



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-002602
On appeal from:
HU/00986/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 September 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE MEAH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDETANLEN BOGDAN OAHIMIN-AKHIMIEN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Arifa Ahmed, a Senior Home Office Presenting Officer
For the Respondent: Ms Althea Radford of Counsel, instructed by Turpin and Miller LLP (Oxford)

Heard at Field House on 13 August 2024

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 13 April 2023 not to revoke a deportation order to send him to Nigeria, of which he is a citizen. The claimant is also a citizen of Romania. The claimant's mother is Romanian and his father Nigerian, which is why he has dual citizenship. The claimant has three children, all British citizens, by different mothers.

2. The claimant is a foreign criminal within the meaning of the UK Borders Act 2007. He has had a problem with alcohol and has a history of criminal offending:
 - (a) On 16 July 2001, the claimant was convicted of wounding and sentenced to 30 months' imprisonment;
 - (b) On 31 December 2005, he was cautioned for common assault;
 - (c) On 2 March 2021, over two months after the EU Exit specified date of 11 p.m. on 31 December 2020, the claimant received a caution for sending threatening communications to his former partner;
 - (d) On 16 September 2021, at Leeds Magistrates' Court, the claimant was convicted on three counts of having a blade or sharply pointed article in a public place. He was sentenced to 1 year's (concurrent) imprisonment on each offence, and ordered to pay a victim surcharge; and
 - (e) On 10 November 2022, he was convicted of possessing a knife, blade or sharp pointed article, sentenced to 8 months' imprisonment, and ordered to pay a victim surcharge.
3. **Mode of hearing.** The hearing today took place face to face.
4. For the reasons set out in this decision, we have come to the conclusion that the First-tier Judge's decision falls to be upheld, and the Secretary of State's appeal must be dismissed.

Background

5. The claimant has travelled between Nigeria and the UK since he was 14 years old, in 1994. He has spent only a short period in Romania just after he was born in 1980. He is 44 now and has no real connection with Romania.
6. The claimant became an adult on 12 March 1998. He travelled to and from Nigeria, entering and leaving the UK, with leave, on six occasions as an adult, between April 1998 and July 1999. His case is that he returned to apply for another visa each time.
7. On 18 October 1999, the claimant was granted leave to remain until 31 October 2000. In January 2001, applying from Lagos Nigeria, the claimant successfully made an application for a student visa, which was extended on two occasions, to expire on 31 October 2010.
8. On 23 April 2007, the claimant was granted a registration certificate as an EEA national (A2 student). His application in May 2012 for a document certifying a permanent right of residence under the Immigration (European Economic Area) Regulations 2006 was refused on 9 July 2012 for want of documentary evidence. On 23 July 2020, the claimant applied for EUSS leave as an EEA national.
9. On 29 December 2021, based on his September 2021 conviction with a sentence of 12 months, the Secretary of State served a notice of intention to deport, accompanied by a request for information which might bring

him within one of the section 33 Exceptions to the automatic deportation provisions of the UK Borders Act 2007.

10. On 7 April 2022, the claimant completed his one-year sentence for the 2021 conviction and was briefly detained under immigration powers. He was released on immigration bail on 19 April 2022, but offended again, leading to the November 2022 conviction and an 8 month custodial sentence.
11. On 14 September 2022, the claimant's solicitors made submissions on his behalf regarding the deportation notice. On 13 April 2023, the claimant's outstanding EUSS application from 2020 was refused on suitability grounds and the Secretary of State made an EEA deportation order pursuant to the Immigration (European Economic Area) Regulations 2016 (as saved).
12. By reason of his long residence, the Secretary of State did not certify her decision and the claimant therefore had an in country right of appeal, which he exercised.

First-tier Tribunal

13. On 22 April 2024, First-tier Tribunal Manyarara allowed the appeal. The First-tier Judge considered that the applicable regime was the domestic provisions of the 2007 Act (as amended) since the index offence, and the 2022 offence, both took place after the EU Exit specified date.
14. The First-tier Judge directed herself correctly that the EEA Regulations no longer applied, despite the applicant's Romanian citizenship. In addition, the provision inserted at section 33(6B) of the 2007 Act, inserted by the European Union (Withdrawal Agreement) Act 2020, created an additional Exception 7 to automatic deportation only where

“(6B) Exception 7 is where—
(a) the foreign criminal is a relevant person, and
(b) the offence for which the foreign criminal was convicted as mentioned in section 32(1)(b) consisted of or included conduct that took place before IP completion day.”

It is not contested that the claimant is a 'relevant person' as defined in subsection 33(6C). The effect of Exception 7 is that for offences and/or conduct which occurred *entirely* after the specified date ('IP completion day'), EEA foreign criminals do fall within the automatic deportation provisions of section 32(5) of the Act.

15. The Judge noted that the claimant had never been treated as settled but was lawfully present in the UK at all material times relevant to the index offences. She was satisfied that the claimant had been lawfully present in the UK for most of his life, despite his regular returns to Nigeria when he was younger. She also found the claimant to be socially and culturally integrated in the UK.

