Upper Tribunal
(Immigration and Asylum Chamber)

Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 00042 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 24 September 2014

Sent on:

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Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YAN BOSSADI

Respondent

Representation:

For the appellant: Mr P Deller, Senior Home Office Presenting Officer
For the respondent: Mr K Mak, Solicitor, MKM Solicitors

(1) Being able to meet the requirements of paragraph 276ADE of the Immigration Rules requires being able to meet the suitability requirements set out in paragraph 276ADE(1). It is because this subparagraph contains suitability requirements that it is not possible for foreign criminals relying

on private life grounds to circumvent the provisions of the Rules dealing with deportation of foreign criminals.

(2) The requirement set out in paragraph 276ADE (vi) (in force from 9 July 2012 to 27 July 2014) to show that a person "is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK", requires a rounded assessment as to whether a person's familial ties could result in support to him in the event of his return, an assessment taking into account both subjective and objective considerations and also consideration of what lies within the choice of a claimant to achieve.

ERROR OF LAW DECISION AND REASONS

1. On 23 July 2013 the appellant (hereafter Secretary of State for the Home Department or SSHD) decided to make a deportation order against the respondent (hereafter the claimant) in accordance with s.32(5) of the UK Borders Act 2007 on the ground that he was a foreign criminal sentenced to a period of imprisonment of at least 12 months and someone who did not fall under any of the exceptions set out in s.33 of that Act. The claimant who was born in 1986 and is a national of the DRC had a history of offending with convictions in 2002, 2004, 2005, 2006, 2008, 2009, 2010, 2011 culminating in a conviction at Croydon Crown Court for robbery and related offences for which he received a sentence of 42 months imprisonment. The claimant appealed against the SSHD's deportation order. In a determination of 24 June 2014 a First tier Tribunal (FtT) panel comprising Judge Abebrese and NLM Richardson allowed his appeal under Articles 3 and 8 ECHR and paragraph 276ADE of the Immigration Rules. The respondent was successful in obtaining a grant of permission to appeal, bringing the matter before us.

2. We are grateful to both parties for their submissions. We have decided that the FtT materially erred in law in several respects.

3. First, in relation to Article 3, its reasoning is seriously deficient. The entirety of the reasoning is set out at [14] as follows:

> "In respect of Article 3 the Tribunal is also of the view that bearing in mind the facts and the circumstances of this particular appellant and the tender age which he came into this country he would have been (sic) at risk in respect of Article 3 if he were to be removed to the DRC."

4. Disregarding the use above of an incorrect tense, the FtT wholly failed to explain why it would be relevant to risk on return to the DRC that the claimant had left the DRC when he was around 4-5 years old. In submissions the FtT had been alerted to a judgment of Phillips J in P (DRC), R (on the application of) v Secretary of State for the Home Department [2013] EWHC 3879 (Admin) which considered that there was a real and substantial risk that criminal deportees to the DRC would be subjected to ill treatment on return to that country. However, Philips J specified that he could not bind the respondent in relation to other cases involving the deportation of convicted criminals to the DRC and

went on to urge the Upper Tribunal to consider giving further country guidance to clarify the issue. Accordingly, even if the FtT can be presumed to have had this judgment in mind, it was necessary for it to identify the evidence which caused it to conclude that P(DRC) should be followed. In para 13 the FtT did refer to "the appellant's and his mother's evidence and the circumstances that he would face if her (sic) were to be deported to the DRC", but without any further elaboration, it is difficult to know what evidence concerning risk on return it had in mind here, if any; it may be that here it meant to address only Article 8 circumstances.

5. In the second place, the FtT erred in allowing the appeal under the Immigration Rules. Whilst concluding that the claimant could not meet the requirements of the Rules dealing with deportation of foreign criminals as set out in paragraphs 399 and 398, it proceeded to rule that he met the requirements of paragraph 276ADE on the basis that he has been in the UK for over 20 years and did not have any family, social or cultural ties in the DRC. It clearly had in mind that the requirement set out at paragraph 276ADE(vi) that applied to the claimant was that he had to show that he *"is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the U.K."* Leaving aside that the FtT nowhere explained why the accepted fact that the claimant had four uncles in the DRC was not to be possibly indicative that the claimant still had family ties there (see further below), it failed to understand that the suitability requirements are an integral part of paragraph 276ADE. Being able to meet the requirements of paragraph 276ADE of the Immigration Rules requires being able to meet the suitability requirements set out in paragraph 276ADE(i)[1]. It is because this subparagraph contains suitability requirements that it is not possible for foreign criminals relying on private life grounds to circumvent the provisions of the Rules dealing with deportation of foreign criminals. As from 28 July 2014 para 276ADE has been amended[2],

[1] Renumbered 276ADE(1)(i) on 1 December 2013, by HC 803).

[2] As from 28 July 2014 the rule reads as follows:

> "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

The corresponding suitability provisions of S-LTR in Appendix FM now state:

> "S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.7. apply.

but at both the date of application and decision in this case the relevant rule read as follows:

> "276ADE. The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
> (vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

6. The corresponding suitability provisions of S-LTR in Appendix FM provided:

> "S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.7. apply.
> S-LTR.1.2. The applicant is at the date of application the subject of a deportation order.
> S-LTR.1.3. The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years.
> S-LTR.1.4. The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for less than 4 years but at least 12 months.

