Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00226/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 22nd May 2017	**On 6th June 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

CHARLES KANEBI BIACHI + 2
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr G. Lee, Counsel instructed by Liberty & Co
For the Respondent: Mr J. McGirr, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria date of birth 15th March 1958. His dependants are his minor children, born in August 2010 and October 2011. He has permission[1] to appeal against the decision of the First-tier Tribunal (Judge Cassel) to dismiss his human rights appeal. The determination was promulgated on the 4th January 2017.

Background

[1] Permission granted by First-tier Tribunal Judge Ford on the 5th April 2017

2. The Appellant has a long and complex immigration history, not all of which is relevant to this decision. It suffices to say that the First-tier Tribunal has accepted that he arrived in the UK in October 1991 as a visitor. The Secretary of State thereafter varied his leave until August 1992 but once this date had passed he became an overstayer. He married a British citizen in 1993 and made an application to remain as her spouse. That was refused and on the 7th November 1997 the Secretary of State made a decision to deport him. It should be noted that in November 1997 deportation was not a procedure reserved for those persons now defined as 'foreign criminals' or those whose removal would otherwise be conducive to the public good. As MacDonald puts it: "Anyone…could be deported for overstaying or breaching conditions of leave"[2].

3. The Appellant was granted an in-country right of appeal which he exercised. In a shocking reminder of the state of the system in the 1990s it took four and half years for the appeal to be listed. The appeal was dismissed by a 'Special Adjudicator' Mr PV Ievins on the 8th February 2002. For reasons unknown the Appellant did not attend that appeal. Mr Ievins noted that the case before him was what was known as a 'limited deport'. The decision under appeal had been made under s3(5)(a) of the Immigration Act 1971 as qualified by s5 of the Immigration Act 1988. The effect of this legislative framework was that persons who had been in the country for less than seven years could only successfully appeal such a decision on the grounds that the Secretary of State did not have the power in law to make it. Since the Appellant had failed to establish that this was the case, the appeal fell to be dismissed. The Secretary of State signed the deportation order on the 14th May 2002.

4. Nothing happened. The Appellant remained in the country and in 2006 attempted to regularise his position by making an application under the then operative provision on '14 years long residence'. This was refused on the 11th April 2008. A number of applications, refusals and appeals ensued.

5. The Appellant remained in the UK throughout. His marriage to the British citizen long since dissolved he met his current partner (a Jamaican national) and had children. He worked, and studied, achieving a BSc in Pharmacology and an MSc in Bio-medical Immunology.

6. This was the factual and legal background in the appeal that came before the First-tier Tribunal in December of last year. The decision under appeal was a decision dated 24th October 2014 to refuse to grant leave on human rights grounds.

[2] *Immigration Law and Practice* MacDonald and Toal (8th ed) at 15.3

The Decision of the First-tier Tribunal

7. The First-tier Tribunal reviewed the Appellant's immigration history and the reasons for refusal. The Respondent had found that Appellant could not qualify for leave to remain under Appendix FM because his claimed partner was not settled. Nor could he comply with the 'suitability requirements' because he had a deportation order against him: S-LTR.1.2. He could not be granted leave to remain as a parent because neither child was either British or settled; at the date of the application nor had either been in the UK for more than seven years. In respect of his private life the Appellant could not rely on his 20 years continuous residence in accordance with paragraph 276ADE(1)(iii), because the outstanding deportation order precluded him from meeting the aforementioned 'suitability' requirements.

8. The First-tier Tribunal began its deliberations by looking at paragraph 390 of the Immigration Rules, the provision relating to revocation of deportation orders. The Tribunal found that this provision had to be read in light of the 'public interest' factors set out at s117B of the Nationality, Immigration and Asylum Act 2002. This included the fact that the Appellant's stay in this country had always been precarious. The Tribunal then directed itself to consider the decision in IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932 as follows: "Although much of the judgement refers to the deportation of a foreign criminal, which the Appellant is not, the guidance is one which I follow, so far as it is relevant to the Appellant" [at 25]. The determination then sets out the guidance in IT. It refers to negative findings made about the Appellant's immigration status by a Tribunal in 2009 (the determination itself was not available but the excerpt had been set out in the refusal letter). Having reviewed the facts the final conclusion is reached at paragraph 40:

> "In considering the immigration rules, I find there are no very compelling circumstances which would outweigh the public interest in the Appellant's deportation".

The appeal was accordingly dismissed.

The Appeal

9. The grounds of appeal are twofold.

10. First, it is submitted that the First-tier Tribunal erred in the application of a "very compelling circumstances" test. The Appellant is not a foreign criminal, and his 'deportation order' was in effect a mechanism for his administrative removal only.

11. Second, the Tribunal erred in discounting the very long residence of the Appellant on the basis that his stay was at all times "precarious".

The fact that it was precarious did not mean it was irrelevant: this much is recognised by the 'twenty year long residence' provision at 276ADE(1)(iii).

