Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12878/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 September 2019	**On 17 September 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SHO [O]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr O Sobowale, Counsel, instructed by NIDO

DECISION AND REASONS

Introduction

1. We shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is the Respondent and Mr [O] is once more the Appellant.

2. This is a challenge by the Respondent against the decision of First-tier Tribunal Judge Chana ("the judge"), promulgated on 17 July 2019, by which she allowed the

Appellant's appeal against the Respondent's decision of 28 February 2018, refusing his protection and human rights claims.

3. The context to this case is that the Appellant, a national of both Japan and the United States, had, during his residence in this country, committed a number of offences. This led to deportation proceedings being instigated against him by the Respondent on the basis that his presence in the United Kingdom was not conducive to the public good. It was determined by the Respondent that the Appellant was a persistent offender.

4. Initially the Appellant raised a protection claim but this is no longer a live issue.

5. In respect of the deportation legal framework, the Respondent accepted from the outset that the Appellant had resided in the United Kingdom lawfully for more than half of his life, therefore, paragraph 399A(a) of the Immigration Rules ("the Rules") was satisfied. The Respondent did not accept either that the Appellant was culturally and socially integrated in this country, nor that there would be very significant obstacles to his reintegration into Japanese society with respect to paragraph 399A(b) and (c) of the Rules.

The judge's decision

6. In what is a relatively brief decision, the judge sets out elements of the background to the case and makes certain findings of fact in relation to the length of the Appellant's residence in this country, his status whilst here (he had had indefinite leave to remain for the majority of the residence), that he had relatives in Japan, and that in light of a pre-sentence report prepared in February 2018 he was an immature individual. The judge concluded that the Appellant was "somewhat of a persistent offender" and noted that his offending, which related to the supply of relatively small amounts of cannabis, had been done when he was a child and he had apparently had no understanding of his actions. It was noted that the Appellant was at the date of hearing an adult and the judge clearly took the view that any future offending would result in very serious consequences for him.

7. For the purposes of this appeal, the most important paragraph in the judge's decision is 16, and it is worth quoting this in full:

> "I find that the Appellant comes within the exception that his removal to Japan given his immaturity would constitute very significant obstacles to his integration into the country that he would be removed to. Even though the Appellant has relatives in Japan, having lived in this country since he was a child, it would be difficult for him to integrate into Japan which has a very different culture to the United Kingdom as a 19 year old who needs the support of his family to kick his marijuana habit. However as an adult and if he continues to commit such offences there would be no impediment to his integration into Japan in the future."

8. The appeal was allowed, although we note that under the sub-heading of "Decision" it is said that the basis of this was "under the Immigration Rules". This of course is an impossibility, given the statutory framework relating to appeals after the amendments brought into force in 2014.

The grounds of appeal and grant of permission

9. The Secretary of State made an application for permission to appeal on the basis that the judge had failed to apply the relevant legal test in respect of paragraph 399A(c) of the Rules. It is said that there was insufficient analysis and/or reasons in respect of the conclusion that this exception applied to the Appellant.

10. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison on 14 August 2019.

The hearing

11. At the hearing before us Mr Walker relied on the grounds and submitted that the judge had simply failed to apply the relevant threshold as set out for example in the case of Treebhawon and Others (NIAA 2002 Particular 5A – compelling circumstances test) [2017] UKUT 13 (IAC).

12. Mr Sobowale submitted that a number of the comments made by the judge were in reality simply an expression of her thoughts by way of "advice" to the Appellant in terms of his future conduct. He submitted that the judge had heard from both the Appellant, his parents and then had considered all evidence, none of which had apparently been challenged at the hearing, and took account of the pre-sentence report. In light of this, the judge's decision was sustainable.

Decision on error of law

13. We conclude that the judge has materially erred in law in respect of what was a core issue in the appeal, namely whether there were very significant obstacles to the Appellant reintegrating into Japanese society, with reference to paragraph 399A(c) of the Rules and section 117C(4) of the Nationality, Immigration and Asylum Act 2002 as amended.

