Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/05946/2014**

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 11 February 2016	**On 29 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR JAMES NDIRITU KARIAMBURI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NAIROBI\449128

Respondent

Representation:

For the Appellant: Mrs H Masih, Counsel instructed by Morris Andrews Solicitors
For the Respondent: Ms R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who has indefinite leave to remain, appeals against the decision of an Entry Clearance Officer to refuse him entry clearance as a returning resident under paragraph 18 of the Rules on the ground that his application for entry clearance fell for refusal under paragraphs 320(2)(b), 320(18B)(b) and 320(19) of the Rules. The appellant appeals against the decision of the First-tier Tribunal (Judge Davidson sitting at Taylor House on 7 May 2015) dismissing his appeal against the Entry Clearance Officer's

decision under the Rules and under Article 8 ECHR. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires to be accorded anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. The appellant is a national of Kenya, whose date of birth is 1 January 1942. From 1965 until March 2013 the appellant resided in the UK. It is accepted by the respondent that the appellant was at all material times lawfully resident in the United Kingdom, having at some point been granted ILR. Mrs Masih informed me that his entitlement to reside in the United Kingdom arose from the fact that he was a citizen of the Commonwealth.

3. As stated by Judge Davidson in the decision which is under appeal, between 1974 and 2004 the appellant was convicted of seventeen different offences. He has spent convictions for offences of theft, burglary, wounding, actual bodily harm and arson in respect of offences committed between 1974 and 1998. He has unspent convictions for more recent offending. In the year 2000 he was convicted of three counts of indecent assault on a female over 16 for which he received thirty months' imprisonment and was obliged to sign on the sex offender's register indefinitely. In 2004 he was convicted of attempted arson for which he was sentenced to five years' imprisonment with a four year extension, and for burglary and theft of a dwelling, for which he received a concurrent term of imprisonment of eighteen months. These were subject to the supervision of the courts until 2013, when his five year conviction and four year extension expired.

4. The appellant's five year term of imprisonment for attempted arson was imposed by a judge sitting at Birmingham Crown Court on 22 December 2004. In the light of that conviction and sentence, the then Secretary of State gave consideration as to whether the appellant should be deported. In or about 2006 the appellant received the following written confirmation:

> I confirm that Criminal Casework Directorate will not be taking any action in this case due to subject's length of residence in the UK.

5. As set out in a letter from the appellant's solicitors dated 7 March 2014 which was addressed to the British High Commission in Nairobi, the appellant travelled to Kenya for a short vacation in March 2013, and booked his flight to return to the United Kingdom in April 2013. However the appellant travelled on a new passport which did not have a visa or ILR stamp allowing him entry back into the United Kingdom. As he had lived in the United Kingdom for 48 years, he was not aware of the necessity of getting a visa transferred into his new passport prior to travelling out of the country. When the appellant tried to embark on a flight to return to the UK, he was refused embarkation by airport officials. He attended the Visa Application Centre the following morning, and solicited the assistance of an agent to complete a visa application as a returning resident.

6. The application for entry clearance was refused because, among other things, the appellant had failed to disclose his criminal convictions in response to a question as to whether he had any criminal convictions in any country (including traffic offences). In their letter of 7 March 2014, the appellant's solicitors said that their client's instructions were that he had not deliberately sought to deceive the British High Commission, and that the responsibility for the errors in the application lay with the agent. Also, the appellant had misunderstood the question about his criminal convictions. He believed that the question referred to convictions in any other country apart from the UK.

7. The appellant submitted a second application for entry clearance under cover of the letter from his solicitors to which I have previously referred. On 31 March 2014 an Entry Clearance Officer in Nairobi gave his reasons for refusing the application. Whilst he acknowledged that the appellant was issued with indefinite leave to remain in the UK, he had taken account of his previous history. He had been convicted of an offence for which he had been sentenced to a period of imprisonment of at least four years and so he refused his application under paragraph 320(2)(b). He was considered to be a persistent offender who showed a particular disregard for the law. He had also been sentenced to over ten years' imprisonment for his various offences in the UK. So he also refused his application under paragraph 320(18B)(b). He considered this exclusion from the United Kingdom to be conducive to the public good, and so he was also refusing his application under paragraph 320(19).