The Response

12. For the Respondent Mr McGirr conceded that the First-tier Tribunal had erred in its approach. The Appellant was not a foreign criminal and the Tribunal was not required to find "very compelling circumstances" to allow his appeal. Mr McGirr further agreed that the long residence was plainly a factor pertinent to any Article 8 assessment outside of the Rules. He invited me to set the decision of the First-tier Tribunal aside and remake the decision myself.

Error of Law

13. The decision of the First-tier Tribunal contains material misdirection's as set out in the grounds of appeal and the determination is set aside by consent.

14. The parties invited me to re-make the decision in the appeal on the material before me.

Discussion and Findings

15. The operative provision of the Immigration Rules is paragraph 276ADE(1):

> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has

> lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

16. As I note above it is the unchallenged finding of the First-tier Tribunal that the Appellant has lived in this country since 1991. At the date of this decision he has therefore been living in the United Kingdom for approaching 26 years. He has never been to prison and so meets the requirements at sub-paragraph (iii).

17. The only matter in issue is whether he can meet those suitability requirements in Appendix FM that are imported into 267ADE(1) by virtue of sub-paragraph (i). The only one of these requirements that has been put in issue is S-LRT.1.2:

> S-LTR.1.2. The applicant is currently the subject of a deportation order.

18. Before me Mr Lee submitted that this provision should be held only to apply to a deportation order "within the current meaning of the Rules". The Appellant was not a criminal and nor had it been said that his deportation was conducive to the public good. The order should be interpreted in light of the circumstances prevailing at the time it was made: it was in effect a decision to administratively remove the Appellant and should be read in that way.

19. Mr McGirr agreed that the deportation order against the Appellant was not of the species that we are familiar with today. It was simply a decision to remove and to that extent was something of a nullity. It had not however been revoked and in the plain language of the rules, S-LTR.1.2 did apply.

20. Although Mr Lee's argument was logically attractive, I can find no basis in law for supposing that the deportation order made on the 14th May 2002 could be ignored. I find that the proper course would be to consider first whether the order should be revoked, and then the Appellant's claim that he should be given leave to remain on grounds of long residence.

21. The current provisions relating to the revocation of deportation orders are set out at paras 390-391A of the Immigration Rules. I have highlighted the pertinent parts:

> **390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:**
>
> **(i) the grounds on which the order was made;**
>
> **(ii) any representations made in support of revocation;**

(iii) the interests of the community, including the maintenance of an effective immigration control;

(iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:

(a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or

(b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

391A. In other cases, revocation of the order will not normally be authorized unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

22. I have highlighted paragraph 390 because it would appear to apply to any application. Paragraph 390A is of no relevance, since this is not a case to which paragraph 398 applies. Similarly 391 is not applicable since the Appellant is not someone who has been convicted of a criminal offence. Since this would appear to be an appeal falling under the rubric of “other cases”, I apply paragraph 391A. I note that this contains a presumption that the deportation order will remain in place unless the situation has materially altered. The passage of time itself may amount to a change in circumstances.

23. The chronology in the Respondent’s bundle informs me that the Appellant has previously applied to have the deportation order against him revoked and for leave to remain to be granted on grounds of long residence. I am told that on the 28th May 2009 the First-tier Tribunal dismissed an appeal against the Secretary of State’s

rejection of those applications. I use those words because neither side was able to provide me with a copy of that determination, nor even identify the Judge(s) who wrote it. The refusal letter contains an extract, which indicates that the Tribunal made a damning assessment of the Appellant's character:

> "In reaching this decision we have noted that the Appellant entered the UK approximately 18 years previously in October 1991. We also noted that most of his presence in the UK has been illegal and without proper leave to remain. We come to the clear view that we find it hard to consider a more clear case of an Appellant who has employed a catalogue of deceit and failed applications in order to maintain his presence within the UK. Such deception has extended to lying about his children in Nigeria, lying about the deaths of his parents and entering into a marriage of convenience in the UK. He has in addition illegally obtained a National Insurance number and has worked and studied within the UK without any formal permission to do so. Whilst we accept that the Appellant is clearly well thought of by those who worship with and know him and that he may well be a man of exemplary character, we come to the view that none of his supporting witnesses and still not those attending the hearing before us had knowledge or provided any information about the Appellant's appalling immigration history within the UK. As we indicated, we find the Appellant to be a person who is largely without credibility and who has employed outright deception in order to seek to prolong his illegal presence within the UK. Indeed, as a result of any of the various misrepresentations that he has made he is fortunate not to have faced criminal prosecution".

24. Mr McGirr recognised that he was in some difficulty in asking me to take a *Devaseelan* approach to this extract, but ask me he did. The difficulty arose from the absence of the determination itself, and from ignorance on the part of the Respondent as to what the deception found by the Tribunal might have been. Mr McGirr did have a file with him but it contained no clues as to what in particular, other than the Appellant's appalling immigration history, might have caused the Tribunal to make such robust comments.

25. I take these comments, insofar as I am able, as a starting point.

26. The relevant considerations are those set out in paragraph 390. I remind myself that in accordance with paragraph 391A there is a presumption that the order shall be maintained.

