Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08679/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 March 2019	**On 25 March 2019**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

EGERTON [B]

(anonymity direction not made)

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr. J. Walsh of counsel, instructed by Chancery CS Solicitors

For the Respondent: Ms A. Everett, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Nigeria. He was born in Germany and entered the United Kingdom with his mother in 1993, at the age of nine months. He then remained here and started primary school in 1996. His mother applied for asylum on 16 April 1998 but her

application was refused on 16 July 1998. His mother then applied for indefinite leave to remain under the seven-year concession policy on 15 April 2002, naming him as her dependent, but her application was refused on 5 July 2006. On 22 November 2004 his mother applied for settlement under the Family ILR exercise, naming the Appellant was her dependent. This application was refused but on 3 July 2008 the Appellant and his mother were granted indefinite leave to remain under the Legacy Programme.

2. On 24 October 2015 the Appellant was convicted of conspiracy to inflict grievous bodily harm and manslaughter, on the basis of joint enterprise, and sentenced to eleven years imprisonment in a Young Offenders' Institution.

3. On 17 July 2014 he was served with notice of his liability to automatic deportation and on 7 August 2014 he claimed that deportation would breach his rights under Article 8 of the European Convention on Human Rights. Subsequently, on 8 October 2015, his human rights claim was refused and certified under section 94B of the Nationality, Immigration and Asylum Act 2002. He lodged a claim for judicial review against the latter part of this decision and, on 14 June 2017, the Respondent withdrew the certification and the decision to refuse his human rights claim.

4. A further decision to refuse his human rights claim was made on 31 July 2017 but his claim was not certified. He appealed against this decision and in a decision, promulgated on 10 January 2018, First-tier Tribunal Judge O'Callaghan allowed his appeal on human rights grounds.

5. The Respondent appealed against this decision and First-tier Tribunal Judge Kelly granted the Secretary of State for the Home Department permission to appeal on 29 January 2019 on a very limited basis. In his grounds of appeal the Respondent had attempted to rely on a number of Court of Appeal cases but First-tier Tribunal Judge Kelly found that "comparison of the factual matrix of the instant appeal with that of a reported decision will not assist the Secretary of State in demonstrating that the First-tier Tribunal had made an error of law. Decisions are reported for their legal principles rather than for the purpose of making factual comparisons". He also found that "given the Tribunal's extensive reference to authority concerning the meaning of "very compelling circumstances", it is not arguable that the Tribunal ultimately misdirected itself in this regard". (The Respondent has not filed and served any Rule 24 response in relation to these findings.)

6. Instead, First-tier Tribunal Judge Kelly found that it was "arguable that the Tribunal ultimately failed to identify any very compelling circumstances that were "over and above" those falling within the two exceptions to deportation.

ERROR OF LAW HEARING

7. The appeal is brought by the Secretary of State for the Home Department, but I have continued to refer to the parties as Appellant and Respondent, as described by First-tier Tribunal Judge O'Callaghan, to avoid any confusion when referring back to his decision, which is the one under challenge.

8. The basis upon which First-tier Tribunal Judge Kelly granted permission to appeal was not to be found in the wording of the grounds of appeal advanced by the Appellant. Rule 19(4) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the Procedure Rules") states that the notice of appeal must set out the grounds of appeal. However, Rule 2(1) of the Procedure Rules also states that the overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly. Rule 2(2)(d) states that this may include using any special expertise of the Tribunal effectively.

9. The Home Office Presenting Officer submitted that the grounds relied upon by First-tier Tribunal Judge Kelly to grant permission were implicitly contained within the grounds filed by the Secretary of State in so far as the question as to whether First-tier Tribunal Judge O'Callaghan had identified any circumstances over and above those falling within the two exceptions to deportation were part of the wider test as to whether there were any very exceptional circumstances over and above these exceptions. Counsel for the Appellant did not submit that it was impossible to read the further ground into those previously submitted and stated that he was prepared to respond to the newly articulated ground. Therefore, I deem the new ground to have been one which can be said to be *Robinson obvious* when First-tier Tribunal Judge Kelly was exercising his special expertise under the Procedure Rules.