8. He had also considered his application under Article 8 ECHR. He considered his bad character outweighed any obligations to him which the UK held under this Article. He also noted he had provided no evidence about his relationship with one of his sons in the UK. He had stated he had six children in all, but had lost touch with five of them on account of his criminal behaviour towards their mother, for which he had received criminal convictions. There appeared to be nothing preventing his son, who he stated was his only family member in the UK, visiting him in Kenya, should he wish to continue the family relationship with him there.

9. In the grounds of appeal for the First-tier Tribunal, the appellant's solicitors relied on the fact that the appellant's current predicament came about through misfortune. Although he had ILR, the appellant did not have a stamp or visa in his passport which evidenced the same. Due to his previous passport containing his ILR stamp being lost "over the years", the appellant was left with no alternative but to submit a new application to the British High Commission in Nairobi in order to re-enter the United Kingdom as a returning resident. His criminal convictions were predominantly due to domestic violence including arson where their client had set fire to his wife's property while both her and the children were asleep. The case had been considered by the then Secretary of State who decided that due to his length of residence, no action would be taken to instigate deportation proceedings against him. So it was unfair that, on the same facts, that the Entry Clearance Officer should see otherwise. His exclusion from the United Kingdom would mean a loss of his home and life

as he knew it. He had been out of Kenya for almost fifty years. It would be difficult, if not impossible, for him to fit into the culture of a country to which he had become a stranger. So the appeal should be allowed on Article 8 grounds.

The Decision of the First-tier Tribunal

10. The appellant's appeal came before Judge Davidson to be determined on the papers. In his subsequent decision, he set out his findings of fact in paragraphs [14] onwards. He accepted that the appellant had been granted ILR, and that he had returned to Kenya for a holiday in 2013. He accepted that in October 2007 the appellant had received written confirmation that the Criminal Casework Directorate would not be taking action against him due to his length of residence in the UK. He also acknowledged that in an earlier letter from the Home Office dated 8 September 2006 the Home Office had informed the appellant they would be taking "no further deportation action" against him "on this occasion".

11. The judge went on to rehearse the appellant's history of criminal offending. In the light of that history, he endorsed the decision of the Entry Clearance Officer to refuse the appellant entry clearance under the three Rules which the Entry Clearance Officer had cited. In particular, he noted that Rule 320(2)(b) was a mandatory provision. It listed a number of situations where the refusal of entry clearance was mandatory, and these included being sentenced to a period of imprisonment of at least four years.

12. At paragraph [22], the judge said he attached little weight to the fact that the respondent had informed the appellant when he was still in the UK in 2007 that she did not intend to deport him at that stage:

> The appellant seems to have deported himself to some extent in 2013, and the respondent has now said that, since he is currently out of the country, he can stay there. If the appellant was stupid enough to put himself in that position, then he only has himself to blame, the respondent is not barred from taking the action she has done.

13. The judge concluded at paragraph [23] that the respondent was justified in refusing entry clearance to the appellant under the Rules, so he dismissed the appeal under the Rules accordingly.

14. The judge addressed the appellant's human rights appeal at paragraphs [24] to [32]. In his discussion of proportionality, he considered **Huang [2007] UKHL 11** and **JO (Uganda) and Another v Secretary of State for the Home Department [2010] EWCA Civ 10**. He accepted that while this was not a deportation case as such, in his view it bore all the hallmarks of one, and he therefore placed reliance on the decision in **JO (Uganda)**. As he had portrayed it above, it was in the nature of a self deportation. He held that the appellant's exclusion was proportionate, both from a private life and family life perspective. With regard to private

life, the judge held at paragraph [30] that there did not appear to be anything significant about his private life in the UK except that a quarter of it was spent in custody. He appeared to have been violent towards his wife and family. There was nothing in his view to indicate that refusing him entry to the UK would interfere in any way with the residue of any private life he had in the UK. He was a Kenyan national who had now returned to his country of origin.

