Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03560/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 April 2019	**On 11 April 2019**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JARRY [D]
(NO ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Mr A Reza, Counsel, instructed by Duncan Lewis Solicitors

DECISION AND REASONS

1. This is an appeal against the decision issued on 19 December 2018 of First-Tier Tribunal Loughridge which allowed an appeal against deportation on Article 8 ECHR grounds.

2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Mr [D] as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Gambia, born on 1 January 1980. He came to the UK in December 2008 at the age of 18 as a spouse. He was issued with indefinite leave to remain (ILR) on 4 May 2011. His marriage subsequently broke down. He formed a new relationship with Ms [MF] and they had a child, a British national, on 3 March 2013. The relationship broke down in 2014. In April 2016 Ms [F] obtained a non-molestation order against the appellant prohibiting him from attending her address other than on the day of the week on which he took their son to school. The appellant breached that order in December 2016, received a community order and had to do unpaid work.

4. On 28 July 2017 the appellant received a sentence of 27 months imprisonment for conspiring to import a controlled drug Class B.

5. On 22 January 2018 the appellant was served with a deportation order. On 30 January 2018 the respondent refused his Article 8 human rights claim.

6. The appellant appealed against deportation on human rights grounds to the First-tier Tribunal. His case came before First-tier Tribunal Judge Loughridge on 11 December 2018. The First-Tier Tribunal found at [36] that it would be in the child's best interests for the appellant to remain in the UK but that the appellant's deportation did not amount to an "unduly harsh" impact on the child. Paragraph 399(a) of the Immigration Rules.

7. There did not appear to be an assessment of the private life provisions contained in paragraph 399A of the Immigration Rules but the First-Tier Tribunal went on to allow the appeal on "very compelling circumstances" grounds, taking into account the appellant's behaviour since his release from detention (see [38]), his involvement in the community, in particular working with young people, for example offering them apprenticeships in his barber's shop and acting as a mentor (see [39]).

8. The judge concluded at [41]:

> "… whilst I am conscious that the public interest in the removal of foreign criminals carries significant weight, in the present situation it would be disproportionate not to give him a second chance. I recognise that at the present time he does not have day-to-day contact with his son but I have no doubt that the level of contact will increase substantially in the future and that he will play a full and active role as a father, and provide a positive role model".

9. The grounds of appeal maintained that the First-Tier Tribunal judge was incorrect in criticising the "shortcomings" of paragraphs 398-399A of the Immigration Rules. She erred in failing to conduct a paragraph 399A assessment, additionally so as, if this rule was not met, this was a factor she should have taken into account in the "very compelling circumstances" assessment. The decision did not explain, if paragraphs 399 and 399A were not met, what it was that amounted to "very compelling circumstances", consistently stated by the higher courts to be

a high threshold which only a small number of cases could meet. The respondent maintained that the material before the First-Tier Tribunal did not permit a finding of "very compelling circumstances" where the appellant had only resumed contact with his son in November 2018, did not live with him, did not see him every day and had, in the past, had access restricted following incidents of violence in the home. The appellant's conduct since coming out of detention as recently as July 2017 was not sufficient to diminish the public interest in deportation to any material degree; .

10. Further, the "very compelling circumstances" assessment was additionally flawed in failing to take into account the appellant's significant unreliability as a witness, for example at [29] which sets out that, "certain aspects of what he has said should be treated with caution", that he was "evasive" about why the non-molestation order was made and as to there having been additional "safeguarding concerns" in 2014. The appellant had also exaggerated the contact he had with his son whilst in prison, the First-Tier Tribunal stating that the "impression the Appellant was seeking to give was clearly, therefore, inaccurate." The First-Tier Tribunal went on to find in [30] that "my impression is that the Appellant is an individual who from time to time seeks to stretch the truth, sometimes beyond breaking point."

11. The Supreme Court in the case of **Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60** set out the correct approach to deportation cases coming under the provisions contained in Part 5A of the Nationality and Immigration Act 2002 and Part 13 of the Immigration Rules. The Supreme Court indicated at [38]:

> "38. The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that **great weight should generally be given to the public interest in the deportation of such offenders**, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a **very strong claim indeed**, as Laws LJ put it in *SS (Nigeria)*. **The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders**, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules

> themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with *Huang* [2007] 2 AC 167, para 20), but they can be said to involve 'exceptional circumstances' in the sense that they involve a departure from the general rule. (my emphasis)"

12. The Court of appeal in **NA (Pakistan) [2016] EWCA Civ 662** also considered the meaning of "very compelling circumstances" and how the test might be met. The Court concluded at [29], referring to the exceptions in section 117C which mirror paragraphs 399 and 399A, that a foreign criminal facing deportation is not "altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". The position is rather that:

> "a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paragraphs 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those exceptions and those paragraphs, which made his claim based on article 8 **especially strong**. (my emphasis)".

