Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00056/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 September 2015	**On 21 September 2015**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RKA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms Savage, Home Office Presenting Officer
For the Respondent: Mr Hart of Terence Ray Solicitors

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Rothwell promulgated on 25 June 2015. The determination allowed the appeal against deportation on Article 8 ECHR grounds. The decision found that the appellant had shown, in line with paragraph 398 of the Immigration Rules, "very compelling circumstances over and above those described in paragraphs 399 and 399A" of the Rules.

2. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of

publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant's children from the contents of these proceedings.

3. For the purposes of this decision I refer to the Secretary of State as the respondent and to RKA as the appellant, reflecting their positions before the First-tier Tribunal.

Background

4. The appellant is a national of Ghana and he was born on 6 May 1974. He came to the UK on 16 April 1987 at the age of 12 with his mother and sister. The family made an asylum claim which was rejected. The appellant was issued with a deportation order on 23 January 1996 because he was an overstayer under the Immigration Act 1971. An appeal against that decision to deport failed on 8 January 1999.

5. Notwithstanding that immigration history, the appellant was granted indefinite leave to remain on 7 July 1999 as a dependent of his mother.

6. The grant of indefinite leave also followed some time after the appellant's extensive criminal history had begun. The appellant has over 30 convictions for a variety of offences, the first occurring on 12 December 1990. That first offence was an indecent assault on a female. Other offences include public order offences, assaults and numerous drugs offences.

7. The appellant was most recently convicted on 25 April 2012 for failing to comply with notification requirements under the Sexual Offences Act 2003 and received a suspended sentence of twelve weeks' imprisonment suspended over two years with a curfew requirement of three months. It also appears that he failed to surrender to custody at an appointed time and received a suspended sentence of four weeks' imprisonment to run concurrently and a curfew requirement of three months.

8. Over ten of the appellant's convictions have led to periods of imprisonment. The notable periods of imprisonment are a conviction for nine months in November 2000 for offering to supply controlled drugs Class A cocaine and a conviction for eight months on 15 June 2007 for attempted theft.

9. The main index offence here, however, is a conviction for rape for which on 4 November 2003 he was sentenced to four years' imprisonment and inclusion on the Sex Offenders Register for life.

10. It is also of note that during this prolific criminal history the appellant employed fourteen aliases and four different dates of birth.

11. The respondent issued the appellant with a notice of his liability to deportation on 17 December 2009. A deportation order was made on 19 March 2010. Various convoluted proceedings followed on which nothing turns here other than leading to a further deportation order being made on 2 June 2014. The proceedings before me arise from that decision.

Error of Law

12. In order to properly address the challenge on error of law it is expedient to set out here the relevant legislation. The first important part of the legislation is Sections 117A-C of the Nationality, Immigration and Asylum Act 2002 which are as follows:-

> '117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under Section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in Section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in Section 117C.
>
> (3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> 117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United

Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to —

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

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

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child,

and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.'

13. The other relevant legislation for these purposes are the provisions at paragraphs 398 to 399A of the Immigration Rules. These state 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 and in the public interest 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 and in the public interest 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;

(c) the deportation of the person from the UK is conducive to the public good and in the public interest 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, 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.

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 be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

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

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

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

14. The respondent's first challenge is that First-tier Tribunal Judge Rothwell did not apply the correct test in substance to the appellant's claim. It is not disputed that he falls outwith any protection provided by sections 117C (3)-(5) and paragraphs 399 and 399A. As a result of his four years' sentence for rape he must show that there are "very compelling circumstances over and above those described in paragraphs 399 and 399A" sufficient to outweigh the public interest in his deportation.

15. There is no doubt in my mind that First-tier Tribunal Judge Rothwell was aware that that was the case. She refers to the need for "very compelling circumstances" at [100] and [107] and concludes at [115] that there are such circumstances present, overriding the public interest in deportation.

16. Judge Rothwell appears to have reached this conclusion on the basis of the appellant's relationship with his partner, LC, and two of his children from other relationships, R, aged 17 at the time of the hearing before the First-tier Tribunal, and S, aged 14 at the date of the hearing before the First-tier Tribunal.

17. The reason why I find that the First-tier Tribunal made an error on a point of law, however, is that it is not merely that very compelling

circumstances must be found but that they must be found to be "over and above" those provided for already in paragraphs 399 and 399A.

18. In the case of Chege (Section 117D – Article 8 – approach) [2015] UKUT 00165 the Tribunal states in the head note:

> "The correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider:
>
> (i) is the appellant a foreign criminal as defined by s117D (2) (a), (b) or (c);
>
> (ii) if so, does he fall within paragraph 399 or 399A of the Immigration Rules;
>
> (iii) if not are there very compelling circumstances over and beyond those falling within 399 and 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B.
>
> Compelling as an adjective has the meaning of having a powerful and irresistible effect; convincing.
>
> The purpose of paragraph 398 is to recognize circumstances that are sufficiently compelling to outweigh the public interest in deportation but do not fall within paragraphs 399 and 399A.
>
> The task of the judge is to assess the competing interests and to determine whether an interference with a person's right to respect for private and family life is justified under Article 8(2) or whether the public interest arguments should prevail notwithstanding the engagement of Article 8.
>
> It follows from this that if an appeal does not succeed on human rights grounds, paragraph 397 provides the respondent with a residual discretion to grant leave to remain in exceptional circumstances where an appellant cannot succeed by invoking rights protected by Article 8 of the ECHR."

