Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12434/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 October 2017	**On 26 January 2018**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MIKE [N]
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr F Khan, Counsel instructed by Edward Marshall Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant" against the decision of the Secretary of State on 3 May 2016 refusing him leave to remain on human rights grounds. The Secretary of State decided to make a deportation order against the appellant on 19 October 2015 and that no doubt prompted him to apply for leave to remain on human rights grounds.

2. The claimant is a citizen of Nigeria. He was born in 1960. He claims to have entered the United Kingdom in June 1995. He came to the attention of the immigration authorities on 28 September 1995 when he applied for asylum.

3. On 6 February 1996 he married a British citizen at a registry office and on 21 February 1996 he applied for leave to remain in the United Kingdom based on his marriage.

4. Very shortly afterwards, on 25 February 1996, he was apprehended by officials of HM Customs and Excise in connection with the attempted importation of 2.45 kilograms of cocaine. This was clearly a very serious matter because on 20 September 1996 at the Crown Court sitting at Nottingham he was convicted after a trial of being knowingly concerned in fraudulent evasion of prohibition or restriction on importation of class A controlled drugs and was sentenced to fifteen years' imprisonment. He was also recommended for deportation.

5. He was released from prison on licence in January 2004 and has not been convicted of any offence in the intervening twelve years and nine months.

6. Unremarkably he was made the subject of a deportation order in November 2003 but he was not removed at the end of his detention and on 8 June 2010 the Secretary of State refused to revoke that deportation order. He appealed that decision and the appeal was allowed by the First-tier Tribunal.

7. The First-tier Tribunal noted that as well as the matter for which he was sentenced to fifteen years' imprisonment he had previously misbehaved and come to the attention of the criminal justice system. He had been cautioned in 2003 for an offence of dishonesty and had used false identities and dates of birth. The First-tier Tribunal also found that he had twice before 1996 entered the United Kingdom with a false passport and had been removed.

8. The Tribunal also found that the appellant had made a stable home with his wife and there were three children of that family then aged 19, 17 and 13 years. The reasons for the First-tier Tribunal allowing the appeal are set out particularly at paragraph 45 of the Tribunal's decision in 2010 which states:

> "We find from the evidence before us that Mrs N ---'s disability severely affects her ability to cope with day-to-day living, particularly outside her home. We find that [the eldest child] is still dependent emotionally on the [claimant]. We find that, since his release from prison, the [claimant] has become an integral and essential part of each of his children's lives. We find that, without his day-to-day support, Mrs N--- would have to rely on either the children for support or obtain support from social services. We find that, in these circumstances, it is not reasonable to expect either her or any of the children to return to Nigeria with the [claimant] and establish a family life there. We accept Mrs N ---'s evidence that to remove the [claimant] would be harmful to the children's emotional and intellectual development, particularly as the burden of her care would then fall onto their shoulders. We find that the [claimant's] removal from the United Kingdom would result in significant difficulties for both Mrs N--- and the children."

9. It is therefore particularly annoying to find at the start of the "decision to refuse a human rights claim" the assertion that the First-tier Tribunal had previously found that "you could not be deported from the United Kingdom because to do so would breach your Human Rights under Article 8 of the ECHR". Manifestly the Tribunal had made no such decision. In my experience

appeals against deportation decisions are almost never allowed because of the impact of deportation on the person to be deported but on the impact that deportation would have on members of that person's immediate family and I find it very regrettable that a refusal letter, which is thorough and fair in many respects, so grossly misrepresents the First-tier Tribunal's reasons for allowing the appeal in 2010.

10. However my concern is more with the decision of the First-tier Tribunal not in 2010 but in February 2017.

11. I will consider the Secretary of State's grounds in more detail below but, and with respect to Mr Khan who could only work with the material presented to him by the First-tier Tribunal, I have no hesitation in saying that the First-tier Tribunal erred materially.

12. There have been significant developments in the law concerning deportation and human rights since 2010, not least being the amendment in July 2014 of the Nationality, Immigration and Asylum Act 2002 by the introduction of the extended form of Section 117. Section 117A provides that this part of the 2002 Act "applies where a court or Tribunal is required to determine whether a decision made under the Immigration Acts (a) breaches a person's right to respect for private and family life under Article 8; and (b)as a result would be unlawful under Section 6 of the Human Rights Act 1998."

