Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01896/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 27 October 2015	**On 10 November 2015**

Before

THE PRESIDENT, THE HON. MR JUSTICE McCLOSKEY
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADELEKE ADEKUNLE OMOLOLU ONILEYAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S. Kandola, Home Office Presenting Officer
For the Respondent: Mr D. Bazini, Counsel instructed by MKM Solicitors

DECISION AND REASONS

Background

1. For the sake of continuity we shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal to the Upper Tribunal.

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2. The appellant is a citizen of Nigeria who was born on 16 January 1985 (and is now 30 years old). He entered the UK in 1991 with leave to enter as the dependent child of his father when he was six years old. He was granted Indefinite Leave to Remain on 19 December 1995.

3. On 17 February 2000 the appellant was convicted of indecent assault on a female and was sentenced to three years detention in a young offender institution and was placed on the Sex Offenders Register. He was 14 years old at the time of the offence. Despite the fact that the respondent relies on this conviction as the sole reason for seeking to deport the appellant (it being his only conviction) no evidence has been produced to show the circumstances of the offence. No sentencing remarks, pre-sentence reports or other kindred documents were produced. The respondent relies solely on the mere fact of conviction. However, we take into account the fact that the offence attracted a sentence of three years detention. Following his release it is uncontested that the appellant has no further convictions and has gone on to gain qualifications and work experience and has established a relationship with his partner who is a British citizen. The appellant produced evidence from the Metropolitan Police to show that he was no longer subject to the notification requirements of the Sexual Offences Act 2003 as of 18 February 2014.

4. After he was notified that he could apply to be removed from the register the appellant decided that he could, for the first time, travel abroad with his partner. He obtained a new passport. In October 2013 he applied to the Home Office for a No Time Limit ("NTL") endorsement and a new biometric identity document. He disclosed his conviction in the application form. It appears that the respondent did not reply to the application until 26 August 2014, when she wrote to the appellant to say that she was considering his immigration status and liability to deportation.

5. On 05 October 2014 the respondent made a Decision to Make a Deportation Order under section 5(1) of the Immigration Act 1971 pursuant to section 3(5)(a) on the ground that his deportation was conducive to the public good. The respondent exercised discretion not to certify the decision under section 94B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") and as such the appellant could remain in the UK while he exercised his right of appeal. The First-tier Tribunal allowed his appeal in a decision promulgated on 26 May 2015.

6. The respondent seeks to appeal the First-tier Tribunal ("FtT") decision on the following grounds:

   (i) The FtT erred in finding that the appellant met the requirements of the exception to deportation contained in paragraph 399(b) of the immigration rules because the evidence did not show that it would be unduly harsh to expect the appellant's partner to relocate to Nigeria or that it would be unduly harsh for her to remain in the UK without the appellant.

(ii) The FtT erred in finding that the appellant met the requirements of the exception contained in paragraph 399A of the immigration rules because the evidence did not show that there would be "very significant obstacles" to the appellant being able to re-integrate in Nigeria.

(iii) The FtT Judge erred in his approach to his assessment of whether there were very compelling circumstances that outweighed the public interest in deportation under paragraph 398 (with reference to section 117A-D NIAA 2002). The alleged error is somewhat unclear from the grounds, which assert that the FtT wrongly "conflated" the test under the immigration rules and section 117A-D.

Decision and reasons

7. Having considered the grounds of appeal and oral arguments we are satisfied that the FtT decision did not involve the making of an error on a point of law for the following reasons.

8. The FtT Judge wrote a detailed and well-balanced decision in which he set out the background to the case as well as the evidence and submissions at the hearing [1-41]. He noted that the respondent's representative chose not to cross-examine the witnesses and made no submissions other than to argue that the case should be remitted to the Home Office for further consideration [36]. He then went on to take a methodical and structured approach to his assessment of the complex provisions relating to deportation and at each stage properly directed himself to the relevant rules, statutory provisions and pertinent case law.

9. The appellant was sentenced to a period of detention of less than four years but at least 12 months. The FtT Judge correctly began his assessment by considering whether the appellant met one of the exceptions to deportation contained in the immigration rules (echoed in section 117C NIAA 2002). In considering whether the appellant met the requirements of paragraph 399(b) of the immigration rules and section 117C(5) of the NIAA 2002 he gave detailed reasons why he considered that it would be unduly harsh to expect the appellant's partner to continue her family life with him in Nigeria [59-60]. He went on to give detailed reasons why he found it would be unduly harsh to expect her to remain in the UK without the appellant and quite properly took into account the fact that the couple were expecting their first child [61-65]. Without hesitation we conclude that those findings were open to him on the facts and evidence. The first and second grounds of appeal amount to no more than disagreements with the FtT's findings and evaluative assessments and fall far short of identifying any material errors of law.

10. The FtT also considered whether the appellant met the requirements of the exception contained in paragraph 339A and section 117C(4). Once again the FtT Judge gave detailed and sustainable reasons for concluding that there would be very significant obstacles to the appellant being able

to re-integrate in Nigeria [67-71]. He took into account the age the appellant entered the UK, his length of residence, the fact that he had not returned to Nigeria and had no broader knowledge of the context or culture there. Those were all matters that he was entitled to take into account. The challenge on this ground is also phrased in terms of a disagreement with the FtT's conclusions and discloses no material errors of law.

