Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA019622015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 June 2016	**On 9th June 2016**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

FIATU LOKO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Tobin, Counsel instructed by Messrs Shanthi & Co Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant, a citizen of the Democratic Republic of Congo (DRC), born on 4 January 1964 against the decision of First-tier Tribunal Judge B A Morris who following a hearing at Taylor House on 9

March 2016 and in a decision promulgated on 4 April 2016 dismissed the appeal of the Appellant against the decision of the Respondent dated 30 September 2015 to refuse his protection and human rights claims and to refuse to revoke a Deportation Order made by virtue of Section 5(2) of the Immigration Act 1971.

2. The Appellant's immigration and criminal history were set out by the Respondent at paragraph 3 of her letter of refusal dated 30 September 2015 as follows:

3. The Appellant arrived in the UK illegally on 15 June 1991 and claimed asylum. He was interviewed on 3 April 1995 when he was interviewed after being caught entering the UK using a forged French ID card. On 6 June 1995 his asylum claim was refused. He appealed against the decision on 9 June 1995 and his appeal was heard on 12 July 1996. On 27 September 1996 his appeal was dismissed. On 31 October 1996 his application for Permission to Appeal (PTA) to the Tribunal was rejected.

4. On 8 January 1997 he was arrested for fraud and convicted and sentenced on 9 May 1997 to two years' imprisonment for Conspiracy to obtain property by deception.

5. The Appellant became the subject of a signed Deportation Order (DO) on 30 December 1997. He appealed against the DO but failed to submit a valid appeal.

6. On 1 May 1998 the Home Office submitted to the Immigration Asylum Tribunal (IAT) that the Appellant's appeal was an invalid appeal. His appeal was subsequently withdrawn on 27 July 1998. The Appellant became Appeal Rights Exhausted on 28 July 1998.

7. On 7 March 2001 the Appellant was convicted at Snaresbrook Crown Court for Fraud/Embezzlement for which he was sentenced to four years' imprisonment. On 28 November 2001 the Appellant was sentenced to a further six months' imprisonment to run consecutively.

8. On 20 January 2004 the Appellant's solicitors submitted an asylum/human rights claim.

9. On 25 August 2004 a bail renewal application was received and on 30 November 2004 the Appellant's bail was renewed until 22 February 2005.

10. On 16 January 2006 the Appellant's MP requested an update on the case.

11. On 4 December 2008 the MP requested an update on the case and questioned the delay on the Appellant's application for permission to work. A response was sent to the MP on 30 December 2008 informing him that permission to work had been refused.

12. On 15 April 2013 the Home Office wrote to the Appellant and offered FRS to which no response was received.

13. On 29 August 2013 the Appellant's case was referred to Criminal Casework in Liverpool.

14. On 8 October 2014 the Appellant was sent a status questionnaire (ICD.3544) and letter with a One-Stop Notice paragraph. The Appellant completed this Questionnaire and returned it to Criminal Casework on 28 October 2014.

15. The Appellant failed to report in accordance with immigration reporting requirements on 15 January 2015 and was issued with a warning letter. He resumed reporting on 26 March 2015.

16. On 15 May 2015 a fax was received from him in which he provided a letter from North Middlesex University Hospital advising that he could not report on 14 May 2015 as he had attended a hospital appointment with them.

17. I should say at this stage that Permission to Appeal was purportedly granted by First-tier Tribunal Robertson on 28 April 2016. I say "purportedly" because clearly for the reasons the Judge gave, his intention was to refuse permission but on its face the application was "granted".

18. I raised the matter with the parties' representatives at the outset of the hearing on 1 June 2016. In that regard I noted that this was of course a matter already recognised by the Respondent in her Rule 24 response dated 17 May 2016.

19. The parties agreed with me that it must follow that I had now been seized with the hearing of this appeal and that the appropriate course was to proceed to deal with it on that basis.

