IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/35303/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 December 2014	**On 15 December 2014**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

MARGARET AINA ADEROMILEHIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Denholm, Counsel instructed by Messrs Wilson Solicitors LLP
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of Nigeria, whose claimed date of birth is 14 June 1965. As recorded by the First-tier Tribunal within their determination promulgated on 21 March 2012, there was an issue about both the Appellant's name and date of birth.

2. The Appellant appealed against the decision of the Respondent dated 29 December 2011 to make a deportation order under Sections 3(6) and 5(1) of the Immigration Act 1971.

3. In that regard, on 5 October 2011, at Snaresbrook Crown Court, the Appellant was convicted of possession of an identity document with intent and on 12 October 2011 she was sentenced to a term of eight months' imprisonment, the sentencing Judge recommending her for deportation.

4. It was said by the Secretary of State that: "therefore a decision has been made to pursue your deportation on the basis that your deportation has been recommended by the court".

5. It was recorded by the sentencing Judge in his remarks on 26 July 2011 that the Appellant had produced a false English passport in the name of Margaret Aderomilehin for the purposes of obtaining employment through an employment agency. The sentencing Judge continued, inter alia:

> "When you were arrested you maintained that you could not speak English which was a lie. You were then interviewed and chose to make no comment in relation to that interview, but you issued a prepared statement which was a lie, by stating that you were illiterate, that you had a genuine English passport, but that you had lost it and that you had asked a friend to obtain one for you and that you had then obtained that passport and believed it to be a genuine passport, a lie.
>
> Thereafter, you have written to this court continuing to assert that the passport that you produced was a genuine passport as far as you were concerned in your genuine name, Margaret Aderomilehin and you of course know that this was another lie. ...
>
> I have read the letter that you have sent to me in the name of Margaret Aderomilehin stating that you were brought into this country from the age of 15, that you did not really know which country you came from.... that is unbelievable... that as far as you were concerned you were here genuinely and that because you did not have a passport you asked a friend who you paid £520 in order to give you one. As I have said, in that letter you produced to me you said that that passport you believed to be genuine, a lie."
>
> There is absolutely no information held by Immigration Services to say when you came into this country, in what name and in what circumstances. I am therefore satisfied that you are an illegal entrant."

6. The Judge continued in the course of his sentencing remarks to refer to the decision of the Court of Appeal in Ovieriakhi [2009] EWCA Crim452 in relation to which he had this to say:

> "There are guidelines in relation to the offence that you have committed and they are set out in the case of Ovieriakhi ...
>
> I am satisfied this offence comes in the higher bracket set out in Ovieriakhi for offences where there is no evidence that the passport was used to gain entry but was used for the purposes of obtaining work. I cannot close my eyes to the fact that you are an illegal entrant. I am therefore satisfied that the starting point in this case is twelve months which can be reduced to eight months as the result of your early guilty plea."

7. The Judge continued inter alia:

> "There will not be an automatic consideration of deportation in your case, but I am quite satisfied there should be a recommendation made to the Home Office. I say this for this reason. You are an illegal entrant. You have not been straightforward with the authorities once you were apprehended. You have lied and lied again. Whatever the reasons for that, I am afraid that cannot be condoned. You cannot be trusted and therefore I am entirely satisfied that having been in this country unlawfully throughout the time of you being here that you are not someone that society would want to continue to live in this country, your presence not being conducive to the public good and upon that basis I recommend deportation. It will be for the Home Office to decide whether that would in fact take place."

The Proceedings

8. The history of this appeal has been to say the least, protracted.

9. The appeal of the Appellant against the Respondent's decision was heard before the First-tier Tribunal at Birmingham on 5 March 2012 and in a determination promulgated on 21 March 2012 the Appellant's appeal was dismissed on human rights grounds and under the Immigration Rules.

10. The First-tier Tribunal panel did not find the Appellant to be credible. The panel also found the Appellant had been in the United Kingdom "for about ten years or just over" and did not accept that she had been here as claimed for 28 years. They did not "think that she (had) told the truth about her family". They did not find that she was "truthful about her health". Overall they were not satisfied with the credibility of her evidence and did not think they had been told "the full truth about the Appellant's life".