11. Adopting an alternative approach, the FtT Judge went on to consider whether there were very compelling circumstances that outweighed the public interest in deportation under paragraph 398 of the immigration rules. He directed himself to the relevant case law and statutory provisions [73-78]. He explained in some detail the importance of the public interest and gave appropriate weight to those matters [82-87 and 95-101]. He went on to balance the public interest against the individual circumstances of this particular appellant. In doing so he took into account the factors outlined in section 117B of the NIAA 2002 and referred back to his findings relating to the exceptions contained in sections 117C(4) and (5) [91-93].

12. Far from erring in "conflating" his assessment under paragraph 398 with sections 117A-D of the NIAA 2002 we find that it was entirely the correct approach. It was consistent with the decision in *Chege (section 117D – Article 8 approach)* [2015] UKUT 00165.

13. Section 117A(2) makes clear that where a court or Tribunal is required to determine whether a decision under the Immigration Acts breaches a person's right to private and family life, in considering the public interest question, the court of Tribunal must take into account the factors set out in section 117B as well as 117C if the case involves deportation proceedings. The provisions set out in sections 117A-D focus on one part of the proportionality assessment i.e. the public interest question but Part 5A of the NIAA 2002 does not set out a complete code regulating Article 8 decisions. In contrast, the wording of paragraph 398 of the immigration rules clearly provides for a full balancing exercise wherein significant weight is accorded to the public interest question. The rule states that the public interest will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

14. In *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 and *SSHD v AQ (Nigeria)* [2015] EWCA Civ 250 the Court of Appeal made clear that in deportation cases an Article 8 assessment must be carried out "through the lens" of the immigration rules. In this case the "public interest question" the FtT Judge was required to consider fell within the full proportionality assessment he conducted under paragraph 398, which by virtue of section 117A(2) of the NIAA 2002 must include an assessment of the public interest considerations set out in section 117B-C. We find that the FtT's findings were consistent with this approach.

15. In conducting the balancing exercise the FtT Judge gave due weight to "the public interest question" and in doing so considered the seriousness of the offence, the public interest in deterrence and the significant weight to be given to the public interest in deportation. He also took into account the risk of reoffending. Given the length of time since his sole conviction, the fact that the appellant incurred no further convictions, and is no longer required to register with the police, it was open to the FtT Judge to conclude that the risk of reoffending was low. After having heard evidence from the appellant and his partner he found that it was "very likely indeed that this appellant is a reformed person who has paid for his crime and poses no risk whatsoever to the public now" [98]. After having weighed all the circumstances of the case the FtT concluded:

> "105. Given the significant passage of time since the offence and the fact that the appellant was only 14 years of age at the time, given the complete lack of propensity to reoffend and that the appellant has led a blameless life since the offence, as well as the fact of his particularly deep and rich private and family life, the failure of the respondent to take any action against him for 16 years, his impeccable immigration history and that it would be unduly harsh to separate him from his partner or to require her to abandon her life and move to Nigeria, I conclude deportation in this case would be wholly disproportionate."

16. On the facts of this case we conclude that those findings were entirely open to the FtT Judge to make and his findings disclose no material errors of law. Accordingly, the Secretary of State's appeal cannot succeed.

Abuse of statutory powers?

17. One of the arguments advanced to the FtT was that, if the case had been considered under the automatic deportation provisions contained in the UK Borders Act 2007, the appellant would have come within one of the exceptions to deportation. If a person is sentenced to a period of imprisonment of at least 12 months section 33(3) provides an exception to deportation if the Secretary of State thinks that the foreign criminal was under the age of 18 at the date of conviction. The only reason the case did not fall within the automatic deportation provisions was because the appellant's conviction pre-dated the coming into force of the Act. The legislation scheme provides clear circumstances in which it is stated that deportation will not be enforced albeit that section 33(7) makes clear that the application of an exception results it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good.

18. Without doubt the respondent had power to make a decision to deport under section 5(1) of the Immigration Act 1971 on the ground that it was conducive to the public good. However, a deportation decision must be rational and proportionate and reflect a proper exercise of the legal power. In cases such as this where it is quite clear that the appellant would have fallen within one of the stated exceptions to automatic deportation, but because of the historical nature of the offence the UK Borders Act 2007 did

not apply, it is difficult to see how a decision to deport him under the 1971 Act could have been assessed as anything other than disproportionate.

19. It is trite law that the public interest in deportation of foreign criminals is a matter that should be given significant weight and that there must be very compelling circumstances to outweigh the public interest. The scheme set out in the relevant rules and statutes is said to constitute a complete code to the assessment of Article 8. Underpinning the scheme is the basic principle that deportation must necessary in a democratic society and should be justified by a pressing social need that is proportionate to the legitimate aim pursued. In this case it is difficult to see how the conviction of a 14 year old boy, which was not sufficiently pressing to justify deportation at the time of conviction, could justify a decision to deport made some 14 years later. Decision makers should still conduct an assessment of whether there is in fact a pressing social need to deport on the facts of each case. In this case the mere fact of a conviction was taken to be sufficient in the absence of any consideration of the details of the offence or any meaningful consideration of the public interest. The decision appears to have been taken on an entirely reactive basis following the appellant's application for an NTL endorsement in his passport without any adequate consideration of the merit and was the antithesis of a properly exercised statutory discretion.

Conclusion

20. For the reasons given above we conclude the grounds of appeal amount to no more than disagreements with the decision and that the FtT decision did not involve the making of an error on a point of law. The First-tier Tribunal decision shall stand.

DECISION

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

The First-tier Tribunal decision shall stand

Signed  Date 10 November 2015

Upper Tribunal Judge Canavan