14. It is right that in the first sentence of paragraph 16 the judge states that the Appellant came within the exception on the basis that his removal to Japan would result in very significant obstacles to his reintegration into the society of that country, based, it appears, largely on his apparent immaturity. However, in the very next sentence she concludes that it would be "difficult" for the Appellant to integrate on return. In the final sentence of the same paragraph the judge states that as an adult (which of

course the Appellant was as at the date of hearing), and if he continued to commit such offences, there would be no impediment to his integration into Japan in the future.

15. In our view, this constitutes a confused and erroneous approach. In particular, the use of the term "difficult" is, we find, directly linked to the issue of integration into Japanese society. The test is not of course whether it would be "difficult", but whether there would be very significant obstacles. That imposes a significantly higher threshold, as is made clear not simply in Treebhawon but in paragraph 14 of the Court of Appeal's judgment in Kamara [2016] 4 WLR 152, [2016] EWCA Civ 813. We conclude that whilst the phrase very significant obstacles is stated at the beginning of paragraph 16 of the judge's decision, what follows significantly undermines what might appear at first blush to be a correct approach.

16. Given the importance of the need to apply the correct (and clear) test in a case such as this, we conclude that the judge has erred and that the error is material.

17. We appreciate Mr Sobowale's submission that the judge heard evidence and that it may be the case that much of this evidence, if not all, went unchallenged at the hearing. This does not detract in any way from our view on what the judge actually did when analysing that evidence and applying it within the relevant legal framework. We would note that whilst there are certain findings set out in particular in paragraph 14, it must be said that there was no particularly detailed analysis of the Appellant's circumstances as they relate to the issue of reintegration into Japanese society. The issues of family members living in Japan is dealt with almost in passing only and the issue of immaturity, whilst clearly of relevance, has not really been subjected to the analysis that is warranted, particularly in the context of the high threshold represented by the very significant obstacles test.

18. We also note that the judge appears to have proceeded on a factually erroneous basis, given that whilst most of the Appellant's offences were committed when he was a minor, the last two were not.

19. In light of the above, the judge's decision must be set aside.

Disposal

20. Having considered the appropriate course of action for the next stage of the process, we conclude that remittal to the First-tier Tribunal is warranted. Whilst there have been certain findings of fact by the judge, as observed previously, these are brief and do not cover all relevant matters in any event. There has been no specific finding that the Appellant is socially and culturally integrated in this country. Further, the judge's finding that the Appellant was a persistent offender is couched in less than clear-cut terms. There is, to our mind, a respectable argument to be had that the offences committed as a minor may have a material effect on the persistent offender assessment.

21. In light of the above, the Appellant's Article 8 claim must be looked at again with a clean slate, save for the uncontroversial fact that he has been in the United Kingdom lawfully for most of his life.

22. The protection claim is not pursued and is not to be considered on remittal.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

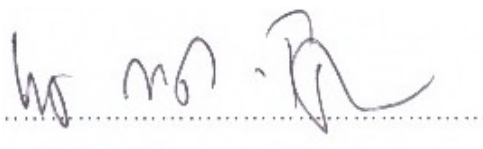
We set aside the decision of the First-tier Tribunal.

We remit the case to the First-tier Tribunal.

No anonymity direction is made.

Directions to the First-tier Tribunal

1. **This appeal is remitted to the First-tier Tribunal;**
2. **The Appellant's Article 8 claim is to be considered afresh, save for the fact that he has been in the United Kingdom lawfully for most of his life;**
3. **The protection claim is not to be reconsidered;**
4. **The remitted appeal shall not be conducted by First-tier Tribunal Judge Chana;**
5. **A Japanese interpreter is required;**
6. **There is a whole-day time estimate for the remitted hearing.**

Signed  Date: 9 September 2019

Upper Tribunal Judge Norton-Taylor