11. Following the guidance inter alia in Razgar [2004] UKHL 27, the panel found the Appellant had established a private life "given the years in the UK where she forged friendships, work, went to church and had medical treatment". The panel recognised that deportation "would interfere in the way she enjoys her private life so as to engage Article 8 albeit it would be lawful as she has no status to remain and justified to prevent disorder and crime and maintain immigration control". In terms of proportionality of her

removal and taking into account "those factors in her favour and those which militate against" and mindful the Appellant had remained in the United Kingdom "illegally throughout", the panel concluded that the Appellant did not have "close ties or put down roots nor that she has a relationship and settled home with a partner".

12. The panel continued:

> "We take into account the compassionate factor of her health and that there is a lack of evidence of ties to Nigeria but she spoke Yoruba to us, a majority language in Nigeria where there is a health service and we found her a resourceful individual who could relocate given her success in relocating to the UK and spending years without detection as an illegal immigrant."

13. In considering and applying the criteria within paragraph 364 of HC 395 against the facts as found, the panel acknowledged that inter alia, whilst acknowledging the commission of one criminal offence only and the fairly short sentence... "we note the Judge's sentencing remarks which set out the reasons why deportation was conducive to the public good and we have dealt with the public interest already in this determination: N (Kenya) ibid".

14. The panel concluded that there was "a presumption in favour of deportation and we do not find it outweighed". The panel proceeded to dismiss the appeal on human rights grounds and under the Immigration Rules.

15. On 10 April 2012 permission to appeal that decision to the Upper Tribunal was granted and the hearing of the appeal before the Tribunal was listed for hearing on 12 December 2012. In the event, that hearing did not take place, because on 11 December 2012, the Appellant's solicitors wrote to the Tribunal complaining they were having considerable difficulties in obtaining the papers from the Appellant's previous solicitors. It was said that having discussed the matter with the Appellant they had her instructions to withdraw the appeal and in consequence the hearing was vacated, the Tribunal having in the circumstances consented to the withdrawal of the appeal.

16. On 30 July 2013, the Appellant instructed her current solicitors in relation to judicial review proceedings challenging the certification made by the Respondent on application to revoke the deportation order and the lawfulness of her detention, the Appellant having been detained since 25 November 2011. On 9 August 2013 the Appellant informed a trainee solicitor from Wilson Solicitors' that she had not given instructions to her former solicitors to withdraw her appeal and it was said that she seemed not to understand that the appeal had in fact been withdrawn.

17. On 6 September 2013 the Appellant's present solicitors received what were described as "several carrier bags full of documents..." relating to the Appellant and it was claimed that nowhere within them was there reference to the withdrawal of the Appellant's appeal before the Upper Tribunal.

18. On 6 November 2013 the Appellant made an application to reinstate her case before the Upper Tribunal pursuant to Rule 17(3) of the Tribunal, Procedure (Upper Tribunal) Rules 2008 and this was heard before Upper Tribunal Judge O'Connor on 27 February 2014, when in a ruling issued on 10 March 2014, he ordered that the Appellant's appeal before the Upper Tribunal be reinstated.

19. Thus the appeal came before me on 6 December 2014 when my first task was to decide whether or not the determination of the First-tier Tribunal contained an error or errors on a point of law such as may have materially affected the outcome of the appeal.

20. At the outset of the hearing, I was informed by Mr Denholm that the Appellant was not present at the hearing and not expected. In fact his instructing solicitor had been made a Deputy by the Court of Protection and therefore had authority to instruct Counsel on the Appellant's behalf.

21. I was informed by both parties that they would base their submissions on the bundle of documents that accompanied Messrs Wilsons solicitors' letter of 28 January 2014 that included a psychiatric report of Professor Cornelius Katona dated 22 March 2014. I was informed by the parties they were agreed that if an error of law was found it would not be possible to proceed immediately to a resumed hearing, not least because the facts were now so fundamentally different to those when the appeal was last heard before the First-tier Tribunal and would therefore require a completely fresh consideration.

22. Mr Wilding handed to me the decisions in JO (Uganda) [2010] EWCA Civ 10, OH (Serbia) [2008] EWCA Civ 694.

23. Mr Denholm handed to me the decisions in Ovieriakhi (above) and those in Kluxen [2010] EWCA Crim 1081, ZH (Bangladesh) [2009] EWCA Civ 8 and Benabbas [2005] EWCA Crim 2113.