16. The Judge held that the claimant met the requirements of Exception 1 to section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended): she found that there would be very significant obstacles to the claimant integrating in Nigeria if returned there and that he had little or no knowledge of life in Romania. Exception 2 was not made out.
17. The Judge also found in the alternative that there were very compelling circumstances why the claimant should not be removed to Nigeria or Romania, giving credit for the rehabilitation efforts he had made during and after his latest prison sentence.
18. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

19. Permission to appeal to the Upper Tribunal was granted by First-tier Judge Boyes as follows:

“... 2. The grounds of appeal assert that the Judge erred, essentially, on a reasons issue. The complaint is that the Judge has reached conclusions which are at odds with the evidence, in contradiction to the evidence and those conclusions are not properly supported by cogent and clear reasons.

3. I have read the judgment with care and the grounds complained of. Simply disagreement with a decision is no basis upon which to trouble the Upper Tribunal however in this case there is arguable merit in the suggestion that the conclusions reached by the Judge may well be in error in terms of their genesis and the material relied upon and the impact of the same in light of the conclusions and reasoning.

4. A party need only show that the grounds are arguable, for the reasons given in the application I am satisfied that the SSHD has reached that threshold. ...”

20. The claimant filed a Rule 24 Reply, arguing that any errors in relation to very compelling circumstances were not material, as the First-tier Judge had found that the claimant met Exception 1 in section 117C(4) of the 2002 Act. The Secretary of State was asking the Tribunal to interfere with the First-tier Judge’s findings of fact which were open to her: she had directed herself correctly and grounded her decision in facts.
21. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

22. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. We had access to all of the documents before the First-tier Tribunal.
23. Neither party has sought to challenge the First-tier Judge’s conclusion that, the claimant’s relevant criminality having occurred entirely after the specified date, the EEA Regulations and Withdrawal Agreement provisions are not engaged, and that only the domestic regime applies. The

provisions of part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended) are set out at [42]-[57] of his decision.

24. The First-tier Judge's self-direction on Exception 1 begins at [58]. At [64] she found, sustainably, that the claimant had been lawfully present in the UK for most of his life. The claimant's father gave evidence of the closeness of his relationship with his eldest child. There was no evidence from the children's mothers.
25. On the very significant obstacles issue, the Judge set out the legal position at [70]-[77]. The findings of fact are at [79]-[81]:

"79. I find that the [claimant's] entire immediate family is currently in the United Kingdom. I accept that the [claimant](4) does not have a network of support in Nigeria, having last lived there as a child. I further accept that the claimant would not be an insider in terms of how life is carried on in Nigeria, having never lived an independent adult life there. In relation to Romania, I have found that the [claimant] last lived there when he was aged five. I have derived considerable benefit from hearing both the [claimant] and his father giving evidence and I find both to be credible witnesses. I accept that the [claimant's] parents have little to no contacts remaining in either Nigeria, or Romania, due to their ages. The relevance of this is in relation to the suggestion that the [claimant's] parents can ask any contacts that they may have in both of those countries to assist the [claimant].

80. It is unclear what the [claimant's] parents' status in the United Kingdom currently is. It is not, however, suggested that they are here unlawfully. I find that whilst the [claimant's] father may have held a respectable position in society in Nigeria, his influence and circumstances have changed as a result of his age and absence from the country. Furthermore, the [claimant's] father's health is in a state of decline and he is receiving/has received treatment in the United Kingdom. There is no suggestion that there is any recourse to public funds in this respect.

81. I find that the [claimant] has little to no knowledge of how life works either in Nigeria or Romania. He would not be an insider in terms of how life works in either country. That there would be very significant obstacles to his integration into society in either country follows. Accordingly, therefore, I hold that the [claimant] meets the requirements of Exception 1 to deportation."

26. The First-tier Judge's finding that Exception 2 is not met stands unchallenged by the claimant.

Conclusions

27. We agree that the First-tier Judge's decision turns on the rationality of the very significant obstacles finding, bringing the claimant within Exception 1 in section 117C(4). If the finding that the claimant comes within Exception 1 is sound, then the challenge to the very compelling circumstances reasoning is not reached.
28. We remind ourselves that an appellate court or Tribunal may interfere with the First-tier Judge's findings of fact and credibility only where they are

‘plainly wrong’ or ‘rationally insupportable’: see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [2]-[5] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed.

29. The First-tier Judge found the claimant and his father to be credible witnesses. She had seen and heard them give evidence and that finding was open to her. The finding of very significant obstacles turns on the credibility of their accounts and whilst it may be generous, the Judge’s reasoning does not reach the demanding standard set in *Volpi* for interference with findings of fact and credibility by a Judge who has seen and heard the witnesses give evidence.
30. The First-tier Judge’s conclusions on very compelling circumstances are expressed in the alternative. The reasoning is at [114]:

“114. Having considered all of the evidence before me, cumulatively, I find that there are very compelling circumstances, in this appeal. The reasons are the same reasons why he meets Exception 1 under the Rules, as well as the rehabilitation that has taken place both in prison and since he was released from custody.”

We do have concerns about the extent and validity of that reasoning, which appears to conflate the very significant obstacles test with very compelling circumstances.

31. We do not consider that the claimant’s efforts to address his alcoholism, and his lack of knowledge of Nigeria and/or Romania, suffice to amount to very compelling circumstances. However, as Exception 1 is made out, this is not material to the outcome of the appeal.
32. Accordingly we uphold the decision of the First-tier Tribunal and dismiss the Secretary of State’s appeal.

Notice of Decision

33. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law

We do not set aside the decision but order that it shall stand.

Judith Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 21 August 2024