The Application for Permission to Appeal

15. Emma Rutherford of Counsel settled the appellant's application for permission to appeal to the Upper Tribunal. Ground 1 was that the judge had materially erred in law in finding that the general grounds of refusal relied on by the Entry Clearance Officer were made out. It was the appellant's case that the general grounds of refusal did not apply to him. Under Section 76 of the Nationality, Immigration and Asylum Act 2002, ILR could be revoked in certain circumstances, but none of the circumstances appeared to apply in the appellant's case. She acknowledged that Section 76(1) provided that a person's ILR could be revoked if they were liable for deportation, but could not be deported for legal reasons. But as the appellant was a Commonwealth citizen, who was ordinarily a resident of the UK on 1 January 1973, and he had remained ordinarily a resident in the UK up until 2013 when he left on holiday, he met the requirements of Section 7 of the Immigration Act 1971 and was thus not liable for deportation.

16. The appellant's ILR had not lapsed due to his departure from the UK because he had not been outside of the UK for more than two years at the date of application or decision. Paragraph 18 of the Rules appeared in Part 1 of the Rules. The Entry Clearance Officer had been wrong to invoke paragraph 320 of the Rules, as paragraph 320 only applied to Parts 2 to 8 of the Rules. The introduction at paragraph 320 states as follows:

> In addition to the grounds of refusal of entry clearance or leave to enter set out in parts 2-8 of these Rules, and subject to paragraph 321 below, the following grounds for the refusal of entry clearance or leave to enter apply…

17. While paragraph 321 allowed an Immigration Officer to refuse entry to a person who had been issued with entry clearance on the basis that they fell to be refused under the paragraphs invoked by the Entry Clearance Officer, it did not appear that paragraph 321 applied to the issuing of entry clearance by the Entry Clearance Officer. Paragraph 321 only applied at port, not in respect of the initial grant of entry clearance by the Entry Clearance Officer.

18. Ground 2 was that the judge had misdirected himself in law in invoking **JO (Uganda)** in his discussion of proportionality. The judge had been wrong to invoke **JO (Uganda)**, as the appellant was not liable for deportation due to the operation of Section 7 of the Immigration Act 1971.

19. Ground 3 was that the judge had erred in law in finding at paragraph [30] that the appellant's continued exclusion from the UK did not interfere with his private life. This was contrary to the decision of the Court of Appeal in **VW (Uganda)** and **AB (Somalia) v Secretary of State [2009] EWCA Civ 5** in which it was held that anything more than a technical interference in a person's private and family life will engage Article 8(1).

20. Ground 4 was that the judge failed to have regard to relevant matters when considering proportionality. By refusing to endorse the appellant's passport appropriately, the Entry Clearance Officer was effectively going behind the decision of the Secretary of State in 2007 which was not to take deportation action due to the appellant's length of residence, and presumably her acceptance that he did not appear to be liable for deportation due to the operation of Section 7 of the 1971 Act.

The Eventual Grant of Permission to Appeal

21. Permission to appeal was initially refused by the First-tier Tribunal, but on a renewed application to the Upper Tribunal, Upper Tribunal Judge Kebede granted permission to appeal for the following reasons:

> There is arguable merit in the assertion made in the grounds that the respondent, not having sought to, or been able to, revoke the appellant's indefinite leave to remain, was not entitled to refuse admission to the United Kingdom and that the judge arguably erred in failing to conclude that that was the case.

