Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00897/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 March 2016	**On 19 May 2016**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDWARD KABUGA
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr E Tufan Senior Home Office Presenting Officer.
For the Respondent: Ms Foot instructed by Tower Hamlets Law Centre

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Herbert OBE promulgated on the 19 May 2015, following a hearing at Hendon Magistrates Court, in which Mr Kabuga's appeal against the decision to deport him from the United Kingdom pursuant to Section 5(1) Immigration Act 1971 was allowed.

Background

2. Mr Kabuga was born in the United Kingdom on 27 October 1994 but remains a citizen of Uganda. Indefinite leave to remain was granted on the 12 February 2002 following periods of earlier temporary leave. On 28 February 2013 a notice of liability to deportation was issued and in May 2013 a decision to deport made

on the basis that Mr Kabuga's previous convictions, criminal associates and conduct make it conducive to the public good for him to be removed from the United Kingdom.

3. Judge Herbert sets out Mr Kabuga's previous criminal activities in the determination under challenge, at paragraphs 17 to 40, which support the finding of Mr Kabuga being a persistent offender and gang member. Key findings made by the Judge can be summarised as follows

   i. The background material and incidences show a pattern of conduct and lifestyle which puts Mr Kabuga in the immediate vicinity of quite serious criminal offences occurring usually involving gang violence. [143-146].
   ii. Mr Kabuga is a persistent offender which 'triggers' paragraph 398 of the Immigration Rules [151]. Mr Kabuga has eight convictions for ten separate offences, fifty four stop and search incidences and twenty one separate matters listed on the CRIS computer record which runs to some four hundred pages [152].
   iii. Mr Kabuga has only lived in the United Kingdom and only has tenuous ties to Uganda [153]. The only ties to Uganda are that his parents originate from there and that he speaks English which is an official language of Uganda, although has no knowledge of even the most simple geography of Uganda or of its culture and customs [155]. Mr Kabuga, in terms of his culture, customs and language is a product of the United Kingdom and in particular of the London Borough of Newham whose upbringing has been influenced by the gang-related culture of that borough [158].
   iv. If returned to Uganda Mr Kabuga will be without accommodation, work or the socio-economic and educational norms which assist in integration [162].
   v. There has been a significant break in Mr Kabuga's offending behaviour from February 2013 save for the breach of a civil injunction in relation to not associating with other gang members for which he pleaded guilty in January 2015 [163]. A charge of affray was noted which was due to be heard at the Snaresbrook Crown Court in July/August 2015 to which Mr Kabuga pleaded not guilty which was not relevant as it was a matter still to be tried [164-165].
   vi. The effect of Mr Kabuga's removal would have an extremely detrimental effect upon his mother as she has already lost two older children in Uganda which was the reason for her return journey, but also on his younger brother and sister with whom he has an extremely strong bond and effectively is the father figure in the household [166]. The effect upon his siblings and others would be significant and irreversible [169].
   vii. Mr Kabuga has made significant progress in changing his lifestyle, criminal behaviour and associates [170]. The expert in working with young people in delinquent circumstances has expressed confidence the Mr Kabuga is a significant way down the path to becoming a model citizen and able to make a significant contribution to society [172].

4. At paragraph 197 the Judge posed the question whether or not there would be very significant obstacles to Mr Kabuga's integration in Uganda. Having set out a number of findings the Judge concludes:

> 213. I find as a matter of fact that the Appellant therefore meets the exception as clearly defined under the Immigration Rules, under paragraph 399A, 398 and find that there would be very significant obstacles to his integration into Uganda.
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> 214. These obstacles are not trivial or slight or transient but go to the heart of his existence as a human being. This is not just a means of survival but of integration which must be a realistic possibility and not just a means of existence. Integration into Uganda means exactly that. It does not mean living on the margins of society. It does not mean living close to starvation or destitution. Integration means that one should have a reasonable prospect of a normal life style of opportunities to engage in work, education and social interaction.
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> 215. There are significant obstacles to all of these factors for obvious reasons that this Appellant was born and brought up in the United Kingdom and has no more connection to Uganda that the vast majority of individuals in the United Kingdom.
>
> 216. The fact he is of African appearance and speaks English is not sufficient connection and means that there are significant obstacles to his integration into Uganda for the detailed reasons set out.
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> 217. I therefore find that the Appellant has discharged the burden of proof of establishing on a balance of probabilities that there would be very significant obstacles to his integration into Uganda where the Respondent proposes to deport him.