27. I look first to the grounds on which the order was made. There is no dispute before me that in 1997 the Secretary of State decided to make an order for the Appellant's deportation because he had overstayed his leave to remain in the United Kingdom by what was, at

that point, some five years.

28. The representations made in support of revocation are summarised in the letter that covered the Appellant's application for leave to remain on human rights grounds dated 8th July 2014, and further in the various items of evidence upon which the Appellant relies. These arguments represent the interest of the Appellant, including compassionate circumstances. It is submitted that the Appellant has lived in the UK for a continuous period of 26 years. During that time he has established a strong private life, including working, studying (to Masters level) and worshipping. He is active in the church and contributes to society by doing voluntary work for a number of charities. The Appellant has a developed family life in the UK. He has three children who have been born here and have lived here continuously since birth. The eldest will be seven in August of this year. The Appellant has never been convicted of a criminal offence.

29. The factors weighing against revocation are the matters set out in the extract from the 2009 determination of the First-tier Tribunal set out above, and the fact that the Appellant has lived in this country all of this time with absolutely no lawful right to do so. He was worked, studied and obtained a national insurance number. These matters must attract a substantial weight in the balancing exercise. The order was made because he was an overstayer, and he remains an overstayer today.

30. The Appellant has not produced any fresh information relevant to the making of the order. I bear in mind however that in accordance with paragraph 391A the passage of time since the decision to deport may also in itself amount to such a change of circumstances as to warrant revocation. It has been twenty years since the Secretary of State signed a deportation order. It has been eight years since the First-tier Tribunal dismissed his appeal. The passage of time has, in this case, yielded two significant changes in circumstance.

31. First, the law and rules have changed. As I have already noted the substantive meaning of the term 'deportation' has altered. At the date that the deportation order was made, it was the procedure by which the Secretary of State removed persons who had overstayed their leave or otherwise breached conditions; today it is confined to the removal of other classes of non-nationals, notably criminals. The law has also changed since the First-tier Tribunal considered the Appellant's long residence appeal in 2009. At that time the applicable provision was paragraph 276B:

> **276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:**
>
> (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom; or

> **(b) he has had at least 14 years continuous residence in the United Kingdom, excluding any period spent in the United Kingdom following service of notice of liability to removal or notice of a decision to remove by way of directions under paragraphs 8 to 10A, or 12 to 14, of Schedule 2 to the Immigration Act 1971 or section 10 of the Immigration and Asylum Act 1999 Act, or of a notice of intention to deport him from the United Kingdom; and**
>
> **(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence**, taking into account his:
>
> (a) age; and
> (b) strength of connections in the United Kingdom; and
> (c) personal history, including character, conduct, associations and employment record; and
> (d) domestic circumstances; and
> (e) previous criminal record and the nature of any offence of which the person has been convicted; and
> (f) compassionate circumstances; and
> (g) any representations received on the person's behalf; and
>
> (iii) the applicant has sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, unless he is under the age of 18 or aged 65 or over at the time he makes his application.

This was the legal framework being applied when the First-tier Tribunal made the comments that they did (set out above). The current rule on long residence/private life does not contain any 'clock-stopping' provisions. Nor does it require the decision maker to conduct a wide- ranging assessment of whether it would be undesirable for the applicant to remain. Those matters are now dealt with under the 'suitability' requirements in Appendix FM, and as I note above the only one of these to have been invoked by the Secretary of State is the fact that the deportation order itself still stands.

32. Secondly the Appellant's own circumstances have changed considerably. He is now in a stable relationship with a Jamaican national and they have three children together. Those children have been born and brought up here. The Appellant's private life, already well established, has now therefore been supplemented by a substantial family life, and although neither partner nor children have leave to remain the position of the family as a whole remains a consideration.

33. I remind myself that there is a presumption that the order should stand, and that the selected extracts I have been given from the 2009 determination should be treated as authoritative as of the date that those findings were made. Having considered all of those factors in the round I am satisfied that the deportation order should now be revoked. The matter must be considered in the context of the current rules, which recognise that continuous long residence of twenty years is a matter that tips the balance in the favour of the applicant. Paragraph 276ADE(1) illustrates how the Secretary of State finds that

the balance should be struck. The nature of the rule is that after such a period of residence a failure to comply with immigration laws will be overlooked: that is implicit in a provision to regularise the position of overstayers. That is what the Appellant is, and that is why he was served with the 'deportation order'. Having had regard to all of the circumstances, to the Appellant's very well established Article 8 rights and to the exceedingly long passage of time since the order was made, I am satisfied that it would no longer be appropriate to bar his regularisation with reference to what was, in essence, a decision to administratively remove him 20 years ago.

34. I find that the deportation order should be revoked, and that the Appellant should be given leave to remain pursuant to paragraph 276ADE(1)(iii) of the Rules.

Decisions

35. The determination of the First-tier Tribunal contains an error of law and it is set aside.

36. The appeal is allowed on human rights grounds.

37. There is no order for anonymity.

Upper Tribunal Judge Bruce
31st May
2017