Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01588/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 January 2016	**On 16 February 2016**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

And

MR SAMUEL OGUNMOLASUMI
(ANONYMITY DIRECTION NOT MADE)

Claimant

Representation:

For the Respondent: Mr Duffy, Home Office Presenting Officer
For the Claimant: Mr Blundell, Counsel, instructed by Devonshires Solicitors

DECISION AND REASONS

1. The respondent appeals with permission against the decision of First-tier Tribunal Judge Abebrese promulgated on 6 February 2015, in which he allowed the claimant's appeal against the decision of the Secretary of State to deport him as a foreign criminal.

2. The claimant is a citizen of Nigeria. He has lived in the United Kingdom since 18 March 1990 and was granted indefinite leave to remain on 11 August 2000. He married his current wife in 2003 and they have two children, born 2006 and 2008. His wife was granted indefinite leave to remain in the United Kingdom on 16 September 2010.

3. On 12 February 2008 the claimant was arrested at Heathrow Airport and was found to have 3.21 kilograms of cocaine on his body and on 28 August 2008 was convicted for the importation of controlled class A drugs for which he was sentenced to eight years' imprisonment.

4. The respondent's case as set out in the refusal letter dated 25 July 2014 is that as he had been sentenced to a period of imprisonment in excess of four years, it was necessary for him to show that there were exceptional factors such that the public interest in deportation was outweighed and that despite the fact that he has a wife and two children in the United Kingdom this was not so. The Secretary of State was satisfied the claimant, his wife and children could relocate to Nigeria and that any interference with their rights pursuant to Article 8 of the Human Rights Convention was proportionate.

5. In his decision, the judge directed himself [7] as to the relevant Immigration Rules stating, [8] that if the provisions set out in paragraph 399 or 399A did not apply then it would "only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".

6. The judge also directed himself [16] that, pursuant to Section 117C(2) the more serious the offence committed by the foreign criminal the greater the public interest in deportation and that as the claimant was sentenced to a term of imprisonment of four years Section 117C(6) provided that in the case of a foreign criminal 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 judge found [12] that the main issue was whether or not the appellant had satisfied the provisions of Article 8(2) of the Human Rights Convention; that the claimant is remorseful and had taken positive steps to turn his life around [13] and accepted the negative impact his actions would have had; that he had obtained qualifications and skills whilst in custody but that he was not a person who could not safely return to Nigeria with his family [13].

8. The judge also found [14] that the family were still in a family unit, that the children do not have any connection to Nigeria even though both parents have a strong Nigerian identity; that the claimant's removal from the United Kingdom would bring about grave consequences for him and his family, bearing in mind the children have never gone to Nigeria; that the Secretary of State had not fully considered the reports in relation to the claimant's progress in prison or the interests of the children pursuant

to Section 55 of the Borders Act 2009; this case would be distinguished from LC (China) [2014] EWCA Civ 1310.

9. The judge concluded:-

(i) there are compelling circumstances which are over and above those outlined in Exceptions 1 and 2, that the claimant had provided credible evidence from an independent social worker who had prepared a report on the claimant and his family dealing with the impact of removal in which she considered Section 11 of the Children's Act 2004 and Section 55 of the UK Borders Act 2009 [16];

(ii) a number of factors were raised in the social worker's report [17], that a member of a voluntary organisation was positive about the claimant and believed he is remorseful and progressing very well with his rehabilitation, that the claimant's probational caseworker considered his progress to be extremely positive and believes that he has turned his life around and will not reoffend;

(iii) the social worker stated in her report that the children do not really know the father due to him being in prison and that this had a very negative effect on them; that the family presents itself as loving and supportive and were already facing stress of a possible eviction in 2015 and the claimant's removal would add to these factors, and the future for the claimant's wife and children looks bleak; that he can provide a male role model for his children which will support them;

(iv) on the basis of the report the appellant has shown compelling reasons for remaining in the United Kingdom and that as a result it would not be proportionate for him to be removed from his family in the United Kingdom [20] and, that it would not be in the best interests of the children and consistent with the obligations under Section 55 of the Borders Act for the children's educational and social life to be disrupted by removing them to Nigeria.

10. The judge then allowed the appeal pursuant to Article 8 of the Human Rights Convention.

11. The respondent sought permission to appeal on the grounds that:-

(i) the judge had made a material misdirection in law in failing properly to consider the Immigration Rules [1];

(ii) the judge had failed to identify the circumstances identified as being very compelling over the exceptions set out in paragraph 399(a), 399(b) or 399A [i], and erred also in basing findings at [20] on evidence assessed under the previous Immigration Rules which set out a different criteria; that the Tribunal had erred in allowing the appeal on Article 8 grounds outside the Rules, the Immigration Rules being a "complete code";

(iii) the judge had failed to identify why the claimant's circumstances are very compelling over and above the exceptions provided for in 399(a), 399(b) or 399A [3]; and, that the circumstances identified by the Tribunal are not very compelling [4] there being no reason why the children could and the claimant's wife could not relocate there [5];

(iv) the judge had failed to note in their assessment that given the length of the claimant's sentence it would need to be shown there were very compelling circumstances beyond it being unduly harsh on the wife or children to remain with them [6], the evidence provided indicating nothing more than the usual consequences of deportation [6];

(v) there was no evidence that the wife and children had any problems in the claimant's absence;

(vi) that the judge had failed to recognise that the scales were very heavily weighted in view of deportation [11] and that something very compelling was required to outweigh the public interest in deportation; and [12] only if it were clear that any rational Tribunal must come to the same conclusion that the error in using the wrong version of the Immigration Rules could be said not to be material;

(vii) that the judge had not given proper consideration to the public interest [13], there being a strong public interest in favour of the appellant's deportation [15- 19], [20].