5. The appeal was allowed by reference to EX.1 of the Rules, section 177C of the 2002 Act, Article 8 ECHR and paragraph 399A. The Judge finding 399A applies as the public interest in deportation is outweighed by the fact Mr Kabuga falls under the exception within paragraph 399A.
6. Permission to appeal was granted on the 16 June 2015. On 4 January 2016 the matter came before Upper Tribunal Judge Goldstein who gave permission for further grounds of challenge to be filed. These were received on 27 January 2016 and Mr Kabuga's Rule 24 response on the 10 February 2016 rebutting the challenge.

Discussion

7. The only basis on which permission to appeal was original granted by First-tier Judge Osborne is that in relation to Mr Kabuga's alleged destitution. It was said to be arguable that the Judge failed to consider the facilitated returns scheme, details of which appeared in the reasons for deportation letter. As a result the Judge stated all issues raised in the grounds are arguable.
8. The document headed 'Further grounds of appeal' relies upon the original grounds and additional grounds. Permission to rely on the addition grounds is granted.
9. It is not disputed that Mr Kabuga has a criminal record as found by the Judge or that his conduct and circumstances are as claimed. As a persistent offender Mr

Kabuga can be deported from the United Kingdom pursuant to paragraph 398 of the Immigration Rules. There is a need to consider if paragraph 399 or 399A applies for, if 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 paragraph 399 and 399A.

10. 399A applies where 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.

11. There is need when assessing any Article 8 element to consider section 117 A – C of the 2002 Act (as amended).
12. The original grounds challenge specific findings of the Judge. The additional grounds raise a number of procedural issues.
13. The first of these is a challenge to the refusal by the Judge to adjourn the hearing as requested by the Presenting Officer. This is referred to at paragraphs 12 to 14 of the determination in the following terms:

> 12. The Respondent made an application that this matter should be adjourned in all for three months in order to allow further charges that had been laid against the appellant be determined. They also cited the necessity of ensuring that the case being put against the Appellant was at its highest given his continued offending behaviour.
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> 13. The application was opposed by the appellant's representative on the basis that this appeal had been outstanding since May 2013 and that there had been seven CMR hearings to date and the further delay would simply have a further cost to the public purse and be disproportionate to the reasons put forward by the Respondent.
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> 14 I therefore refused the application for an adjournment.

14. It is arguable the Judge may have fallen into legal error for he makes no mention in his reasoning of the correct test when considering an adjournment application which is that of the fairness of the decision. It is necessary to consider whether if an application is refused the parties are able to receive a fair hearing of the issues in dispute.
15. What is not established is that any error that may have been made is material. It was not disputed that Mr Kabuga had come to the adverse attention of the authorities again or that there were pending proceedings. The deportation order was, however, issued on the basis of Mr Kabuga's conduct prior to issue which was the case before the Tribunal. Although the post hearing information referred to at paragraph 4 of the additional grounds refers to a sentence of four months having been imposed for the breach of a 'gang injunction', the Secretary of State is able to issue a further decision if circumstances warrant the same. The reference to Farquharson [2013] UKUT 14 is also noted but the conduct complained of was the breach of an injunction of which the Judge was aware.

No arguable prejudice to the Secretary of State is made out or evidence of a lack of a fair hearing established.

16. The second procedural point arises by reference to paragraph 7 of the additional grounds of appeal in which it is stated:

> 7. DC Callum Fraser's statement of 31 December 2015 is clear with respect to ongoing investigations with regard to appellants post hearing criminal activities. These include: "Bladed Article – 19 October 2015; Possession of Class B – 1 November 2015; Allowing to be carried in stolen vehicle – 22 November 2015; Conspiracy to supply Class B – 27 November 2015"

17. It cannot be an error for a judge to decide an appeal on the basis of information not known to the judge that may not have existed at the date of the hearing.