The Parties' Submissions

24. Mr Denholm most helpfully clarified that a lengthy document before me marked "grounds of appeal" was in fact a skeleton argument and I noted that there was before me, a shorter set of grounds in support of the appeal. I was told by Mr Denholm, that in any event the focus of his submissions would be as to the manner in which the First-tier Tribunal dealt with the

public interest as a factor in the Article 8 ECHR proportionality balancing exercise. He explained that "in a nutshell, they misdirected themselves in law as to the correct approach and that their assessment of facts in relation to that were contradictory and irrational".

25. Mr Denholm referred to the panel's findings pointing out that those findings taken together with the Judge's sentencing remarks formed the factual matrix when the Tribunal moved on to determine whether the Appellant's deportation would breach Article 8.

26. In referring me to OH (Serbia), Mr Denholm pointed out, that the court had held that the principle in the face of serious offending was that the public interest in deportation went beyond simply preventing re-offending and also expressed the public serious revulsion for offences committed by foreign nationals. It was very clear from the line of cases taking N (Kenya) onwards, that the policy imperative was in expressing society's revulsion that flowed specifically from the commission of serious or very serious offences and the need to deter foreign nationals from committing serious crimes.

27. Mr Denholm submitted that in contrast, the First-tier Tribunal panel in the present case, acknowledged that the Appellant's offence was as stated at paragraph 53 of their determination "only one offence not involving serious matters such as violence, drugs or serious antisocial conduct although it has to be said that the Appellant has totally disregarded immigration law for a number of years". He accepted they were entitled to take into account the latter factor in terms of the proportionality exercise, but the important point was, that on its face, the panel appeared to recognise that the Appellant's offence was not of a very serious kind. Further, that at paragraph 54 of their determination in reference to Benabbas the panel observed that it was held that "false identity document offences attack(ed) the very foundation of immigration law and are serious".

28. Mr Denholm continued with what the panel did not do, was to ask themselves the extent of the seriousness of the documentation offence for which the Appellant in her particular circumstances was convicted. He continued, "Document offences, just as offences of dishonesty, are necessarily serious, but within those categories are offences of greater or lesser gravity. We say on the face of it, that the offence in the present case was one of lower gravity".

29. In this regard Mr Denholm referred to Kluxen that dealt in circumstances where it would ordinarily be appropriate for a criminal court to make a recommendation for deportation, in particular where at paragraphs 26 and 27 it was pointed out, "that a court considering recommending an

offender's deportation should apply substantially the same test whether the offender is or is not a citizen of the EU" and that:

> "Lawton LJ did not go so far as to say in *Nazari* that it was *only* defendants convicted of serious crimes or having long criminal records whose continued presence in the United Kingdom would be to its detriment, but he clearly had such persons particularly in mind... In our view it will really be that either test is satisfied in the case of an offender none of whose offences merits a custodial sentence of 12 months or more".

30. Mr Denholm continued that as a general indication therefore the twelve month cut-off was significant and also signified that it mirrored the threshold set out in the United Kingdom Borders Act 2007. Mr Denholm continued that two cases reflected this, one of which ZH (Bangladesh) was before the First-tier Tribunal, the other being Ovieriakhi. In ZH Sedley LJ observed, that the use of a false identity document in order to gain access to work was of less gravity than the use of a false identity document to commit fraud. A similar distinction has been drawn in Ovieriakhi.

31. Mr Denholm submitted that whilst the First-tier Tribunal panel at paragraph 54 in reference to Benabbas, recognised that false identity document offences attacked the very foundation of immigration law and were "serious" they had "said nothing about the gravity of this particular offence". There were two particular facts to be taken into account. Firstly, this was an offence that in the view of the Judge warranted a sentence of less than twelve months and secondly, the panel had failed to take into account the fact that this was an offence to use a false document to obtain work as opposed to the more serious purpose of committing fraud or using a document for unlawful purpose to enter the United Kingdom.

32. Mr Denholm continued that it followed that the panel had simply failed to examine the particular circumstances of the Appellant's offence in enough detail "to go on and lawfully consider the application in terms of the N (Kenya) test".