20. It would however be as well, to set out below First-tier Tribunal Judge Robertson's reasons that were clearly intended to lead to his refusal to grant permission. They were as follows:

> "As to grounds at para 14-16, the Judge took into account the Appellant's rehabilitation and the delay in the Respondent's consideration of the Appellant's further representations at [31-32]. Whilst the guidance in **EB (Kosovo) [2008] UKHL 41** is raised in the grounds, this case related to an illegal entrant who had no leave to enter or remain. In the Appellant's case, he was an illegal entrant who had never had leave to enter or remain and who also was sentenced to a term of four years' imprisonment. The Judge was statutorily bound to apply the provisions of s.117 of the Nationality, Immigration and Asylum Act 2002 in the context of a private and family life built up when the Appellant had no leave and his wife, when they married, knew that he had no leave."

21. I pause there because in the course of the hearing, Ms Tobin clarified to me that in fact the Appellant and his wife and their first child had been born in the DRC prior to coming to the UK.

22. First-tier Tribunal Judge Robertson's reasons continued as follows:

> "The fact that the Appellant made further submissions does not detract from the fact that he had no leave. As to paras 6-8 of the decision, the judge was entitled to find that notwithstanding the Appellant's rehabilitation, there was still the public interest in deterring foreign criminals from committing offences [see 31]. Whilst another Judge may have reached a different decision, the Judge's findings were open to him on the evidence before him and are not unreasonable or irrational.
>
> At the grounds at paras 13-15 the Judge referred to the letter submitted by the Appellant's child at [36] and his oral evidence at [19], including that the child could not imagine life without his father. However, on the evidence before him, the Judge found that he could continue to be cared for by his family in the UK if they did not choose to relocate to the DRC with the Appellant [37]; the fact was that his wife coped with younger children when he was in prison [see 23] and there is nothing to prevent the Appellant's wife from taking responsibility for their child if they choose not to relocate. As to the grounds at paras 16-17, the Appellant's wife and child are not being expected to relocate to the DRC; it is a decision for them. There was no independent evidence before the Judge that the Appellant was the child's primary carer.
>
> As to paras 18-23, the Judge is mindful of the education provision in the DRC (in the context of the decision which will face the family), and the circumstances of each family member are considered before the Judge concludes that the factors, taken singly or cumulatively, do not amount to compelling circumstances. The Judge has stated that he has considered the factors cumulatively and it cannot therefore be said that he has not. As stated previously, whilst another Judge may have reached a different decision, the Judge's findings were open to him on the evidence before him and are not unreasonable or irrational."

23. It is right to say that as recorded by the Judge in her decision, that in the course of the hearing before her, she was informed by the Appellant's Counsel that asylum was not relied upon, that the Appellant accepted that he was not at risk on return to the DRC due to his membership of the UDPS.

24. Further, that the Appellant's case was not argued on the basis of family life with his eldest son. In addition, as conceded in the Appellant's Counsel's skeleton argument that the Appellant could not bring himself within paragraphs 399 or 399A of the Immigration Rules or Section 117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002.

25. It was accepted that there was a *prima facie* compelling public interest in deportation and that whilst the Appellant was English speaking and his wife was in employment, his circumstances fell within Section 117B(4) of

the 2002 Act such that neither his private life nor his relationship with his wife could be accorded significant weight in the proportionality balancing exercise. It was accepted the Appellant had to show very compelling circumstances over and above those described in paragraph 399 or 399A.

26. The Judge recorded that the Appellant relied upon Section 84(1)(c) of the 2002 Act, that his removal would be unlawful under the Human Rights Act 1998 and that in that regard he relied upon his membership of the UDPS as a factor to be taken into account in the proportionality assessment of his proposed removal.

27. The Judge was clear in her decision that she had considered Sections 117A-D of the statutory scheme and the Immigration Rules and at paragraph 27 that she had also borne in mind Section 55 of the Borders, Citizenship and the Immigration Act 2009.

28. The Judge noted with care the decision of the Secretary of State and concluded that there were no factors to outweigh the public interest in the deportation of the Appellant.