10. Both counsel for the Appellant and he Home Office Presenting Officer then made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

11. The Appellant had been sentenced to eleven years imprisonment and, therefore, section 32 of the UK Borders Act 2007 applied and he was subject to automatic deportation unless he could establish that his deportation would amount to a breach of the European Convention on Human Rights. The sentencing remarks confirm that the Appellant was found guilty of being part of a gang of young people who had conspired to inflict grievous bodily harm on members of another gang. He had also been part of a group who attacked and killed an unarmed young man in Victoria Station and this led to him being convicted of manslaughter. He was sentenced to eleven years in a young offenders' institution.

12. At paragraph 114 of his decision, First-tier Tribunal Judge O'Callaghan clearly understood the egregious nature of the offences committed by the Appellant, as he stated:

> "The appellant has committed a very serious offence. I have no doubt that [S] experienced considerable fear and pain in the last minutes of his life; left by his friends, alone, on the ground, surrounded by a mob of violent youths and subjected to a knife attack. His last moments can only have been ones of great anguish … His death has adversely impacted not only upon his family but also upon his friends who have to deal with his sudden and violent loss".

13. In paragraph 101 of his decision, First-tier Tribunal Judge O'Callaghan also reminded himself that the more serious the offence committed by a foreign criminal, the greater is the public interest in the deportation of the criminal. First-tier Tribunal Judge Kelly refused the Secretary of State permission to appeal in relation to the grounds relating to the weight given to the seriousness of the Appellant's offence.

14. The basis upon which permission was granted was very narrow but it is necessary to place it in the context of the relevant Immigration Rules and statute.

15. Paragraph 397 of the Immigration Rules states that:

> "A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention…"

16. However, this statement is qualified by the contents of paragraphs 398 and 399 of the Immigration Rules. Paragraph 398 states that:

"Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least 12 months…

(c) …

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those listed in paragraphs 399 and 399A".

17. Paragraph 399 states that:

"This paragraph applies where paragraph 398(b) or (c) applies if-

(a) …

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen…, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported".

18. Paragraph 399A of the Immigration Rules states:

"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 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".

19. Paragraph EX.1. of Appendix FM to the Immigration Rules states that:

"This paragraph applies if

…

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen … and there are insurmountable obstacles to family life with that partner continuing outside the UK".

20. Paragraph EX.2. of Appendix FM to the Immigration Rules states that:

"For the purposes of paragraph EX.1. (b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner".

21. Section 117A of the Nationality, Immigration and Asylum Act 2002 states that:

"(1) This part 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.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard-

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals to the considerations listed in section 117C".

22. Section 117C states:

"Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of a foreign criminal is in the public interest.

(2) The more serious the offence committed by a foreign criminal, that greater is the interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where –

(a) C has been lawfully resident in the United Kingdom for most of C's life'

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh".

23. Therefore, even if the length of the Appellant's sentence precludes him from relying on the exceptions alone to avoid deportation, they are part of the factual matrix which must be considered when considering whether there are very compelling circumstances, over and above the content of these exceptions, which would entitle him to leave.

24. When granting permission to appeal, First-tier Tribunal Judge Kelly explicitly found that it was not arguable that First-tier Tribunal Judge O'Callaghan had misdirected himself in relation to the meaning of "very compelling circumstances". He also noted that First-tier Tribunal Judge O'Callaghan had made extensive reference to the relevant authorities as to its meaning and this has not been challenged by the Secretary of State. For example, in paragraph 107 of his decision, he found:

> "As to 'very compelling circumstances', Nicol J held in *Chege (section 117D: Article 8: approach)* [2015] UKUT 165 (IAC); [2016] Imm AR 833 that 'compelling' as an adjective means having a powerful and irresistible effect and the annexing of the word 'very' indicates that very high threshold that has to be passed to meet this requirement of the Rules".