> S-LTR.1.2. The applicant is currently the subject of a deportation order.
> S-LTR.1.3. The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for at least 4 years.
> S-LTR.1.4. The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for less than 4 years but at least 12 months.
> S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law.
> S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.
> …"

It can be observed that as from 28 July 2014 the test no longer focuses on ties with the country of return and whether they have been lost, but on whether there are very significant obstacles to integration into the country of return.

S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law.
S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.
…"

7. Manifestly the claimant did not meet the suitability requirements set out at S-LTR 1.2, 1.4 or 1.5.

8. In the third place, the FtT's consideration of the claimant's Article 8 circumstances outside the Immigration Rules was also vitiated by legal error. In [13] the FtT stated that:

> "As the appellant has satisfied the Immigration Rules the panel did not consider it necessary to make a separate finding on Article 8 but it is the view of the Tribunal that the appellant would in any event have satisfied the principles and criteria laid down in respecting of freestanding Article 8…"

9. Given the consequential nature of the FtT's reasoning here - reasoning based on the flawed premise that the claimant stood to succeed under the Rules - it is difficult in any event to sever the two decisions. Mr Mak sought to argue that the substance of the FtT's consideration of Article 8 commenced earlier at [11] and that is true. But the reasoning it relies on in this paragraph is problematic for several reasons, most notably that in the course of addressing paragraphs 399 and 398 it had said categorically that it accepted that the deportation of the claimant was conducive to the public good. Since in logic the FtT could only have concluded the claimant succeeded under Article 8 if satisfied that the public good served by his deportation was outweighed by other factors, adequate explanation was needed as to why this was thought to be the case. All that the FtT offered was its finding that the claimant "perhaps now would not reoffend". That was plainly not enough.

10. In addition, there is the matter of the FtT's treatment of the issue of ties in the DRC. In considering this matter we must have regard, of course, to the judgment of the Court of Appeal in YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292.

11. At [50]-[52] Aikens LJ stated:

> "50…On that basis, the last issue arises: did YM have no ties (including social, cultural and family) with Uganda? Before us, the parties assumed that this question had to be decided as at the time that the UT re-made the decision. It concluded that YM could not meet this "stringent" requirement. However, when making its determination the UT did not have the benefit of the decision of the UT in Ogundimu (Article 8 – new rules) (Nigeria) v SSHD**.** In that case the UT stated, at [123], that:

> "The natural and ordinary meaning of the words 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation and removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless".
>
> I agree with that construction.
>
> 51. The UT in that case went on to recognise that the test was an exacting one. However, the exercise that had to be conducted was a "rounded assessment of all the relevant circumstances", which were not to be confined to "social, cultural and family" issues. The UT concluded, on the facts, that Mr Ogundimu did not have ties with Nigeria, the country to which he would have been deported. It noted that his father might have ties but they were not the ties of Mr Ogundimu himself "or any ties that could result in support to [him] in the event of his return [to Nigeria]".
>
> 52. I agree with the analysis of the UT in Ogundimu**.** Whether this is a "hard –edged" factual enquiry, or a question of "evaluation", the question in this case is: what ties does YM himself have with Uganda and would they support him in the event of a return there. Ties of other relatives, particularly YM's mother, are irrelevant."

15. Whilst in the instant case it was open to the FtT to accept the claimant's and mother's evidence about the claimant's lack of social and cultural ties in the DRC, it was (as already noted) part of their evidence that he had four uncles living there. Following Ogundimu (and now, for us considering the case, YM), the FtT was required to consider in the form of a rounded assessment whether the claimant's familial ties could result in support to him in the event of his return to the DRC. In our view the Strasbourg jurisprudence understands assessment of this matter to require the decision-maker to take into account both subjective and objective considerations and also to consider what lies within the choice of a claimant to achieve.

16. In this case the FtT appears to have approached the matter of family ties as a purely subjective one, reasoning that because the two witnesses said there would be no effective family ties in the DRC, that must be the case objectively. That was at odds with Strasbourg jurisprudence which requires not only that assessment of ties has an objective as well as a subjective dimension but also that such assessment must consider, as a relevant consideration, whether ties that are dormant can be revived. Thus, in Balogun v UK app. no. 60266/09 [2012] ECHR 614 at [51] the Court noted that whilst it accepted that the tie between a Nigerian applicant and his mother in Nigeria was "not a strong familial tie", nevertheless "it is one that could be pursued and strengthened by the applicant if he chose". That assessment was not undertaken by the FtT.

17. For the above reasons we conclude that the FtT materially erred in law and in such a manner as to necessitate that its decision be set aside.

18. The appeal will be set down for an Upper Tribunal hearing so that the decision can be re-made. The parties must comply with separate directions that will accompany the notice of hearing.

19. The hearing will be set for a date in late February on the basis that by then the Upper Tribunal is likely to have produced fresh country guidance relating to the return to the DRC of persons with criminal convictions. If however, the aforementioned new country guidance is not to hand by mid-March, it may be necessary for the Upper Tribunal to consider whether to proceed with this case nonetheless. It is a deportation case and should not be postponed further unless absolutely necessary.

20. It is to be observed that in the context of a re-making of the decision, the next hearing will require specific submissions as to the impact on the claimant of the provisions of s.117C of the 2002 Act as amended with effect from 28 July 2014.

Signed

Date:

Dr H H Storey

Judge of the Upper Tribunal