29. It was noted that mindful of the provisions of paragraph 398 of the Immigration Rules, the Appellant fell within paragraph 398(a) in that he was sentenced to four years' imprisonment and that the public interest in deportation, meant that very compelling circumstances, had to be shown. Further that Section 117C(6) mirrored the provisions of paragraph 398. The Judge further took account of relevant case law guidance. In that regard it included Danso [2015] EWCA Civ 596, KMO (Section 117 – unduly harsh) Nigeria [2015] UKUT 543 and JZ (Zambia) [2016] EWCA Civ 116.

30. I would pause there because there has recently been promulgated the decision of the Court of Appeal in MM (Uganda) and Another [2016] EWCA Civ 450 in which their Lordships reminded themselves that in cases concerning the deportation of foreign criminals, the Court or Tribunal must have regard to the considerations set out in Section 117C that provided:

> "(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**. [Emphasis added]

(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."

31. Their Lordships further noted that at the same time as those provisions were entered into force, amendments were made to the applicable Immigration Rules that built on previous amendments made in 2012, that those had been sought to emphasise the strength of public interest regarding the desirability of deportation of foreign criminals and also to secure a consistency of approach.

32. In that regard their Lordships noted that Rule 398(a) in its amended form stated:

"(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years.

(c) the deportation of the person from the UK is 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,

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 paragraph 399 and 399A**." [Emphasis added].

33. The primary question before their Lordships was to resolve the question as to the proper construction of the phrase 'unduly harsh' in Section 117C in which regard the guidance of the Tribunal in MAB (USA) [2015] UKUT 435 was disapproved but that in KMO (Section 117 – unduly harsh) Nigeria [2015] UKUT 00543 (IAC) was approved. It would be as well for the sake of completeness to set out the head note of KMO even though of course in this case we are dealing with an Appellant who was required to establish

very compelling circumstances over and above that of undue harshness. Nonetheless the head note to KMO stated as follows:

> "The Immigration Rules, when applied in the context of the deportation of a foreign criminal, are a complete code. Where an assessment is required to be made as to whether a person meets the requirements of para 399 of the Immigration Rules, as that comprises an assessment of that person's claim under article 8 of the ECHR, it is necessary to have regard, in making that assessment, to the matters to which the Tribunal must have regard as a consequence of the provisions of s.117C. In particular, those include that the more serious the offence committed, the greater is the public interest in deportation of a foreign criminal. Therefore, the word 'unduly' in the phrase 'unduly harsh' requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh."

34. At paragraph 30 of her decision, the First-tier Tribunal Judge carefully and comprehensively set out the Appellant's submissions as to the compelling circumstances upon which he relied that it was submitted in aggregate outweighed the public interest in deportation. At paragraphs 31 to 44 of her decision the Judge comprehensively dealt with and reasoned her consideration in response to those submissions and in reaching her conclusions considered with care the relevant aspects of the Immigration Rules and statutory scheme that applied in this case that she set against the backdrop of the facts as found.

35. In terms of the application to revoke the Deportation Order account was also taken of paragraph 390.

36. Much of what the Judge concluded was indeed carefully summarised by First-tier Tribunal Judge Robertson whose reasoning in what was clearly intended to be a refusal of permission I have set out above and with which (following my own consideration of the evidence; the Judge's decision and; the submissions of the parties before me), I agree, save for the Judge's observation that I have above corrected.

37. I had indeed at the outset of the hearing further drawn to the parties' attention Taylor [2015] EWCA Civ 845 that held that whilst the First-tier Tribunal recognised the need to attach significant weight to the public interest, they had failed to identify clearly the different purposes served by deportation, namely; to reflect public revulsion at serious crimes; to protect the public from further offending; and to deter others from acting in a similar way. Further that inter alia, the provisions of 399 and 399A did not apply where a person was sentenced to four years or more.