25. First-tier Tribunal Judge O'Callaghan had also reminded himself that, in paragraph 38 of *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, Lord Reed had

observed that the cases in which the public interest in deportation of those who have been sentence to more than four years in prison "are likely to be a very small minority".

26. The only ground of appeal on which permission to appeal was granted to the Secretary of State for the Home Department was that ultimately First-tier Tribunal Judge O'Callaghan had failed to identify any circumstances which were 'over and above' those falling within exception one and two.

27. In my view, it is clear from paragraph 120 of his decision, that First-tier Tribunal Judge O'Callaghan understood that he needed to identify such circumstances, as he stated:

> "Turning to the appellant's personal facts I initially consider the exceptions identified by section 117(4) and (5) of the 2002, as very compelling circumstances require more than the establishment of one or both of these exceptions".

28. Previously, in paragraph 107 of his decision, First-tier Tribunal Judge O'Callaghan had also noted that "since the present appeal falls within section 117C [(5)], the public interest requires deportation unless there are very compelling circumstances over and above those described in "Exceptions 1 and 2".

29. First-tier Tribunal Judge O'Callaghan then gave detailed consideration to whether there were very exceptional circumstances 'over and above' the exception established in section 117C (4) and paragraph 399A of the Rules in paragraphs 121 to 125 of his decision.

30. In paragraph 121 he found that:

> "There are three elements to the exception established by section 117C (4) and paragraph 399A of the Rules which are concerned with 'private life' rights: a) the offender has been 'lawfully resident' in the United Kingdom for most of his life, b) they are 'socially and culturally integrated' into United Kingdom society and c) there would be 'very significant obstacles to integration in the society of the proposed country of removal. The elements are conjunctive and so all three must be satisfied before this exception can be relied upon".

31. In paragraph 122, he noted that the Appellant could not succeed in relation to the first requirement, as he had only had lawful status in the United Kingdom since the age of 15 and, therefore, he had not been lawfully present for most of his life.

32. In paragraph 123, First-tier Tribunal Judge O'Callaghan found, to the appropriate standard, that the Appellant had been fully integrated into United Kingdom society. He gave cogent and

detailed reasons for this decision and the Secretary of State for the Home Department has not sought to challenge the adequacy of these reasons.

33 In paragraphs 124 and 125 of his decision, First-tier Tribunal Judge O'Callaghan gave cogent and detailed reasons for finding that there would be very significant obstacles to the Appellant's integration into Nigerian society, if he were to be deported there. Again, the Secretary of State has not challenged the adequacy of this reasoning.

34. The Home Office Presenting Officer made the bare submission that there were no exceptional circumstances over and above the factors considered in these paragraphs which related to the Appellant's private life rights. However, in my view there were a significant number of factors which were referred to in detail in paragraph 131 of First-tier Tribunal Judge O'Callaghan's decision. These included the fact that the Appellant had shown genuine remorse from soon after the index offence and continues to do so and that he exhibited a proper understanding of his serious wrongdoing. He also noted that the Appellant's behaviour in prison, both before and after his conviction had been exemplary. In addition, he found that the evidence of Lord Hastings, Ms Rice and Ms Burge establish with some strength that the Appellant's rehabilitation is remarkable and that he enjoys a very good work record. He also noted that Dr. Misch's evidence was that the Appellant was 'an exceptional individual who is highly self-motivated and displays no area of forensic concern at all". In addition, between paragraphs 75 - 84 and 86 - 91 of his decision First-tier Tribunal Judge O'Callaghan had detailed the evidence provided by these witnesses, who had all attended the adjourned oral hearing in order to give evidence and be cross-examined. I note that First-tier Tribunal Judge O'Callaghan had the benefit of hearing such oral evidence and it is not suggested that the weight he gave to it was misplaced or irrational.