The Rule 24 Response

22. On 15 January 2016 David Clarke of the Presenting Officer's Unit in Feltham, settled an extensive Rule 24 response opposing the appeal. The application was not refused for any of the reasons asserted by the appellant. Rule 320(2)(b) required mandatory refusal where an individual had a criminal history such as that of the appellant's. There was no discretion. In addition, it was a question of fact that the appellant was required to make an entry clearance application. This was not an appeal against revocation, or against the decision to make a deportation, or a refusal of leave to enter under Rule 321. This Rule (Rule 321) was specific to someone "who holds an entry clearance which was duly issued to him and is still current". The fact the appellant was required to make the entry clearance application demonstrated that he did not meet this definition. In any event, Rule 321 permitted a refusal of leave to enter on the same grounds as has been invoked by the Entry Clearance Officer to justify a refusal of entry clearance. So the appellant's complaint was wholly immaterial. The grant of permission implied that an individual cannot be refused entry clearance if he has ILR. This is inconsistent with Rule 320.

The Hearing in the Upper Tribunal

23. At the hearing before me to determine whether an error of law was made out, Mrs Masih developed the arguments raised in the grounds of appeal. In reply, Ms Pettersen adopted the Rule 24 response settled by Mr Clarke.

Discussion

24. The first ground of appeal is the only ground which Upper Tribunal Judge Kebede singled out as having arguable merit. It was not part of the appellant's case before the First-tier Tribunal that the decision of the Entry Clearance Officer was unlawful, still less that it was unlawful for the reasons advanced in the grounds of appeal to the Upper Tribunal. So prima facie the First-tier Tribunal Judge did not err in law in not engaging with a case that had not been put to him.

25. However, the law always speaks, and so it is right to consider whether ground 1 has underlying merit. I answer this question in the negative, essentially for the reasons canvassed in the Rule 24 response.

26. The Secretary of State did not need to revoke the appellant's ILR as a pre-condition of the Entry Clearance Officer refusing the appellant entry clearance on the grounds of his criminal history. Although the appellant has been issued with ILR in the past, he was not able to produce a passport containing an ILR stamp so as to be able to embark on a flight to the UK. The appellant put himself in a position where he had to apply for entry clearance to return to the United Kingdom as a returning resident.

27. The construction which the appellant's Counsel has sought to place on the introduction to paragraph 320 is wrong. On a proper construction of the introductory wording to paragraph 320, the general grounds of refusal are not confined to persons seeking entry clearance under Parts 2 to 8. Paragraph 320 also applies to a person seeking entry clearance under Part 1, and specifically under paragraph 18.

28. It is clear from the introductory wording to paragraph 320 that the mandatory grounds of refusal set out thereunder are *in addition to* the grounds of refusal of entry clearance or leave to enter which are set out in Parts 2 to 8 of the Rules. Thus, as a matter of construction, the mandatory grounds of refusal set out in paragraph 320 apply right across the board, including to returning residents who have to apply for entry clearance under Part 1.

29. The remaining grounds of appeal pursued by the appellant relate to the First-tier Tribunal's disposal of his Article 8 claim. Paragraph 320(2) provides that entry clearance or leave to enter the United Kingdom is to be refused where the person seeking entry to the United Kingdom:

> (b) Has been convicted of an offence for which they have been sentenced to a period of imprisonment for a least four years; ... where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol relating to the Status of Refugees, it will only be in exceptional circumstances that the public

interest in maintaining a refusal will be outweighed by compelling factors.

30. Given the wording of paragraph 320(2), there is no merit in the argument that the judge misdirected himself in assessing proportionality in accordance with the guidance given by the Court of Appeal in **JO (Uganda)**. The judge was not thereby applying a higher proportionality threshold than was appropriate. It is irrelevant that the appellant was not liable to deportation for legal reasons. As he met the criteria for exclusion from the United Kingdom on account of his criminal history, the public interest in his exclusion was no less than the public interest in his expulsion. The scales were tipped against the appellant because of the circumstances in which he found himself, which was that he had voluntarily left the United Kingdom in circumstances where he had to seek entry clearance in order to return to the United Kingdom. It was thus open to the judge to find, for the reasons which he gave, that neither the appellant's private life interests, nor his right to enjoy a family life with the one son of his with whom he maintained a relationship, was sufficiently compelling to outweigh the public interest in maintaining the refusal. Accordingly, grounds 2 to 4 are not made out.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date

Deputy Upper Tribunal Judge Monson