IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01292/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 November 2015	**On 9 December 2015**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Ms M Rhind, IR Immigration Law LLP

DECISION AND REASONS

1. The respondent is a citizen of Nigeria and his date of birth is 27 June 1985. I will refer to the respondent as the appellant as he was before the First-tier Tribunal.

2. The Secretary of State made a decision to deport the appellant pursuant to Section 35A of the Immigration Act 1971 on 23 June 2014. The appellant appealed against this decision and his appeal was allowed by the First-tier Tribunal comprising a panel comprising Judge of the First-tier Tribunal Monro and Mr G H Getlevog. The

panel allowed the appellant's appeal under Article 8. The Secretary of State was granted permission to appeal against this decision by First-tier Tribunal Judge Pirotta in a decision of 13 February 2015.

3. The appellant came to the UK in 1995 with his family when he was a child for a holiday and he returned in 1998. He returned to the UK in 1999 having been granted a visit visa and he has remained since then. He has been an overstayer since his visa expired in 2000.

4. The appellant has a criminal history. On 4 August 2004 he was convicted of possession of a bladed article and he was sentenced to two months' imprisonment. On 30 September 2004 he was convicted of failing to surrender to custody and he was fined £25 and ordered to serve one day in prison. On 19 November 2004 he was convicted of two counts of robbery and sentenced to three years' imprisonment (the trigger offence). On 23 May 2006 he made an application to remain under the Human Rights Act and on 23 June 2014 the appellant was served with the deportation order.

5. The First-tier Tribunal heard evidence from the appellant, his brother B and their sister, J (aged 17). The appellant pleaded guilty to the robberies and his evidence was that he regretted his involvement with the offences. Whilst he was in prison he worked in the kitchen and took some courses, but he was not required to take any victim awareness courses. He was detained for nineteen months and he was released on licence in December 2005 with a requirement that he reported to his probation officer which is did.

6. Since his release he has not been in trouble with the police. After his release from prison he lived in hostels for a while and then returned to live with his mother and siblings. Shortly after his release from prison his mother was diagnosed with breast cancer. She recovered from this, but then she was later diagnosed with bone cancer and passed away in January 2012. The appellant's sister J was only aged 14 at the time. The Social Services became involved and they wanted the family (the appellant and his siblings) to stay together as a unit. They found a place for the three of them to live and the appellant and his brother took responsibility for J. The evidence from the appellant and his siblings was that they have always been very close and that the Social Services decided, following their mother's death, that it would be in J's best interests to be looked after by her brothers and to remain together as a family unit. J, according to the appellant, looked upon him as a father figure. She depends on both her brothers for everything. J was studying for A' levels and B had started a university course, but he was not able to complete this because of their mother's illness. The appellant's evidence was that after he came out of prison he worked so that he could assist his mother. He did some building and painting and decorating.

7. The appellant was aged 19 when he went to prison and before then he had had no reason to question his immigration status. He thought he was a British citizen because his mother had dealt with these kinds of things. It was not until he was released from prison that he realised that he was not a British citizen and that he was

in fact here unlawfully. The appellant's mother and siblings were granted leave to remain in 2009 and their visas were extended in 2012. At this point the appellant had still not received a decision following his application in 2006. The appellant's evidence was that he was close to his siblings and that they have no family in the UK or Nigeria.

8. The Tribunal also heard evidence from B's partner, who was expecting their first child in May 2015. She has four children from a previous relationship. There were letters from others in support of the appellant's case including from a senior social worker, Maggie Allingham-Hodge at St Joseph's Hospice. She had supported the appellant and his family for a year after their mother's death. In her second letter she stated that should the appellant be deported it would have a very negative effect on the remaining siblings as it was their mother's intention that they should stay together.

9. There was a letter from Janet Vandi, J's social worker, who confirms that it was assessed to be in J's best interests for her to be looked after by her siblings and that the family was coping well under the circumstances but remained anxious about the appellant's immigration situation.

The Findings of the First-tier Tribunal

10. The panel found that the appellant had spent most of his formative years here and that it was not in issue that he had studied and worked here. They found that he was socially and culturally integrated and that he has no family in Nigeria. They found that he has established a significant private life in the total of nineteen years over two periods during which he has been living in the UK and they found that it was not in dispute that he was raised by two parents with his brother [and] sister until 2003 when their father left the family and they found themselves in difficult circumstances. The panel observed that for the next two years [he] went off the rails.

11. The panel found that there was family life between the appellant and J, who was at that time still a minor in the Ghising sense (Ghising (family life - adults - Gurkha policy) Nepal [2012] UKUT 160). The panel found that she was still a minor and looked to her older brothers for emotional support and that this was recognised by Social Services following their mother's death.

12. The Tribunal took into account that B's partner was expecting. The panel observed that the appellant was released from prison in December 2005 and since then there has been no allegation that he has committed any further offences and that his clean record since 2004 supports their view that the offences were a "blip", albeit serious, and that he had matured and moved away from criminal behaviour.

13. The panel found that although he had overstayed, the appellant was a child at the time and cannot be held responsible for the actions of his parents, who brought him here and remained without leave. They accepted the appellant's evidence that he did not discover until much later that he had no right to remain here. The Tribunal

found at [50] that there are exceptional circumstances such that they outweigh the public interest in deportation.

14. At [55] they stated that they had had regard to Section 117 of the 2002 Act and noted that the appellant had not always been in the country lawfully, but since 2006 he had been attempting to rectify the situation, he speaks English and that he is capable of working and indeed has worked and could remain financially independent.