Submissions

12. Mr Duffy submitted that it was evident that the judge had considered the wrong version of the Immigration Rules and had not properly dealt with the issue of "unduly harsh". The judge's conclusions that there were "grave consequences" did not satisfy this test and it was evident from what was said at [15] and [16] that the judge had not properly addressed the issue of very compelling circumstances. He submitted that the reasons given by the judge were clearly inadequate.

13. Mr Blundell accepted that there was an error in the judge's description of the Immigration Rules at paragraph [8] but that this was not, however, material when analysing the decision as a whole. He submitted that the grounds of appeal, particularly at paragraphs [3], [8] and [11] were simply disagreements. It was submitted that the judge had been clear at paragraphs [8], [13], [15] and [16] of the decision that the judge had applied the correct test. He submitted further it was clear also that the judge had engaged with Section 117C(6) of the 2002 Act submitting that the failure to refer to "very" compelling circumstances later on in that paragraph was simply a slip.

14. Mr Blundell submitted that in reality the Secretary of State's challenge was a perversity challenge but was not properly pleaded. He submitted that adequate reasons had been given with regard to Section 55 and to the

impact that there would be on the children if moved to Nigeria. It was said the judge had addressed the issue of circumstances over and above those set out in Exceptions 1 and 2.

15. In reply, Mr Duffy submitted that much of what had been identified by the judge for his reasons to allow the appeal were clearly not giving proper counter to the public interest. He submitted that there was on the face of this case no evidence that the effect on the children would be different from any other case of deportation.

Did the Decision of the First-tier Tribunal Involve the Making of an Error of Law?

16. I am satisfied that, for the reasons set out below, it did. It is accepted in this case that at [7] and [8] the judge directed himself to a now superseded version of the Immigration Rules. In light of the decision in YM (Uganda) v SSHD [2014] EWCA Civ 1292 this is clearly incorrect. Further, the current and previous versions of Rules as set out in YM (Uganda**)** identify the significant differences in the Immigration Rules applicable to this appeal. Whilst the judge did note that given the length of sentence imposed in this case, the exceptions in paragraph 399 and 399A did not apply, he nonetheless directed himself, following the previous version of paragraph 398, that it would "only be in exceptional circumstances" that the public interest in deportation would be outweighed in other factors. That test is now contained in the new version of paragraph 398 which provides as follows:-

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest 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, **the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling**

circumstances over and above those described in paragraphs 399 and 399A. [emphasis added]"

17. There is clearly a significant difference here in the final paragraph indicating a serious error in self-direction. The judge also erred in considering the appeal on an Article 8 basis when, as it is established law, the Immigration Rules insofar as they relate to deportation constitute a "complete code".

18. Whilst it is correct the judge did consider Section 117C of the Nationality, Immigration and Asylum Act 2002 at in particular [16] and did properly direct himself that as to the effect of Section 117C [6], I consider he misdirected himself further on in this paragraph in stating "the Tribunal is of the view that there are compelling circumstances in this instance which are over and above those outlined in Exceptions 1 and 2".

19. I do not accept the submission that the omission of "very" before compelling is simply a slip. In the context of the other errors it cannot be assumed that the judge the judge was directing himself properly. Further, it is not clear on what basis the judge concluded that these circumstances over and above Exceptions 1 and 2, the contents of which he does not consider in any detail. It is important in this context to note that Exceptions 1 and 2 provide as follows:-

> "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.
>
> 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."

20. It is noticeable also at [20] that the claimant has shown compelling reasons to remain the United Kingdom rather than very compelling.

21. Taking these matters together, I consider that having started from an incorrect premise, that is the wrong version of the Immigration Rules, that there is no indication that the judge did properly direct himself in making findings pursuant to Section 117C such that it could be said that the errors were not material. I am satisfied that he did not consider whether the factors are "very compelling" as is shown from his approach to exceptions 1 and 2. Accordingly, I am satisfied that the decision did involve the making of an error of law and I set it aside.

22. Given that both parties were in agreement that, were I to conclude that there was an error of law in this case, the appropriate course of action would be to remit the case to the First-tier Tribunal, there being a new

additional issue regarding the claimant's safety on return to Nigeria which requires detailed consideration. Accordingly, I am satisfied that it would be appropriate in this case to remit the case to the First-tier Tribunal for a fresh determination on all issues.

SUMMARY OF CONCLUSIONS

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I remit the appeal to the First-tier Tribunal for a fresh determination on all issues.

No anonymity direction is made.

Signed Date: 10 February 2016

Upper Tribunal Judge Rintoul