IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/23297/2016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 18 September 2017	**On 2 October 2017**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TEMITAYO AKINOLA

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr N Haque, Solicitor

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, it is convenient to continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Nigeria born in August 1994. He arrived in the UK on 15 March 1999 with another sibling, to join his father.

3. On 28 August 2015 in the Crown Court sitting at Chelmsford, he was convicted of an offence of inflicting grievous bodily harm with intent, and received a sentence of six years' imprisonment. That resulted in a decision by the respondent to make a deportation order against him. On 5 September 2016 a decision was made to refuse a human rights claim, that claim having been in effect the appellant's response to the deportation decision.

4. His appeal against the respondent's decision came before First-tier Tribunal Judge Herbert ("the FtJ") on 12 June 2017. The FtJ allowed the appeal, purportedly under the Immigration Rules, but also under Article 8 of the ECHR.

The grounds and submissions

5. The grounds upon which permission to appeal to the Upper Tribunal was granted contain a number of criticisms of the FtJ's decision. Those were supplemented by amended grounds of appeal, in respect of which I granted permission for them to be relied on on behalf of the respondent.

6. I do not propose to set out each and every ground of complaint, but summarise the main issues relied on on behalf of the respondent.

7. By way of introduction, it is to be noted that the appellant is single, is not in a relationship with a British citizen partner and has no children. Given the length of sentence, he needs to demonstrate very compelling circumstances over and above those described in paragraphs 399 and 399A of the Rules (parental relationship with a child or partner, and residence/integration/obstacles to integration, respectively), and similarly in relation to s.117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

8. It is contended that the FtJ failed to give reasons for concluding that the appellant was ill-equipped to deal with return to Nigeria. The FtJ had said at [81] that Nigeria must be one of the most difficult countries in Africa simply to relocate to if one does not have the benefit of language, culture and custom in relation to that country. However, that assertion is inadequately reasoned, it is argued. Further, the FtJ had failed to acknowledge the assistance that the appellant could obtain from his family in the UK. The fact that he does not speak Yoruba would only be relevant if the appellant had to live in a part of Nigeria where that was the only language. The appellant speaks English.

9. At [100]–[102], the FtJ had made reference to the longer sentences of imprisonment passed on defendants of African Caribbean origin as compared to their white counterparts, although acknowledging that in this appellant's case a shorter sentence, even if in excess of four years, would not have affected the considerations that needed to be applied. However, it was not clear therefore, why the FtJ included reference to that issue in his decision.

10. The OASys report referred to the appellant as representing a medium risk to others, yet the FtJ had found that when released he would only pose a low risk. It is argued that the FtJ had failed to give reasons for departing from the view in the OASys report. Furthermore, the FtJ had not reflected in his decision the strong public interest in deportation, regardless of the risk of reoffending. The FtJ had also erred in his assessment of the principle of deterrence.

11. In the amended grounds, some of the same arguments are advanced, albeit in expanded form. One of the factors that the FtJ failed to take into account, it is argued, is that the appellant had in fact denied the index offence and had been convicted.

12. In terms of the risk of reoffending, the FtJ had overemphasised the relevance of that issue, without having regard to authorities which reveal that the risk of reoffending was not the most significant issue in the case of serious offences.

13. Furthermore, it is argued that the FtJ erred in finding that there was a further proportionality test outside the confines of s.117C of the 2002 Act, which approach is inconsistent with the decision of the Court of Appeal in *NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239 which makes it clear that ss.117A–117D of the 2002 Act are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with Article 8.

14. In submissions on behalf of the respondent, Mr Jarvis relied on the grounds and amended grounds. Other aspects of the decision were referred to, and to which I shall make reference in due course.

15. On behalf of the appellant a skeleton argument was also relied on. It was, in effect, submitted in the skeleton argument that the FtJ's decision is free from any material error of law. Reference is made in it to the appellant's background and his offending behaviour. It indicates that the appellant became involved in gang culture (although that does not seem to have been part of the respondent's case in terms of deportation). Arguments are advanced in terms of the extent of the appellant's integration in the UK, with reference to the age that he was when he arrived, being four years. It is argued that the FtJ's decision was made in line with relevant authority, as cited in the skeleton argument.