13. It follows that this Section should have been at the forefront of the First-tier Tribunal's mind. It is something that it was statutorily obliged to consider.

14. Section 117B introduces considerations in all cases in which Article 8 is relied upon and Section 117C introduces additional considerations in cases involving foreign criminals. There are two schemes; one applies where the foreign criminal has not been sentenced to a period of four years or more in which event certain exceptions can apply and the other is where the foreign criminal has been sentenced to a period of imprisonment of at least four years. In that event, according to Section 117C(6) "the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2".

15. Exception 1 applies where a person has been lawfully resident in the United Kingdom for most of his life and is socially and culturally integrated into the United Kingdom and there would be very significant obstacles to that person's integration into the country to which it is proposed to deport him.

16. Exception 2 applies where is a genuine and subsisting relationship with a qualifying partner or parental relationship with a qualifying child so that the effect of deportation on the partner or child would be unduly harsh.

17. As is apparent from what I have said above in a case such as this where the sentence is over four years' imprisonment the public interest requires deportation unless there are "very compelling circumstances, over and above those described in Exceptions 1 and 2".

18. With great respect I have to conclude that the First-tier Tribunal lost sight of this provision when making its deliberations. There is a "nod" towards the provisions of the Act where the Tribunal decided at paragraph 17 that "the

public interest in deportation is considerably outweighed in the very compelling circumstances amounting to such exceptional circumstances" that removal would be disproportionate. However we are not told what those very compelling circumstances are.

19. It is clear from the decision that the judge was impressed by the appellant's good behaviour since his release from prison and what seems to be, unremarkably, an accepted fact by the Secretary of State that there is little chance of this claimant committing further criminal offences.

20. I now turn to the Secretary of State's grounds.

21. These criticise the judge from his finding at paragraph 15 that "expression of societal revulsion" is not a legitimate component justifying interference with a person's private and family life. However the First-tier Tribunal Judge was quoting accurately part the judgement of Lord Wilson in the decision in **Hesham Ali [2016] UKSC 60** and although Lord Kerr's judgment was a minority judgment these remarks were based carefully on human rights jurisprudence and Lord Wilson who authored the phrase "an expression of society's revulsion" in a different capacity expressly adopted Lord Kerr's criticism. It follows that when the grounds complain as they do that the First-tier Tribunal had wrongly followed a dissenting judgment it is the grounds and not the First-tier Tribunal that is wrong.

22. Nevertheless the legitimate reason for interfering with a person's private and family life is prevention of crime and disorder and the deterrent effect of deporting a foreign criminal remains legitimate. As far as I can see the Secretary of State did not rely on expression of societal disapproval as a reason for making the order that led to this appeal.

23. It would have been helpful if the judge had considered more carefully Section 117B of the 2002 Act. This applies in all cases where a Tribunal has to consider Article 8 of the European Convention on Human Rights and establishes that the maintenance of effective immigration control is in the public interest and that when conducting a balancing exercise little weight should be given to a private life or a relationship formed with a qualifying partner established at a time when a person is in the United Kingdom unlawfully. It also provides that when a person is not liable to deportation the public interest does not require removal where there is a genuine and subsisting parent relationship with a qualifying child. This Section of course does not apply here but it is instructive to appreciate that even if there were no question of deportation the judge would be required to give little weight to the relationship the appellant has with his children who are now adult and are no longer qualifying children. Clearly this relationship with the children are now outside the statutory exceptions.

24. The relationship with his wife is a little different. They married after he had applied for asylum and so presumably had some weak permission to be in the United Kingdom and he has had permission to be in the United Kingdom at different stages when he has pursued various applications and certainly since discretionary leave was granted in May 2011 following the appeal against the revocation of the deportation order succeeding. It follows that his wife's relationship has been established at a time when he was in the United Kingdom lawfully but that relationship cannot be given much weight in a balancing

exercise because of the clear requirements of Section 117C(6) which prescribes that there be "very compelling circumstances" over and above those described in Exceptions 1 and 2."