38. Their Lordships further held that the cases in which rehabilitation could make a significant contribution to establishing compelling reasons sufficient to outweigh the public interest in deportation were likely to be

rare. It was primarily relevant to the reduction of risk of re-offending but was less relevant to other factors that contributed the public interest in deportation. This judgment confirmed the approach in Danso (above) to which the First-tier Tribunal Judge in her decision had properly referred as to the approach to rehabilitation but which is very different from that in EEA removals.

39. I had also referred the parties to Suckoo [2016] EWCA Civ 39 that held that an Article 8 assessment outside the ambit of the Immigration Rules on deportation was wrong in law. See also LC (China) [2014] EWCA Civ 1310 and AJ (Angola) [2014] EWCA Civ 1636.

40. In that case their Lordships held consistent with other guidance, that an assessment of Convention rights must be made through the lens of the Immigration Rules. The public interest in deportation of foreign criminals and Article 8 rights were not held in a suspenseful balance. The scales were weighted in favour of deportation unless there were circumstances that were sufficiently compelling and therefore exceptional to outweigh the public interest in deportation.

41. Further, paragraph 399 was not applicable to a person sentenced to four years' imprisonment or more. Thus the very compelling circumstances that the Secretary of State must take into account were over and above the fact that it would be unduly harsh for the child in such circumstances.

42. Finally I drew the parties' attention to the recent decision in CT (Vietnam) [2016] EWCA Civ 488 that held inter alia as follows:

> "The best interests of the child always a primary consideration were not sole paramount but to be balanced against other factors, in this case that only the strongest Article 8 claims will outweigh the public interest in deporting someone sentenced to at least four years' imprisonment. It would almost always be proportionate to deport event taking into account as a primary consideration the best interests of a child."

43. At paragraph 36 of her judgment Lady Justice Rafferty had this to say:

> "36. The effect on the children was, on the evidence to leave them unhappy at the prospect of their father being on another continent. I readily accept that description. Experienced teaches that most children would so react. I cannot accept the conclusion that added to a low risk of re-offending the effect on them tips the balance. These children will not be bereft of both loving parents. Nor was there evidence of the striking condition which his presence in the UK would dispositively resolve. He is said to have 'a particular tie' with the respondent. The son was said to have spoken less confidently when his father was in prison and to have returned to confidence upon his release. That is not exceptional.
>
> 37. Neither can I accept the respondent had rebutted the presumption that he posed a danger to the public. This could only have been based on three and a half years of unreported further offending. In the context

of such serious offending and on lessons plainly not learnt between prison sentences I agree with the SSHD that he failed to rebut the presumption.

38. Appellate guidance is clearer now than when the FtT promulgated its decision. As paragraph 24 of LC (China) succinctly explains, where the person to be deported has been sentenced to four years' imprisonment or more the weight attached to the public interest in deportation remains very great despite the factors to which paragraph 399 refers. Neither the British nationality of the respondent's children nor their likely separation from their father for a long time is exceptional circumstances which outweigh the public interest in his deportation. Something more is required to weigh in the balance and nothing of substance offered. The approach of both the FtT and the UT failed to give effect to the clearly expressed parliamentary intention."

44. Ms Tobin invited me to distinguish the facts in CT from those of the Appellant in the present case, in that he was not convicted of an offence of violence. I recognise that distinction but it is apparent to me on reading of the judgment in CT as a whole that the principles that Rafferty LJ enunciated generally applied to those who were sentenced to a period of imprisonment of four years or more.

45. I have observed that although the decisions in MM (Uganda), CT (Vietnam), Suckoo all postdated the Judge's decision, they were nonetheless declaratory of existing legal principles and interestingly the Judge's approach in the present case to the relevant guidance applicable at the time of her decision, was consistent with recent decisions and properly applied against the backdrop of the facts as she found them.

46. Ms Tobin in her submissions contended that the First-tier Tribunal Judge had failed to deal with the delay in the making of the Secretary of State's decision. In that regard I would point out that as a matter of law, the Appellant has not technically been ever admitted to the United Kingdom and has had no lawful basis for being present. The Appellant has known since the first Deportation Order was signed on 30 December 1997 that he was a person in respect of whom the Secretary of State was seeking his deportation and therefore the decision was proportionate and was not subject to any delay in consequence.