19. The guidance in Chege is entirely in line with the learning of the Court of Appeal in SSHD v AJ (Angola) [2014] EWCA Civ **1636**. That case indicates in paragraph 39 the correct approach to the role of the Immigration Rules – that is paragraphs 399 and 399A – in the "very compelling circumstances" assessment:

> "39. The fact that the new rules are intended to operate as a comprehensive code is significant, because it means that an official or a tribunal should seek to take account of any Convention rights of an appellant through the lens of the new rules themselves, rather than looking to apply Convention rights for themselves in a free-standing way outside the new rules. This feature of the new rules makes the decision-making framework in relation to foreign criminals different from that in relation to other parts of the Immigration Rules, where the Secretary of State retains a general discretion outside the Rules in exercise of

which, in some circumstances, decisions may need to be made in order to accommodate certain claims for leave to remain on the basis of Convention rights, as explained in *Huang* and *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).

40. The requirement that claims by appellants who are foreign criminals for leave to remain, based on the Convention rights of themselves or their partners, relations or children, should be assessed under the new rules and through their lens is important, as the Court of Appeal in *MF (Nigeria)* has emphasised. It seeks to ensure uniformity of approach between different officials, tribunals and courts who have to assess such claims, in the interests of fair and equal treatment of different appellants with similar cases on the facts. In this regard, the new rules also serve as a safeguard in relation to rights of appellants under Article 14 to equal treatment within the scope of Article 8. The requirement of assessment through the lens of the new rules also seeks to ensure that decisions are made in a way that is properly informed by the considerable weight to be given to the public interest in deportation of foreign criminals, as declared by Parliament in the 2007 Act and reinforced by the Secretary of State (as the relevant Minister with responsibility for operation of the immigration system), so as to promote public confidence in that system in this sensitive area."

20. SSHD v AJ (Angola) and Chege confirm that in order to show compelling circumstances, which must be "powerful and irresistible", those circumstances must be relating to matters that "do not fall within paragraphs 399 and 399A". This aspect of the "very compelling circumstances" is simply not addressed at all by First-tier Tribunal Judge Rothwell.

21. Further, not only is the correct test not addressed, but the decision states at [115] that it was "especially his children's circumstances" that led to the appeal being allowed.

22. Further, the First-tier Tribunal found at [110] that the appellant's son, R, would be forced to leave the UK if the appellant was deported. However, the Upper Tribunal has indicated in MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380 that the EEA citizen must be "compelled" to leave the EEA state. Such compulsion will not arise if the qualify of life of the EU citizen is diminished by the absence of the non-EU national.

23. The evidence here was that R did not live for most of the week with the appellant but with his partner, LC, so that R could attend college. R is also supported by his paternal grandmother, the appellant's mother with whom he stays from time to time.

24. There is an assumption at [110] of the determination that R would be unable to live with his maternal grandmother "as this would have occurred when his mother left". That appeared to me to be speculation as none of the witnesses gave evidence to that effect. There is the additional matter, as indicated at [89] and [91], that it was not accepted that R has lost touch with his mother who is in the USA. There was no exploration of her position regarding R if the appellant were to be deported.

25. There is the further factor that the First-tier Tribunal states at [98] that "I also find that R will not accompany the appellant to Ghana as he had decided to remain in west London and not move to Beckenham, so I do not find he would go to Ghana". This appears to be a finding of fact that the reality is that R would not be forced or compelled to leave the EEA if the appellant were deported, further undermining the statement at [110] that Regulation 15A of the Immigration (European Economic Area) Regulations 2006 was engaged. The finding at [98] is not consistent with the statement at [110] that "I find it is likely that [R] will be forced to leave the United Kingdom and go with the appellant".

26. I also found merit in the respondent's argument at [29] of the grounds that the First-tier Tribunal Judge materially mischaracterises the appellant's offending history at [112] when assessing whether the public interest could be outweighed by very compelling circumstances. The judge refers to the index offence being very serious but being committed in 2003 and no further sexual or violent offences occurring since then and no offences occurring since 2012. The offending here is prolific, from 1990 to 2012, continuing well after the index offence in 2003 and after instigation of deportation proceedings. The criminal history before and after the index offence includes a number of drugs offences and significant period of imprisonment for attempted theft in 2007.

27. For all of these reasons, I found that the determination of the First-tier Tribunal contained an error on a point of law such that it had to be set aside and remade. I heard submissions from the parties on the correct procedure for remaking the appeal where that was so. It was submitted for the appellant that the appeal would have to be remitted to the First-tier Tribunal in line with the provisions of the Senior President's Practice Statement dated 25 September 2012 at paragraphs 17.2(b) and Ms Savage did not seek to argue against that outcome. It is my view that there are sufficient findings that fall to be made here in line with the error of law findings above that it is appropriate to remit the First-tier Tribunal.

Notice of Decision

28. The decision of the First-tier Tribunal discloses an error on a point of law and the assessment of "very compelling circumstances" is set aside.

The appeal will be re-made in the First-tier Tribunal.

Signed  Date 18 September 2015
Upper Tribunal Judge Pitt