In the case of a medium offender, the Court sets out, at [32]:

> "if all he could advance in support of his article 8 claim was a 'near miss' case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. **He would need to have a far stronger case than that by reference to the interests protected by article 8 to bring himself within that fall back protection.** But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to article 8 but not falling within the factors described in Exceptions 1 and 2. The decision-maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation. (my emphasis)"

13. The First-Tier Tribunal found that it would not be "unduly harsh" for the appellant's child if the appellant were to be deported. That finding was not subject to a cross-appeal. The evidence here permitted no other conclusion given the appellant's limited contact with his son prior to, during and after his imprisonment, the issues that led to the non-molestation order being made. The child's autism was not a significant factor; see [35]. There was the additional evidence of Ms [F] caring for the child well and the additional support of her brothers; see [36]. The evidence was not capable of showing "a degree of harshness going

beyond what would necessarily be involved for any child faced with the deportation of a parent"; see K**O (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53**.

14. In light of the guidance given by the Court of Appeal in **NA (Pakistan)**, this was not a "near miss" under paragraph 399 and the appellant needed to show an "especially strong" factor to meet the "very compelling circumstances" test. Thedecision here does not identify what evidence here could meet that threshold, the assessment focussing in large part on the situation for the child, already found not to be sufficient to show an Article 8 ECHR breach.

15. Further, there was no assessment of whether paragraph 399A was met. This is an error as an assessment of those factors was a required part of the "very compelling circumstances assessment", without which it cannot be said that the outcome would have been the same.

16. In addition, the evidence before the First-Tier Tribunal was clearly incapable of showing that the provisions of paragraph 399A were met. The appellant came to the UK in 2008 aged 28 and is now 39. He has not lived in the UK lawfully for more than half his life. He has been here for only 11 years after growing up and living the rest of his life in Gambia. Setting aside whether his conduct can show that he is socially and culturally integrated, albeit his sisters were in the UK, the evidence was that his father remained in Gambia, was a chief and a businessman, the appellant had been able to establish his own business as a barber in the UK and could be expected to do the same in Gambia, having lived there for by far the majority of his life, coming to the UK as an adult. These matters indicated that the appellant could not show very significant obstacles to re-integration in Gambia. He was again required to show "especially strong" factors to meet the "very compelling circumstances" test and the decision here does not identify what evidence here could meet that threshold.

17. The "very compelling circumstances" decision was also based on the judge's view that the appellant's conduct since his release from imprisonment showing the "weight of the public interest in removal is towards the lower end of the spectrum"; see [42]. This does not show a proper application of the "great weight" to be given to deportation in light of the sentence here, following **Hesham Ali** and **NA (Pakistan)**. As the grounds set out, it was not for the respondent to justify the public interest in deportation but for the appellant to identify factors capable of outweighing the high public interest in his exclusion.

18. For all of these reasons, it is my judgment that the grounds of appeal have merit. The First-Tier Tribunal took an incorrect approach to the "very compelling circumstances assessment" in omitting to take into account that the appellant's relationship with his son could not meet paragraph 399 by some margin, that he did not meet paragraph 399A by a similarly large margin, that the factors on which weight was placed were not

capable of being found to be "very compelling" over and above paragraphs 399 and 399A or to amount to a "very strong claim indeed". The First-Tier Tribunal also erred in weighing the public interest in the deportation, finding that the appellant was at the "lower end of the spectrum" despite his conviction of drugs offences and sentence of 27 months, the guidance being that "great weight should generally be given to the public interest in the deportation of such offenders".

19. I therefore found a material error of law in the decision of the First-Tier Tribunal and set it aside to be re-made. I heard submissions from Mr Reza and Mr Bramble on the re-making.

20. As above, the provisions of paragraphs 399 and 399A are not met and are not met by a significant margin. The appellant's relationship with his son, the length of time that he has been here and his circumstances on return to Gambia are not factors capable of amounting to "very compelling circumstances". I must therefore assess whether there are other factors making this appellant's claim "especially strong." I could not identify such factors here. The appellant has conducted himself reasonably well since coming out of prison, re-establishing limited contact with his son, starting a small business, supporting young people and not re-offending. He has only been out of detention since July 2018, however. The OASys report shows that he denied any responsibility for his offences for an extended period of time whilst in prison, having pleaded not guilty at trial. His expressions of remorse since leaving prison have to be considered in the context of the findings of the First-Tier Tribunal as to his willingness to "stretch the truth, sometimes beyond breaking point", set out in [10] above.

21. In my judgment the factors weighing on the appellant's side of the balance, even weighed cumulatively and holistically, are not capable of outweighing the public interest in deportation where the appellant has received a 27 month sentence for drugs convictions. As in **Hesham Ali**, Parliament has decided that only "a very strong claim indeed" can outweigh the public interest here and the evidence does not show that that threshold is met.

22. I make this decision aware that that it will bring distress to the appellant, his ex-partner and their child. It remains the case that the approach set down by Parliament and clarified by the higher courts affords of only one outcome on the evidence presented here, that there are not very compelling circumstances capable of outweighing the public interest in the appellant's deportation.

23. For these reasons, therefore, I remake this appeal as refused.

Notice of Decision

24. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.

25. I remake the appeal as refused.

Signed:  Date: 9 April 2019
Upper Tribunal Judge Pitt