25. Having decided that the First-tier Tribunal erred by not considering this point I have to decide on the remedy. There was considerable material prepared for the First-tier Tribunal's hearing. I have no hesitation in accepting, and this has not been challenged, that the claimant remains an important influence in the lives of his now adult children and that his departure would be disappointing for them. It would be more than that for his wife who does have some health problems and who does not want to settle in Nigeria even if she were to be permitted in. However as is apparent from what I have said above these things do not support a finding that there are "very compelling circumstances, over and above those described".

26. Neither can much be made of the length of his residence in the United Kingdom. It started off unlawfully and quite a lot of it was spent in prison. His time since he came out of prison has been a time of limited or no leave although I recognise that he has been known to the authorities since his asylum application in September 1995 and any periods where he was without leave were short between different applications. The position was a little more formalised after his successful appeal against deportation but his periods of leave then have always been limited. At no time was he entitled to assume he was permitted to settle in the United Kingdom. He has always known he had to make a further application and it is trite immigration law that a person's legitimate expectation can only be for a decision in accordance with the Rules relevant to when the decision is made. The Secretary of State's approach to deportation cases has probably become harsher in the intervening period and has certainly become subject to relevant statutory changes that make it harder for a person to resist deportation but that is not unlawful and the fact that Parliament has made it harder to remain is no reason to allow an appeal.

27. I consider the claimant's age and the fact that he has been out of Nigeria for a long time. Setting aside periods in prison he has not been lawfully resident in the United Kingdom for most of his life so even if Exception 1 applied the claimant could not come within it but it does not apply and the public interest requires deportation again unless there are "very compelling circumstances" over and above those described in Exceptions 1 and 2. There are none here. This appeal is quite different from the kind of case that the Tribunal sees occasionally where a person with, for example, indefinite leave to remain, is allowed out of prison and re-establishes himself in the community and many years pass before the Secretary of State realises the deportation is a possibility. Such cases are rare but are not unknown and might very well support a finding that there were such very compelling circumstances but that line of argument does not apply when a person has been allowed to stay for the sake of his relationship with his children who can be expected to grow older and reach adulthood and his wife whose circumstances are not necessarily fixed and whose own leave is of limited duration.

28. I raised these points with Mr Khan at the hearing but although he pointed out, correctly, the length of time the claimant had spent in the United Kingdom, that his wife does have significant health problems including problems with her

eyes and that the claimant has succeeded in an earlier appeal he was not able to draw my attention to anything that I regard as capable of amounting to "very compelling circumstances, over and above those described".

29. I appreciate the First-tier Tribunal Judge's concern in this case. There is something intrinsically worrying to lawyers, and all fair-minded people, that a person whose appeal succeeds against deportation should find himself deported some years later when he has committed no further offence and has established himself still more firmly in the United Kingdom. However this is a false concern arising from a false analysis. This claimant is a man who has never had indefinite leave to remain, whose appeal against deportation did not succeed because of his circumstances but mainly because of his children's circumstances and to some extent his wife's circumstances and who since that successful appeal has had short periods of leave so that his position can be considered again in the light of the new statutory regime.

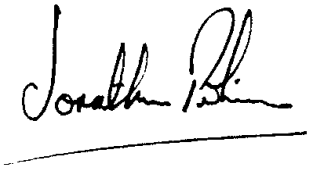
30. It follows therefore that I am persuaded that the proper thing to do in this case is to set aside the decision of the First-tier Tribunal and substitute a decision dismissing his appeal against the first Secretary of State's decision.

31. I appreciate that this will be most unwelcome to the claimant who thought that he had won but as I hope I have made clear my reason in this decision is that I am bound by Section 117C(6) of the 2002 Act and I can see nothing in my own reading of the papers or Counsel's representations that could support the finding that will be necessary to allow the appeal.

32. I am not allowing it under the Rules which are not a complete code but I am dismissing it under the Act which binds me. The Exceptions provided in the Act do not assist this claimant.

Decision

The First-tier Tribunal erred in law. I set aside its decision and I substitute a decision DISMISSING the claimant's appeal against the decision of the Secretary of State



Signed

Jonathan Perkins, Upper Tribunal Judge Dated: 24 January 2018