The Grounds Seeking Permission

15. The grounds seeking permission are twofold. First, it is asserted that the panel misdirected themselves in relation to exceptional circumstances and, secondly that they did not properly weigh into the balance the public interest and failed to follow the principles expressed in relevant jurisprudence including AJ (Angola) [2014] EWCA Civ 1636. Mr Jarvis asked that I rely on his oral submissions rather than the grounds. He also sought permission to amend the grounds to include the fact that the panel had not considered the precarious nature of the appellant's siblings' status here. There was no objection to this by Ms Rhind, but she sought time to clarify matters. I gave her time and granted the application to amend the grounds. She was able to confirm to me that the siblings had been granted discretionary leave since the date of the hearing before the First-tier Tribunal. Mr Jarvis further submitted that the panel erred in applying the test of exceptional circumstances whereas the applicable test was compelling circumstances over and above those described in paragraph 399 and 399A. This was not raised in the grounds.

Conclusions

16. The grounds are unimpressive and Mr Jarvis distanced himself from them effectively relying on grounds not previously raised. The position of the respondent was far from satisfactory.

17. The Tribunal clearly attached significant weight to family life between the appellant and his adult siblings. It was clear from the decision that their status in the UK was precarious and indeed it still is. However, this must be placed in context of the unusual circumstances.

18. The appellant has been here continuously for a period of sixteen years. Prior to that he was here for two. In total he has resided in the UK for eighteen years. It is without doubt that he cannot meet the requirements of paragraph 399A of the Immigration Rules because he has not been here lawfully. However, this must be considered in the context of the fact that he has been here since he was a child and he is not responsible for the failure to regularise his stay. Whilst the evidence before the panel did not establish that there are significant obstacles to integration into Nigeria, it is obvious on the findings of the panel that it would be very difficult for him to return to Nigeria. Contrary to Mr Jarvis' submissions, in my view, the panel was entitled to conclude that the appellant is socially and culturally integrated in the UK. He has been here since he was a child, he has been educated here and he has worked here. He thought he was a British citizen and this was a reasonable assumption for

him to make. He has no family in Nigeria. There are no language problems and he has shown that he is able to be financially independent. I accept that mere presence may not be sufficient to establish social and cultural integration and I take into account the appellant's criminality and prison sentence. However, in the appellant's case his evidence goes beyond mere presence. However, by any account, the appellant cannot meet the requirements of 399 or 399A of the Immigration Rules.

19. The panel went on to consider exceptional circumstances in the context of 398. It is a fact that the wording of 398 had in fact changed by the time of the hearing and the panel should have considered whether or not there are compelling circumstances over and above those described in paragraphs 399 and 399A. This was an issue raised by Mr Jarvis in oral submissions, but it was not raised in the grounds of appeal, which in fact repeatedly refer to exceptional circumstances. I am not persuaded that this is a material error in any event.

20. The appeal has to be considered through the lens of the Rules and Section 117B and 117C of the 2002 Act and I am satisfied that the Tribunal did this. The properly directed themselves on relevant jurisprudence and legislation and clearly had regard to the factors raised in Section 117 generally. The maintenance of immigration control is in the public interest and the deportation of foreign criminals is in the public interest and I am satisfied having considered the decision as a whole that the panel had this in mind. The appellant is a foreign criminal. On any account the offences that he committed are serious and the more serious the greater the public interest in deportation. The public interest is a weighty factor against the appellant. Although there is no risk of him reoffending there are the deterrence and the public revulsion factors to take into account. However, in this case there was no presentence report or sentencing comments before the panel. The panel was entitled to conclude that the offences were at the lower end of the seriousness scale. Delay is a weighty factor here in the appellant's favour regardless of whether or not the Secretary of State is directly to blame or not. There has been a lengthy period of time during which the appellant has remained here since his release from prison during which he has not been convicted of further offences and the panel was entitled to consider that this reduced the weight to be accorded to the public interest.

21. The appellant's case here rests on his private life and his family life and it has been formed here when the appellant has been here unlawfully. I take into account that primary legislation instructs that little weight should be given to private life formed when an appellant has been here unlawfully. However, in this case there are unusual features of the case. The obvious unusual feature is that the appellant was not responsible for his unlawful status here. There are also unusual features of the appellant's family life. There was unchallenged evidence of the need for family unity between siblings. There is clearly an argument that they could all return to Nigeria together in the light of the precariousness of J and B's status here. This was not considered by the Tribunal; however, it does not appear to have been advanced by the respondent at the First-tier Tribunal. The failure of the panel to consider this does not amount to an error of law. J was a child at the time of the hearing. The panel adopted the findings of the Social Services that it would be in her best interests

to be looked after by her brothers and there was indeed no challenge to this. Clearly J has been here for a considerable period of time and, like the appellant and B, cannot be blamed for the actions of her parents. The evidence that it would be in her best interests to remain here in the UK with both of her siblings was strong. Although the panel did not make a clear finding about this it is something that would only have weighed in the balance in favour of the appellant. Mr Jarvis readily accepted that the family history was an unusual circumstance of the case. The panel was entitled to attach weight to the appellant's family and private life here.

22. Whilst the Tribunal should have assessed compelling circumstances over and above those described in paragraphs 399 and 399A as opposed to exceptional circumstances, in my view it is not material. There are, as identified by the panel exceptional circumstances or unusual circumstances, which amount to compelling circumstances over an above those described in 399 and 399A. It is of significance that Mr Jarvis indicated that it was the process of the decision making rather than the ultimate conclusion that was the subject of the appeal. Ultimately the panel reached a conclusion that it was entitled to reach on the evidence and the grounds and Mr Jarvis's submissions do not disclose material error in the decision. Indeed, if I were to remake the decision I would reach the same conclusion.

Notice of Decision

The decision of the First-tier Tribunal is maintained and the appeal of the Secretary of State is dismissed.

No anonymity direction is made.

Signed Joanna McWilliam Date 1 December 2015

Upper Tribunal Judge McWilliam