18. In relation to the Judge's comment that Mr Kabuga has no more connection to Uganda than to any other sub-Saharan African country [195], the claim this is inadequately reasoned has not been shown to amount to a material error of law per se. It is correct, however, that in Uner v The Netherlands – 46410/99 the Grand Chamber affirmed at paragraph 55 of the judgment, after considering general principles in preceding paragraphs, that even those born in the host state can be expelled. That theme was repeated by the Upper Tribunal in Bossade [2015] UKUT 415 in which it is noted at paragraph 5 of the determination that "He [the appellant] had never been outside the UK and did not speak Lingala or French. In the DRC he would have no friends, family, home or knowledge of the language or culture. He was not aware he had uncles in the DRC." At paragraph 56 of the judgement the Tribunal find:

> 56. Even if we had considered the claimant to meet the requirements of paragraph 399A(b), we would still have concluded he fails under paragraph 399A because he fails to meet paragraph 399A(c) and (as explained earlier) to succeed under paragraph 399A, the requirements of both (b) and (c) (as well as (a)) must be met and we are not persuaded that there would be very significant obstacles to his integration into the country to which it is proposed he is deported. We accept there would be significant obstacles: in particular he would have required to overcome the fact that he does not speak Lingala; that he has no experience of living in such a country as an adult or indeed even as a young person (only an infant). Whilst we do not accept that the respondent has ever resiled from her position set out in her refusal decision that the claimants has uncles in the DRC, for the purposes of this appeal we are also prepared to decide his case on the basis of his own claim as set out in his witness statement that he has no uncles there.
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> 57. But the paragraph 399A(c) test is more stringent: it is not simply met by showing that a person has no close family ties in the country to which it is proposed he is deported; it requires "very significant obstacles to … integration" to be shown. In our judgment the obstacles the claimant faces do not meet this demanding standard. In relation to his command of language spoken in the DRC, it was his own mother's evidence that he had been brought up in a household where French was spoken. The DRC is a Francophone country. In any event, it was not suggested his behalf that there would be any reasons related to physical or mental incapacity preventing him from learning the local language or dialect. As regards his lack of knowledge of the culture, whilst it was his evidence that he identified with British culture, it was not suggested he had specifically rejected or no longer understood his cultural origins. Furthermore, as regards lack of family ties, he is now a young adult and the skills he has acquired through attending classes in prison will assist him in being able to earn a living without the need to be a dependant. Further, we agree with Mr Jarvis that it is reasonable to infer that his mother and/or other relatives here will seek to help him financially, at least until he has time to find his own

feet. We agree with Mr Javis that it has not been shown that he would be prevented by reason of any physical or mental instability from developing social and cultural ties in the DRC. He is young, able bodied and of an adaptable age.

19. Paragraph 396 of the Immigration Rules provides that where a person is liable to deportation the presumption shall be that the public interest requires deportation. Paragraph 398(c) applies as Mr Kabuga is a persistent offender. Paragraph 399(a) has no application as Mr Kabuga has no children. 399(b) was not found to apply which has not been challenged on appeal [180].

20. Paragraph 339A applies to deportations from 28 July 2014 and provides:

> 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 into the UK; and
> (c) There would be very significant obstacles to his integration into the country to which it is proposed he is deported.

21. It was not disputed before the Judge that Mr Kabuga has lived in the UK for at least half his life immediately preceding the date of the immigration decision. As such the finding 399A(a) is satisfied has not been shown to be infected by arguable legal error.

22. It was not disputed before the Judge that Mr Kabuga is socially integrated into the UK and the finding by the Judge that 399A(b) is satisfied has not been shown to be infected by arguable legal error.

23. The issues was, as identified by the Judge, 399A(c) and the existence of very significate obstacles. It must be noted that the language of the Rule is for there to be very significant obstacles which is a higher threshold than just obstacles or significant obstacles. Significant denotes something that is sufficiently great or important to be worthy of attention or something having or likely to have a major effect.