35. In my view, this evidence did refer to additional factors over and above those referred to in exception one.

36. In paragraph 126 and 127 of his decision, First-tier Tribunal Judge also gave detailed and cogent consideration to whether there were very exceptional circumstances over and above those relevant to paragraph 399(b)(i) of the Rules and section 117C (5) of the Nationality, Immigration and Asylum Act 2002. He noted that the Appellant's relationship with his wife started after he had been granted settled status in the United Kingdom and, therefore, at that time his immigration status was not precarious. He also found that their relationship was

genuine and subsisting and that it would be unduly harsh for his wife to join him in Nigeria. But he also identified factors which were over and above those contained in exception two. For example, he found that the Appellant's deportation would be a final blow to their marriage and would be an emotional body blow to his wife who had suffered various vicissitudes in life and that she had placed her emotional attachment to the Appellant as the core element in her own life.

37. In paragraph 128 of his decision, First-tier Tribunal Judge O'Callaghan then considers whether any of the factors identified are of such force, whether by themselves, or taken in conjunction with other relevant factors not covered by the 'exceptions' to satisfy the test" in of *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662. The Respondent has not challenged the manner in which he considered this part of First-tier Tribunal Judge O'Callagahan's decision.

38. In reply to the submission by the Home Office Presenting Officer that the Appellant had sought to rely on factors which were already mentioned in the two exceptions, Counsel for the Appellant relied on paragraph 19 of *NA (Pakistan)* in which Lord Justice Jackson found that:

> "A third question which arose under the 2012 rules was whether a foreign criminal seeking to establish "exceptional circumstances" could rely upon any matters of the kind referred to in paras. 399 or 399A…The answer is that a foreign criminal is entitled to rely on such matters, but he would need to be able to point to features of his case of a kind mentioned in paras. 399 or 399A, or falling outside the circumstances described in these paragraphs, which made his claim based on Article 8 especially strong".

39. Counsel noted that submissions similar to those made by the Home Office Presenting Officer had been discussed and not accepted in *NA (Pakistan)*. In particular, in paragraph 20 it was said that:

> "Jackson LJ, giving the lead judgment in this court in *Secretary of State for the Home Department v JZ (Zambia)* [2016] EWCA Civ 116, explained the reasons as follows:
>
> > "28. Mr. Pilgerstorfer submits that the first task of the First-tier Tribunal in a case such as this is to consider whether the claimant can bring himself within rules 399 or 399A. If he cannot, then matters of the character described in those two rules drop out of the picture. Thus, matters such as length of residence in the UK and lack of ties with Zambia cannot form part of the aggregation of matters which collectively constitute "exceptional circumstances" within the meaning of rule 398".

> 29. I do not accept this argument for two reasons. First, as a matter of construction, rules 398, 399 and 399A do not either expressly or impliedly "ring fence" the 399.399A factors in the way that Mr. Pilgerstorfer suggests. Rule 398 first requires the Secretary of State to see whether the proposed deportee falls into the safety net of rule 399 or 399A. If he/she does not, then rule 398 requires the Secretary of State to consider whether there are exceptional circumstances which outweigh the public interest in deportation…it would be bizarre if the Secretary of State were required to ignore such matters altogether when considering whether there were "exceptional circumstances".
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> 30. In my view, rule 398 requires the Secretary of State (and on appeal the First-tier Tribunal) to consider all relevant matters in deciding whether there are "exceptional circumstances" which outweigh the public interests in deportation… But the Secretary of State cannot take a shortcut to arrive at that answer by ignoring every circumstance of the character mentioned in rules 399 and 399A".

40. First-tier Tribunal Judge O'Callaghan correctly adopted the approach taken in *JZ (Zambia)* and approved in *NA (Pakistan).*

41. For all of these reasons, I find that First-tier Tribunal Judge O'Callaghan did not make any errors of law in his decision.

Decision

(1) The Secretary of State for the Home Department's appeal is dismissed.

(2) As a consequence, First-tier Tribunal Judge O'Callaghan's decision stands.

Nadine Finch

Signed Date 21 March 2019

Upper Tribunal Judge Finch