IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001749

First-tier Tribunal No: HU/07999/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 March 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUWADDAISI OLATUNDE OWOSOJU
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr B Adkoya, instructed by Waterdenes Solicitors

Heard at Field House on 6 February 2023

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but hereinafter for the purposes of this decision, we will refer to the parties as they were described before the First-tier Tribunal, that is Mr Owaosoju as the appellant and the Secretary of State as the respondent.

2. The appellant , a national of Nigeria appealed against the Secretary of State's decision dated 20th October 2020 to refuse his human rights claim following the refusal of an application to revoke a deportation order (3rd October 2020) and refusal of entry clearance to the United Kingdom. The appellant was convicted in 2008 of identity fraud. In her refusal letter the Secretary of State continued to

question the appellant's identity but did not accept there was family life with his said child, a British citizen living in the United Kingdom and born on 28th September 2007.

3. First-tier Tribunal Judge Malcolm ("the judge") allowed the appeal on human rights grounds and from [85] to 88] recorded as follows:

> *"85. Whilst it would be possible for the appellant's son to live in Nigeria with his parents, given his age and the fact that he has spent his whole life in the UK I consider that it clearly would have a major impact on his son's life if he were required to leave the UK. The advantage for the child would of course be that he would be able to live with both of his parents if he and his mother were to relocate to Nigeria, however overall I do not consider that it would be reasonable to expect the appellant's son to relocate to Nigeria.*
>
> *86. I was advised in evidence that the appellant's son was a few months old when the appellant left the UK.*
>
> *87. I accept that the appellant does have family life with his wife and son albeit that the family life which they do have has been maintained by such methods of communication as they have been able to employ.*
>
> *88. I also accept from the evidence which has been presented that the appellant's continued absence from the UK has had an effect on his son resulting in his son requiring counselling from CAMHS in 2015 and 2016".*
>
> …
>
> *94. In considering the appeal under Article 8 outside of the requirements of the Immigration Rules given that there is a Deportation Order in place I require to consider if there are compelling circumstances. I have given consideration as to whether there are compelling circumstances which outweigh the public interest considerations*.[our underlining]

The grounds of appeal

4. The Secretary of State submitted that the First-tier Judge when allowing this matter under Article 8, failed to apply primary legislation and identified that

> *'Reliance is placed on Binaku (s. 11 TCEA; s. 117C NIAA; para 399D) [2021] UKUT 34*
>
> *(IAC), which confirms that in cases involving foreign criminals, the Tribunal is required to apply the structured approach under Part 5A of the 2002 Act which applies equally to pre-removal cases, and as in this instance, cases where an individual has already been removed. Paragraphs [77], [81], [82], [88] and the summary at [97] all refer'.*

It was contended that

'by not following this approach, the FTJ has made a material misdirection of law, so that the decision should be set aside. No unduly harsh outcomes have been identified, nor any very compelling circumstances.

Analysis

5. The judge made no reference whatsoever to Section 117C or Section 117D of the Nationality Immigration and Asylum Act ("the 2002 Act"). Those sections are axiomatic to the appeal.

6. Those sections of the 2002 Act set out as follows:

117CArticle 8: additional considerations in cases involving foreign criminals

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

(2) The more serious the offence committed by a foreign criminal, the greater is the public 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.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

Section 117D insofar as material:

…

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

7. In a letter dated 3rd October 2020 and served on 5th October 2020, the respondent identified that the appellant had been convicted by Lewes Crown Court in 2008 for possession of false identity documents and was sentenced to 9 months in prison. He was recommended for deportation. The Secretary of State specifically confirmed that

> *'The maintenance of your deportation order is conducive to the public good and in the public interest because you have been convicted of an offence which has caused serious harm'.*

8. The judge failed to recognise that the appellant was ostensibly subject to Section 117D of the 2002 Act (and thus Section 117C) and did not engage with those provisions which would determine whether Section 117C applied. That was the first task and the failure was a material error of law. As explained in Mahmood v Secretary of State [2020] EWCA Civ 717 at [56]

> *"The views of the Secretary of State are a starting point and the reasoning of a decision letter may be compelling; but ultimately the issues that arise under s.117D(2)(c)(ii) will be a matter for the FtT. Provided the tribunal has taken into account all relevant factors, has not taken into account immaterial factors and has reached a conclusion which is not perverse, its conclusion will not give rise to an actionable error of law."*

9. As paragraphs [77] and [83] of Binaku confirm

> *"77. By virtue of section 117A(1) of the 2002 Act a tribunal is bound to apply the provisions of primary legislation, as set out in sections 117B and 117C, when determining an appeal concerning Article 8. In cases concerning the deportation of a foreign criminal (as defined), it is clear from section 117A(2)(b) of the 2002 Act that the core legislative provisions are those set out in section 117C. It is now well-established that these provisions provide a structured approach to the application of Article 8 which will produce in all cases a final result compatible with protected rights (see for example NE-A (Nigeria) [2017] EWCA Civ 239, at paragraph 14, and CI (Nigeria), at paragraph 20)".*
>
> *…*
>
> *83. Paragraph 52 of IT (Jamaica) is instructive for present purposes:*

> *"The function of section 117C is to set out the weight to be given to the public interest to be taken into account in the proportionality exercise to be carried out under Article 8 of the Convention in the case of a foreign criminal. Section 117C(1) states that the deportation of foreign criminals is in the public interest. In this context, and indeed in the other uses of the word "deportation" in this section, the word "deportation" is being used to convey not just the act of removing someone from the jurisdiction but also the maintaining of the banishment for a given period of time: if this were not so, section 117C(1) would achieve little.""*

10. There was no analysis by the judge of the concept of 'unduly harsh', and no analysis of whether continued separation of the father and child was considered 'unduly harsh' particularly as the judge stated at [84] "the child had lived in the United Kingdom and nowhere else". The subsequent analysis of 'very compelling circumstances' was thus also fundamentally flawed. When allowing the appeal on compelling circumstances the judge referred to the threshold of 'compelling circumstances' and not 'very compelling circumstances' contrary to Hesham Ali v Secretary of State [2016] UKSC 60 which explained at [50]

> *"The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in MF (Nigeria) - will succeed".*

11. Mr Adekoya conceded that there was an error of law but submitted that we should preserve the findings of fact within the decision and possibly remake the decision ourselves. Mr Whitwell objected to that course owing to the extent and nature of the findings to be made. We conclude that owing to the entire absence of proper legal direction that all findings were materially flawed and unsafe and we preserve none of the findings.

12. When determining the remitted the appeal the First-tier Tribunal will also need to have regard to the relevant Immigration Rules including Rule 391(a) which provides

> **"**391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:
>
> (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained ..."

Notice of Decision

13. The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the

matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Helen Rimington

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber

14th February 2023