47. The question of delay cannot in the circumstances of this Appellant, amount to very compelling circumstances and indeed the Judge at paragraph 32 of his decision, whilst accepting that there had been a lengthy delay in this case pointed out that he also took into account that the Appellant never had permission to be in the United Kingdom in that his arrival was unlawful, that he had remained here knowing that he had no permission to do so. He had remained in the United Kingdom knowing that a Deportation Order was signed on 30 December 1977 and therefore did not find that such delay amounted to "very compelling circumstances". I find not even an arguable error of law in that reasoning.

48. Ms Tobin further submitted that there had been a failure to engage with Section 55 and the best interests of the Appellant's youngest child in terms of whether there were compelling circumstances as to why deportation should not proceed. In that regard I would point out that under the Immigration Rules and Section 117C, the public interest as I have described above, requires deportation unless very compelling circumstances are established over and above Exceptions 1 and 2. If it is accepted that the effect of deportation would be unduly harsh that would not be enough in this case because very compelling circumstances had to be shown.
49. It was submitted that the relationship between the Appellant and his child had developed to the point where disturbing it would be unduly harsh on the child. Whilst it was during a period when the Appellant could have been but was not deported, I can appreciate that this fact could be a compelling circumstance over and above the exception. However, in that regard the First-tier Tribunal Judge made reference to the evidence concerning the child and as to the child's circumstances at paragraphs 6, 7, 8, 19, 23 and 30 of his decision. It is impossible in those circumstances to conclude that the Judge could not have had in mind throughout his decision in this appeal, the best interests of the child. Indeed it is apparent to me that it is a thread woven throughout the whole determination.

50. Ms Tobin further submitted that the Judge had looked at the various aspects of the case but had failed to look at them cumulatively and in the round and had instead, looked at each issue in the case in isolation and made a decision as to whether in isolation each factor constituted compelling circumstances.

51. I do not agree. At paragraph 30 of her decision the Judge carefully and comprehensively set out the Appellant's submissions as to the compelling circumstances upon which he relied and as a matter of practicality she had to deal with the issues sequentially, making of them what she did. At paragraph 45 of her decision she made it unambiguously clear that she had then drawn all of that material together in reaching a balance between the competing interests in play.

52. The Judge was indeed clear at paragraph 45 that:

> "Taking account of the evidence as a whole as I do, I find that there are no circumstances considered singly or cumulatively which amount to very compelling circumstances which outweigh the public interest in deportation of this appellant. Consequently the appeal is dismissed."

53. Whilst in Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC) it was made clear that reasons for conclusions in the central issues of appeals need not be extensive if the decision as a whole made sense, in fact in the present case and within the determination, comprehensive reasons were provided by the Judge for her conclusions. This is not a case where such reasoning could in any sense be described as inadequate. It is

apparent that the determination reveals no misdirection of law. Further the Judge's fact-finding process cannot be criticised. Additionally it is apparent that relevant case law guidance was properly taken into account within the context of the Judge's findings and that of the statutory scheme on the basis of the evidence that was reasonably open to her.

54. Mindful of the guidance of the Court of Appeal in R (Iran) [2005] EWCA Civ 902, I find that it cannot be said that the First-tier Tribunal Judge'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 Judge's reasoning was such that the Tribunal was unable to understand the thought processes that she employed in reaching her decision.

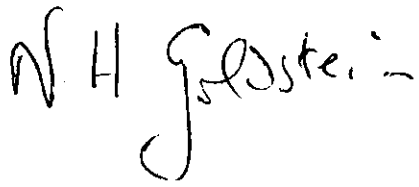
55. I find that the Judge properly identified and recorded the matters that she considered to be critical to her decision on the material issues raised before her in this appeal. The findings that she made were clearly open to her on the evidence and thus sustainable in law.

Notice of 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.

57. No anonymity direction is made.

Signed Date 7 June 2016



Upper Tribunal Judge Goldstein