24. In Secretary of State v JZ(Zambia) [2016] EWCA Civ 11 at paragraph 35 the Court of Appeal said:

> 35. The correct approach for any decision-maker applying the rules 398 or 399A of the Immigration Rules is now well established. The task is not to carry out a freestanding analysis of the article 8 factors. The Secretary of State has already carried out that exercise in drafting the rules 398 to 399A. Those rules form a complete code explaining how article 8 must operate in cases where a foreign criminal is resisting deportation. The decision maker must take account of the proposed deportee's Convention rights through the lens of the Immigration Rules. The rules emphasise the high public interest in deporting foreign criminals. In a case to which rule 399 and 399A do not apply, very compelling reasons will be required if they are to constitute "exceptional circumstances" which outweigh the public interest in deportation. For a fuller exposition of these now well established principles. See *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014]1 WLR 544, *Secretary of State for the Home Department v AJ (Angola*) [2014] EWCA Civ 1636, *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310 and *Secretary of State for the Home Department v Suckoo* [2016] EWCA Civ 38.

25. It is not suggested the Judge referred to the wrong legal test. The issue is therefore whether the findings of the Judge and the overall conclusion that they amounted to very significant obstacles was properly open on the available evidence.
26. Paragraph 11 of the additional grounds suggest that in the decision letter of 2 May 2013 Mr Kabuga was advised that he is entitled to make an application under the facilitated returns scheme to benefit from the integration package that is available. As such it is implied that the Judges finding in relation to the lack of resources on return is irrational. This suggestion has been countered by Ms Foot who submitted that the terms of the Secretary of States policy specifically excludes Mr Kabuga as he has contested his deportation by way of the appeal. The policy is only available to those willing to return to their country of origin voluntarily. Mr Tufan maintained that the Secretary of States position is that a package remains available via the International Office for Migration. This will provide support and assistance with the integration process 'on the ground'. Such support has not been shown to be inadequate but if no such support is available the position is considered below.
27. In relation to very significant obstacles to integration into Uganda the Judge found that if returned to Uganda Mr Kabuga will be without accommodation, work or the socio-economic and educational norms which assist in integration [162].
28. As stated above, and as found in Bossade, the test of very significant obstacles is a demanding one. Mr Kabuga is said to only speak English but the primary national and official language of Uganda is English. No bar to effective communication is therefore made out if Mr Kabuga is returned, especially to the major urban areas such as Kampala. At paragraph 22 of the determination the Judge finds:

> 200. Having taken into account the numerous reports and evidence before me, I find that whilst English is one of the official languages of Uganda from the country assessment and guidance it is necessary to survive to converse unless one has an independent source of income it is necessary for survival purposes to be able to speak one of the primary local languages namely Luganda in order to have any reasonable prospects of integration into society.

29. The Judge fails to consider whether Mr Kabuga is able to learn an alternative language or to identify why only being able to speak one of the three main languages will result in very significant obstacles. The test is not that of reasonable prospects of integration. It is accepted that the ability to communicate is important in enabling Mr Kabuga to integrate, but the evidence does not show that only being able to speak English initially will leave him isolated and unable to function.
30. The statement Mr Kabuga has no more connection to Uganda than any other sub Saharan part of Africa is arguable incorrect as his mother is Ugandan. It may be tenuous as Mr Kabuga's mother came to the UK when she was 21 and only returned on two occasions to look for her two children born in Uganda who are said to be missing. It is not disputed that Mr Kabuga has never lived in Uganda and only visited the country when he was aged 11 and 14 to accompany

his mother for a few weeks, but this does not prevent removal. The wording of the Rules provide a balance in that if a person is able to satisfy the requirements they may remain which enables the impact of a person having no practical experience of living in another country to be considered.

