Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12221/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 June 2019	On 28 June 2019

Before

THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ESTHER [O]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: Ms Z Bantleman, Counsel instructed by S Hirsch & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal Judge Jones promulgated on 22 March 2019. The Secretary of State issued a notice of refusal to revoke a deportation order made against the now respondent appellant on 20 July 2006. The decision is dated 15 September 2017. The deportation order proceeded on a conviction Isleworth Crown Court on 3 January 2006 for using false instruments and attempting to obtain services by deception for which the

appellant received a sentence of imprisonment of nine months. In making the application for revocation the appellant relied on a number of factors including the fact that ten years had elapsed since the making of the deportation order. In the interim she had married a British citizen in 2006, although the First-tier Tribunal Judge found that the relationship was entered into in the United Kingdom prior to that. There were now also two children of the marriage aged 9 and 7. They reside with the appellant in Nigeria.

2. The grounds of appeal can be succinctly characterised as being misdirection in law by the First-tier Tribunal Judge in the application of the rules; the correct threshold was one of exceptional circumstances in accordance with paragraph 390A. Before us Mr Clarke drew our attention to the fact that the First-tier Tribunal Judge proceeded on the basis of Section 117C(5) on the basis that the appellant was a foreign criminal. This was an error of law; she is not a foreign criminal. It is not surprising that the First-tier Tribunal Judge proceeded on that basis since that was the way that it was presented by the appellant's representative before the First-tier Tribunal Judge and apparently acquiesced in by the Presenting Officer. That being the case Rule 391A applies and that is in the following terms:-

> "In other cases, revocation of the order will not normally be authorised 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".

3. In **Smith (paragraph 391(a) – revocation of deportation order) [2017] UKUT 00166(IAC))** the Upper Tribunal held that the fact that a period of ten years has elapsed since the making of the order creates a presumption that the order will be discharged unless having considered the individual facts of the case the Secretary of State considers that it continues to be in the public interest to maintain the order (paragraph 23).

4. Essentially what is required in the consideration of an application to revoke a deportation order where Section 117C does not apply is a proportionality exercise taking into account all of the factors including the public interest. The First-tier Tribunal Judge conducted that exercise and that is set out in the conclusions in paragraphs 26 onwards. In particular she took into account the fact that the appellant regretted her offending, that she has not reoffended, that her offending although serious concerning immigration controls it was not one of violence, that she does not present a risk of reoffending, that the appellant had entered into a relationship in the UK and that there were children of the relationship. Her husband suffers from sickle cell disease and if he was to return to Nigeria his life expectancy would be thereby reduced. These were all factors which the First-tier Tribunal Judge was entitled to take into account.

5. As Ms Bantleman pointed out the First-tier Tribunal Judge specifically addressed the public interest in paragraph 31 as follows:

> "31. In terms of the public interest I trust the respondent does not consider I treat this lightly. I do not. However, there are provisions here that express the public interest which I find are addressed to the requisite standard by the appellant and given the passage of time relevant to the sentence imposed".

6. Accordingly while it is clear that the reference to Section 117C(5) is misconceived, we do not consider that the error is a material one given that the First-tier Tribunal Judge has fully considered all the factors on both sides. Accordingly, the appeal is refused.

7. No anonymity direction is made.

LORD BOYD OF DUNCANSBY
Sitting as a Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

Date: 26 June 2019

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed and therefore there can be no fee award.

LORD BOYD OF DUNCANSBY
Sitting as a Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

Date: