasons for disregarding the letter from Lancashire County Council which refers to specific incidents of a serious kind. To suggest that letter was unreliable implies that the author Jacqui Cummings had misrepresented the position. The serious concerns expressed in the letter required something more than the simple oral testimony of the respondent by way of rebuttal. The panel did not ask themselves the question why YG had not attended the hearing and furthermore there was no evidence before them how her statement had come into being other than that it had been provided by the solicitors. We are persuaded that the Tribunal reached conclusions on the evidence as to the relationships in play that were not rationally sustainable. Even if we could be persuaded otherwise, the panel erred in failing to answer the question at paragraph 399(a)(ii)(b). It is unarguable on the evidence before the panel that there was another family member who was able to care for the children.
19. The panel's reasoning in respect of its finding that paragraph 399(b) had been made out is equivocally expressed at [38] of the determination but more positively at [51]. This is undermined by the conclusions we have reached as to the sustainability of the findings regarding the relationship between the respondent and YG. Furthermore, it appears that the panel failed to turn its mind to the second limb of the rule and consider whether the respondent had lived in the United Kingdom with valid leave continuously for at least fifteen years immediately preceding the date of

immigration decision discounting any periods of imprisonment. Disregarding the concerns which we come to below over the findings by the panel on the length of time the respondent had been in the United Kingdom, no panel could have rationally concluded that the respondent had been here continuously with any valid leave let alone for the fifteen years required by this provision.

20. The panel also concluded that paragraph 399A had been made out. It has to be said this is not subject to direct challenge in the grounds of application, yet having regard to the questions raised about the adequacy and rationality of the reasons given for the panel's finding as to the length of time the respondent has been in the United Kingdom and the absence of any ties in Nigeria, we consider it is an aspect we must address.
21. There appears to be no dispute that the respondent is aged under 25. The immigration decision is dated 11 October 2013. For the respondent to succeed based on the earlier of the two dates of birth (5 May 1991), he would need to have been here for at least twelve years and to have arrived before December 2001. Those inconsistencies are noted at [11] of the determination and it is not at all clear from the determination how that was resolved before the panel concluded by implication at [45] that the respondent was only 10 years of age at the time he came to the UK. In the light of a challenge to this by the Secretary of State in the refusal letter, it was incumbent upon the respondent to produce some evidence of his earlier years. Bearing in mind the respondent is recorded to have made friends during those early years including someone he lived with as a best friend, the panel erred in not asking itself why there was no corroborative evidence forthcoming rather than just simply resolving this by reference to him having lived "under the radar" and hence having no official documentation.
22. Even if the panel were correct that the respondent had spent half his life living in the United Kingdom, discounting the periods of imprisonment, it was not rationally open to them to conclude at [40] that having been orphaned, the respondent as a consequence had no social, family or cultural ties in Nigeria as a result, applying the principles in *Ogundimu* (Article 8 - new rules) Nigeria [2013] UKUT 60 (IAC).
23. Accordingly we are satisfied that the panel failed to give adequate and rational reasons for its positive conclusions under 399A.
24. In summary therefore the decision of the First-tier Tribunal is infected by error of law. We set that aside and remit the case to the First-tier Tribunal for the appeal to be heard afresh. None of the findings of the First-tier Tribunal is preserved.

Signed



Date 27 June 2014

A handwritten signature in blue ink, appearing to read "Busma", with a horizontal line extending to the right.

Upper Tribunal Judge Dawson