33. It would be as well to set out below what was said by the panel at paragraph 54:

> "54. As found by the Court of Appeal in **Benabbas [2005] EWCA Civ 2113** false identity document offences attack the very foundation of immigration law and are serious. Judge Beech recommended deportation and gave cogent reasons. We note the cases on the public interest including **N Kenya** ibid and **OH Serbia [2008] EWCA Civ 694**. The public interest includes a risk of reoffending but that is not the only public interest factor as there is also the need to deter foreign nationals, to reflect society's revulsion at crime and build public confidence in the treatment of foreign nationals who have committed crimes. These public interest factors were reiterated in **Masih** when it

> was decided that the starting point for assessing the facts of an offence and the effect on others and on the public must be the view taken by the sentencing Judge who in the case before us found the Appellant a comprehensive liar whose presence was not conducive to the public good and who should be recommended for deportation."

34. Mr Denholm's submissions in summary, were that the panel's understanding of N (Kenya) was "effectively a misdirection by omitting the important word 'serious' i.e. it reads as if it applies to all offending when clearly it does not". Secondly, the panel failed to take into account the particular circumstances of the Appellant's offending as opposed to the general type of offence that was committed and finally, that as distinguished on the facts of the case, it would be irrational to categorise the Appellant's conviction as one so serious as to be deserving of deportation.

35. Mr Wilding in response, maintained that in substance, Mr Denholm's submissions were no more than an attempt to re-argue the case as put, rather than identifying any material error of law and re-litigate in effect the sentencing Judge's decision, namely the reliance on the Court of Appeal as to whether there should be a recommendation and as to seriousness in cases involving false instruments.

36. Mr Wilding continued, that what had been overlooked, was that the sentencing Judge had applied the guidance in Ovieriakhi in sentencing, and for the reasons that he gave, he was satisfied that the recommendation for deportation was appropriate in this case. Further, the Judge had been clear in his remarks that the appropriate sentence was one of twelve months but was only discounted because of the Appellant's guilty plea. It was therefore not right to say "Here is what the court has said on various scales of sentencing to a case, where the sentencing Judge has relied on those very cases".

37. Mr Wilding continued:

> "As the sentencing Judge had referred to the case and guidance in Ovieriakhi it cannot 'be waved over the head of the Tribunal in relying on it'. It is a bizarre point – if right – that in a deportation appeal this is what should or should not happen. The point of a failure to deal with the gravity of the offence is simply not made out."

38. Mr Wilding continued, that the Tribunal were right to consider the sentencing remarks of the Judge as the starting point (see Masih) and that is exactly what the Tribunal had done at paragraph 54 of their determination. It was the sentencing Judge's expertise as to the appropriate sentence (incidentally not appealed against nor against the recommendation).

39. Mr Wilding submitted that the Tribunal were well aware of the circumstances of this particular offence. The sentencing Judge was well aware of the sliding scale in a criminal case where someone used a false document and he had applied the relevant test.

40. Mr Wilding submitted that Mr Denholm's reliance on Kluxen was of no real assistance. In Kluxen it was said that it would rarely be the case that someone who did not receive a sentence of twelve months or over should be recommended for deportation. However this was a case where guidance was based on the state of the law when that Appellant was sentenced.

41. Mr Wilding continued that the Appellant could not submit to the Tribunal, that the First-tier Tribunal in effect, should have found that the Secretary of State's decision was unlawful because the Appellant should not have been recommended for deportation in the first place. In any event, it was clear from the Secretary of State's decision letter, that the public interest was also relied on and not just the recommendation for deportation in what she viewed, amounted to the Appellant's offending and the fact that the Appellant was an illegal entrant, was an aggravating feature. The Tribunal were well versed as to the particulars of the offence and on the question of seriousness. At paragraph 53 of their determination, they were mindful of the fact that "the Appellant's offence was only one offence", but that should be seen in the context of their saying, that the offence was not serious as compared with "serious matters such as violence, drugs or serious antisocial conduct". Further the panel had gone on to say " . although it has to be said that the Appellant has totally disregarded UK immigration law for a number of years".

42. Mr Wilding continued that as the Court of Appeal had said on numerous occasions; "all offences were serious" and this appeared to be a case where the Appellant have been remanded to the Crown Court for sentence.