16. In submissions, Mr Haque relied on the skeleton argument. He reiterated the features of the appeal which the FtJ found in favour of the appellant, submitting that the FtJ had taken into account the seriousness of the offence and the extent of the appellant's integration in the UK, as well as the hardships that he would face on return to Nigeria if deported.

Conclusions

17. I have no hesitation in concluding that the FtJ's decision contains significant errors of law such as to require it to be set aside. The respondent's arguments make good her case for material errors of law in many respects, although I only need to highlight some of the deficiencies in the FtJ's decision. All of the matters I refer to were canvassed, to a greater or lesser extent, at the hearing before me.

18. The OASys report at pages 26 and 34 refers to the appellant's risk of reoffending as being medium. The risk of serious harm to the public in the community is also assessed as being medium (page 31). At [55] the FtJ referred to that risk assessment but stated that it appeared to be an assessment largely because of the conviction, and not being necessarily a comment on his lack of insight now, or his willingness to undertake "remedial and introspective courses" within detention, should they become available.

19. The OASys report, and the risk assessment within it, is dated 11 November 2016. The appeal before the FtJ took place on 12 June 2017. At [77] the FtJ said that the appellant had displayed a significant degree of remorse for his actions and that "he now only poses a medium risk to the general public as of November 2016", but on his view a very low risk to the general public by the time of his release in 2018, by which time he should have completed the Thinking First programmes and other courses. At [78] he said that the appellant had already made significant progress in addressing his offending behaviour on his own and with his family, and concluded that there was a very low risk that anything of the like would occur again.

20. However, I cannot see there, a properly reasoned conclusion in terms of the risk of reoffending that the appellant would pose by the time of his release in 2018. The FtJ, on the face of it at least, accepted that the appellant "now" poses a medium risk to the general public, yet concluded that that would become a very low risk by the time of his release in 2018. There is very little in the FtJ's reasons to support that speculative conclusion.

21. On behalf of the appellant reference is made to the FtJ's quotation at [12] from the sentencing remarks. Those sentencing remarks are to the following effect in this context:

> "I'm not persuaded that there is a significant risk of serious harm to the public through the future commission, by you, of specified offences such as to require the imposition of a life sentence or an extended sentence."

22. That is taken on behalf of the appellant as an indication that there is no significant risk of serious harm to the public by future offending by the appellant. However, that is to misunderstand what the sentencing judge was saying. He was referring to the process by which a life sentence or an extended sentence may be imposed in relation to the risk of the commission of a specified offence. That is a quite different consideration

from what needs to be assessed in considering the public interest in a deportation appeal.

23. Although the FtJ referred to the seriousness of the offence, and at [97] referred to society's abhorrence of such offending, as well as the principle of deterrence, he referred at [96] to the decision in *Secretary of State for the Home Department v HK (Turkey)* [2010] EWCA Civ 583, and purported to quote from it. However, the quotation does not come from the case cited. Apart from that, whatever case the quotation comes from, it is misquoted, for example using the expression "public propulsion". The FtJ has plainly not taken care to ensure that the citation of cases is accurate as to their content.

24. Furthermore, at [98] the FtJ quotes, without citation, what are said to be "the words of Blake J", what is in fact a quotation from *RG (Automatic deport – Section 33(2)(a) exception) Nepal* [2010] UKUT 273 (IAC), a decision which was overturned on appeal by the Court of Appeal in *Gurung v Secretary of State for the Home Department* [2012] EWCA Civ 62.

25. At [99] the FtJ said that the appellant was under the age of 18 when he committed the offence of grievous bodily harm with intent. However, the appellant was in fact 19 years of age at the time. It appears therefore, that the FtJ considered the appeal on the basis that the appellant was a juvenile when he committed the offence, which he was not. Youth plainly is a factor to be taken into account, but it was incumbent on the FtJ to determine the appeal on a correct factual basis.