31. The finding at paragraph 204 that as Mr Kabuga has no family, friends, employment or accommodation in Uganda this means he will be effectively destitute is not made out. In MB, YT, GA and TK v SSHD [2013] EWHC 123 it was held that case law establishes that Article 3 impose no general obligation on a contracting state to refrain from removing a person to another state or territory in which he would be destitute. It was not the function of Article 3 to impose a minimum standard of social support for those in need. A breach of Article 3 only occurred when deliberate state action was taken to prohibit a person from sustaining himself by work and when accommodation and the barest of necessities were removed.

32. The Judge fails to consider what support may be available such as from Mr Kabuga's mother who works in the UK, according to her witness statement, and who speaks of the close bond she has with Mr Kabuga. The average month's disposable income in Uganda is in the region of 556,250.00 Ugandan Shillings which equates to approximately £116.00. The cost of renting a one bedroom apartment in the city is in the region of £120 per month. It has not been shown there are no NGO who are unwilling or unable to assist in integration as a number of such groups exist in Uganda, including the church.

33. The legal error in the determination is the Judge recording those elements that will make integration into Uganda difficult and even initially hard for Mr Kabuga and to add to that a number of other elements [208-212] which are claimed on balance to satisfy the required test, when this not the case. The test is not difficulties or problems but very significant obstacles. It has not been shown those the Judge considered cannot be overcome. Even if significant obstacles this is not enough when the higher threshold of very significant obstacles are required. Whilst initially it may have appeared that the Judge had just done enough to support the decision, on a more detailed consideration of the evidence and reflection, I find the Secretary of State has made out her case in relation to the making of legal error material to the decision to allow the appeal.

34. The determination is set aside with the findings in relation to Mr Kabuga's gang related activities, personal presentation, and family circumstances being preserved. No rule 15(2)(a) application has been made, enabling me to remake the decision on the evidence available.

35. As Mr Kabuga has failed to show he is able to satisfy paragraphs 399 or 399A in full, with specify reference to 399A(c) he is only able to succeed if he is able to show, pursuant to paragraph 398, that the public interest in deportation is outweighed by other factors where there are very compelling circumstances over and above those described in paragraph 399 and 399A. This imposes a very high threshold upon Mr Kabuga and even when considering all the facts he seeks to rely upon in support of his being permitted to remain in the United Kingdom, I find he failed to demonstrate such very compelling circumstance. In arriving at this decision consideration has been given to section 117B and C of

the 2002 Act. It is accepted Mr Kabuga is integrated into the UK and speaks English. He is not financially independent but hopes to be able to be so in the future, He is not a parent.

36. As regards 117C(1) and (2) Mr Kabuga has been found to have been a member of a gang in in UK and a persistent offender. He has recently been sentenced for a breach of a gang related injunction forbidding his contact with other members of the gang. In 2011 Mr Kabuga was sentenced to an eighteen month detention and training order when aged 16 for offences of a violent nature which the sentencing judge found were gang related. There is a substantial deterrent element in relation to the deportation of those involved in gang related crimes which plague cities in the UK such as London. Operation Nexus has been set up solely to deal with such offenders and has been designed and delivered by the Metropolitan Police and UKBA and aims to maximise intelligence, information, and worldwide links to improve how the UK deals with and responds to foreign nationals breaking the law. The documents provided by the Operation Nexus team are those referred to by Judge Herbert in paragraph 10 of his decision of some 500 pages. These contain references to serious matters giving rise to a greater public interest in deportation.

37. Mr Kabuga does not have a qualifying partner or child so as to fall within section 117(C)(5) (Exception 2). Exception 1 is not available for the reason Mr Kabuga is unable to satisfy 399A(b) and (c). The situation of his mother and siblings has been considered and the reports provided in relation thereto taken into account. It is accepted the family will have to adapt following deportation but it has not been shown this will result in a situation sufficient to make the decision disproportionate. The chronology of the offending history has also been factored into the decision.

38. I find Mr Kabuga cannot succeed under the Immigration Rules both in relation to the first and second stages of the Article 8 analysis as identified in Bossade.

Decision

39. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

40. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed
Upper Tribunal Judge Hanson

Dated the 16 May 2016