43. As for Mr Denholm's reliance on ZH (Bangladesh), this was not a deportation case and there was no suggestion of a deportation although it was held that the public interest would be wounded by the Appellant in that case, staying in the United Kingdom. In contrast, the present appeal was a deportation case and as stated by Richards LJ at paragraph 29 of JO (Uganda):

> "There is however one material difference between the two types of cases in that they generally involve the pursuit of different legitimate aims: in deportation cases it is the prevention of disorder or crime; in ordinary removal cases it is the maintenance of effective immigration control. The difference in aim is potentially important because the factors in favour of expulsion are in my view capable of carrying greater weight in a deportation case than in a case of ordinary removal. The maintenance of effective immigration control is an important matter, but the protection of society

against serious crime is even more important and can properly correspondingly greater weight in the balancing exercise."

44. Mr Wilding concluded that ultimately the Appellant's challenge really concerned the weight to be given to the competing factors and these had ably been considered and balanced in the panel's reasoning. He submitted that this was a well-reasoned determination that had properly balanced the competing factors. There was no material error of law in the Tribunal's determination.

45. In response, Mr Denholm referred to paragraph 9 of JO (Uganda) [2010] EWCA Civ 10 and the guidance in Üner and the relevant factors to be considered in an Article 8 proportionality exercise in a deportation case, in particular that account should be taken of the nature and seriousness of the offence committed by the Appellant. He maintained that that necessarily encompassed the particular circumstances of the particular offence committed by the individual, where deportation was being considered and in his submission the Tribunal in the present case had simply failed to do that. Mr Denhom took the point of Masih and that the Judge's sentencing remarks were the starting point, but he submitted, they were not however the end point. It was not Mr Denholm's contention that the sentencing Judge was not entitled to reach the conclusions that he did, but to make the point that they were within the broad categories of document offences some of lesser and some of greater seriousness and that the Tribunal had simply failed to bear that in mind.

46. I reserved my determination.

Assessment

47. Despite the eloquence of Mr Denholm's submissions, I find that I simply do not share them. I would concur with the distinctions drawn by Mr Wilding in terms of the present case, in relation to those aspects of the case law (above) upon which Mr Denholm relied.

48. Clearly the imperative for deportation can increase when the offences are particularly serious or if not particularly serious in themselves have particularly unpleasant characteristics, but as was recognised in argument before me, there can be no challenge to the primary liability to deportation.

49. Whilst N (Kenya) related to an Appellant who had committed very serious offences, there is nothing in N (Kenya) that supports the suggestion that less serious offences can be excused when Parliament has said they make a person liable to deportation.

50. Absent some reasons to find that the Tribunal had completely misunderstood the nature of the offence, Mr Denholm's arguments based

on the panel's alleged failure to use a particular formula when considering the need for deportation, in effect is about form rather than substance.

51. Looking at the panel's reasoning as a whole, it is manifestly plain that they in fact, had in mind, and considered the gravity of the offence per se and as to its seriousness. Any such consideration of the seriousness of the offence was not done in a vacuum, and properly involved on their part, having regard to cases of the same type, relative to other types of offences.

52. Whilst it is said the Tribunal failed to spell out the particular circumstances of the Appellant's offence, the reality is that they did, not least in taking account of the Judges sentencing remarks that included his observation that the Appellant's conduct had been permeated with lies. They looked at the Appellant's particular circumstances, including her immigration history and the quality of her private life, and reached findings in relation to it, that were supported by and open to them on the evidence and thus sustainable in law.

53. I turn to Mr Denholm's submission in reliance upon Kluxen that the panel failed to bear in mind. It is not the case that Kluxen establishes that there is a clear cut-off point. In any event, the submission ignores the extent to which this Appellant used the false document.

54. Mindful of the guidance of the Court of Appeal in R (Iran) [2005] EWCA Civ 982, I find that it cannot be said that the First-tier Tribunal's panel's findings were irrational and/or Wednesbury unreasonable such as to amount to perversity. It cannot be said that they were inadequate. This is not a case where the First-tier Tribunal panel's reasoning was such that the Tribunal were unable to understand the thought processes that they employed in reaching their decision.

55. I find the panel properly identified and recorded the matters that they considered to be critical to their decision on the material issues raised before them in this appeal.

Decision

56. The making of the previous decision involved the making of no error on a point of law and I order that it shall stand.

Signed Date 12 December 2014

Upper Tribunal Judge Goldstein