26. In terms of the sentence that was imposed, at [100]–[103] The FtJ said as follows:

> "100. Notwithstanding the Appellant's relatively young age when he committed this offence I have also had regard in passing to the substantial evidence under Section 95 of the Criminal Justice Act 1991 as published on a regular basis and underlined by the review by the right Honourable David Lammy MP that defendants of African Caribbean origin are habitually sentenced to a longer sentence of imprisonment than their white counterparts.
>
> 101. Whilst there is no clear evidence before me that this would have impacted upon the length of sentence received by this Appellant there is no evidence that it did not. This is not to suggest that this would have made a substantial difference to the issues before me.
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> 102. It is in all likelihood even if the sentence had been somewhat shorter by even a year it is almost inevitable that it would [have] been a sentence of four years imprisonment or more and therefore this factor would have had a very minimal impact upon the issues before me. It is nevertheless important to note as the level of deterrence may be directly related to the length of the criminal sentence that has been passed on any individual.

> 103. It is also correct to say that this sentence was not subject to an appeal although the reason for it appeared to be a reluctance on behalf of the solicitors and the cost to the family of having to pursue this as [a] matter of private litigation."

27. Although the FtJ suggested that the appellant might have received a sentence of over four years in any event, and therefore his remarks in this context would not have made a difference to his assessment, it is plain that the FtJ, if not expressly, then by clear implication, formed the view that the sentence that was imposed on the appellant was excessive. Firstly, he referred to "substantial evidence" that the sentence imposed on defendants of African Caribbean origin are habitually longer than those imposed on white individuals. He referred also to the fact that the sentence was not the subject of an appeal, but that that appeared to be as a result of reluctance on the part of the solicitors and the cost to the family.

28. I am satisfied that the FtJ in that context took into account wholly irrelevant considerations when assessing the public interest in deportation. It is not for the FtJ in determining a deportation appeal to seek to undermine the sentencing process, not least because the sentencing judge will have been in a far better position to assess the appropriate sentence in the context of a criminal trial than an Immigration Judge who is undertaking an entirely different task.

29. I am further satisfied that the FtJ made unsupported assertions in relation to the appellant's circumstances on return to Nigeria. At [81] he said as follows:

> "…Nigeria must be one of the most difficult countries in Africa simply to relocate to if one has no benefit from language, culture and custom which clearly this Appellant does not."

30. The FtJ does not refer to any background evidence or other material to support the contention that Nigeria is a particularly difficult country in Africa to be returned to.

31. Furthermore, at [83] the FtJ said that:

> "It is inconceivable that without family or other means of support to turn to on the ground in Nigeria he would himself be extremely vulnerable to all forms of abuse upon return."

32. Again, there is no indication of the basis upon which the FtJ came to that conclusion.

33. Lastly, in my judgement there is merit in the respondent's argument that the FtJ appears to have concluded that beyond the confines of s.117A–D of the 2002 Act, there is a proportionality assessment which can be carried out outside that regime. Such a conclusion is contrary to the decision in *NE-A (Nigeria)*, in particular at [14].

34. As I have indicated, I have not rehearsed every aspect of the FtJ's decision about which complaint is made on behalf of the respondent. The matters I have referred to are sufficient to reveal that his decision must be set aside for error of law.

35. Given that I consider that there needs to be a wholesale reappraisal of the appellant's appeal, the appropriate course, taking into account the Senior President's Practice Statement at paragraph 7.2, is for the appeal to be remitted to the First-tier Tribunal.

36. Accordingly, this appeal is remitted to the First-tier Tribunal for a hearing *de novo* with no findings of fact preserved, before a judge other than First-tier Tribunal Herbert.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside, and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Herbert, with no findings preserved.

Upper Tribunal Judge Kopieczek 29/09/17