Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13680/2018

THE IMMIGRATION ACTS

Heard at Bradford on 11 December 2019	**Decision & Reasons Promulgated on 7 January 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

JONATHAN [D]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer.
For the Respondent: Mr Frost instructed by Duncan Lewis & Co Solicitors.

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of First-Tier Tribunal Judge Ince promulgated on 25 June 2019 in which the Judge allowed Mr [D]'s appeal.

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Background

2. Mr [D], a citizen of the Democratic Republic of Congo (DRC), was born on 25 December 1995. He appealed against a decision of 14 November 2018 refusing his protection and human rights claims pursuant to what the Judge describes as the making of a deportation order against him.
3. The chronology set out in the Secretary of States papers is in the following terms (reference to appellant and respondent is as they appeared before the First-tier Tribunal):

> Home Office records show that the appellant's mother arrived in the UK on 22 April 2001 with the appellant's younger sister and claimed asylum.
>
> That the appellant and his older sister, [BD] were still in the DRC.
>
> The appellant's mother's asylum application was refused on 10 June 2004 and an appeal against that decision dismissed on 12 October 2004 and on 12 January 2005 an application for permission to appeal to the Tribunal was rejected. On 22 February 2005 a Statutory Review was dismissed and on 15 March 2005 the appellant's mother's appeal rights became exhausted.
>
> On 15 March 2015 an application was made for Humanitarian protection under Article 3 of the ECHR on behalf of the appellant's mother with the appellant and his siblings as her dependents.
>
> On 5 April 2007 the appellant's mother's representatives submitted further representations to be considered as a fresh application for asylum and under the provisions of the European Convention on Human Rights (ECHR). On 6 August 2007 both the application for ILR and the further representations were refused.
>
> On 7 December 2007 the appellant, his mother and siblings all granted ILR under the Legacy concession.
>
> On 13 November 2010 the appellant's mother submitted an application for naturalisation as a British citizen with the appellant and his siblings as her dependents, but on 4 January 2011 the application was refused.
>
> On 4 October 2017 the appellant was convicted at Leeds Magistrates Court for violent disorder and on 1 December 2017 he was sentenced to 6 months imprisonment.
>
> On 15 December 2017 the appellant was served with a decision to deport letter dated 14 December 2017.
>
> On 3 January 2018 the applicant made representations in response to the decision to deport letter.
>
> On 10 January 2018 the appellant's representatives wrote the Home Office requesting an extension of time in which to make representations and on 16 February 2018 he was permitted an extra 5 working days to respond.
>
> On 22 February 2018 the appellant's legal representatives submitted further representations together with additional documents citing Articles 3 and 8 of the ECHR.

On 20 April 2018, the appellant completed a screening interview.

On 21 May 2018, and asylum interview was completed.

31 May 2018, the appellant's licence expired.

4. On 14 November 2018 Mr [D] was served with the reasons why his protection and human rights claim of the 22 February 2018 had been refused. Part One of the Notice of Decision is in the following terms:

> Part 1 – Deportation decision
>
> We wrote to you on 15 December 2017 and notified you that because of your criminal convictions in the UK the Secretary of State had decided to make a deportation order against you under section 5(1) of the Immigration Act 1971. This is because the Secretary of State deems your deportation to be conducive to the public good. In response to that decision, you submitted representations dated 22 February 2018 setting out why you should not be deported. Your representations have been considered below.
>
> What this means for you
>
> You remain subject to a decision to make a deportation order.
>
> You do not have a right of appeal against the decision to deport you. However you may appeal against the decision to refuse your protection and human rights claims under section 82 (1) Nationality, Immigration and Asylum Act 2002 from within the UK.

5. The decision maker noted that the reason for the deportation was the above conviction for a criminal offence resulting it being deemed his deportation was conducive to the public good under section 3(3)(a) Immigration Act 1971. The decision maker noted Mr [D] was sentenced to 6 months imprisonment and required to pay a victim surcharge.

6. The Judge at [2] sets out the provisions of Section 32 UK Borders Act 2007 when it is not suggested in the respondent's decision, or elsewhere, that this is an automatic deportation appeal. Section 32(5) of the UK Borders Act 2007 mandates that, unless certain circumstances apply, the Home Secretary must make a deportation order against a 'foreign criminal', defined in the same Act as 'a person who has been convicted of an offence and sentenced to 12 months imprisonment as a result'. Mr [D] has been convicted of an offence but not sentenced to 12 months imprisonment and so these provisions cannot apply.

7. The Judge at [17] wrote:

> "Prior to hearing evidence, I discuss the issues with the representatives and it was agreed that the asylum on human rights (Article 8) issues were before me. Further, there was the preliminary point referred to above, namely whether the Appellant was a "foreign criminal", which categorisation depended upon whether he had been convicted of an offence "that has caused serious harm". Mr Spence accepted that the burden of proving this was upon the Home Office on the balance of probabilities."

8. In relation to the human rights aspect, the Immigration Rules at 398, 399 and 399A attempted to define exactly what qualities a family or private life would need to have in order to outweigh the public interest in deportation.
These rules essentially put foreign criminals into three categories:
Those sentenced to 4+ years in prison;
Those sentenced to 1-4 years in prison; and
Individuals who had not necessarily been sentenced to time in prison, but
whose offending had caused serious harm; or
was a persistent offender and showed a particular disregard for the law.

9. The Judge commenced by considering as a preliminary point whether Mr [D]'s offending had caused serious physical or psychological harm. At [29] the Judge writes:

> "I am therefore led to the conclusion that Miss Pickering is correct - there is insufficient evidence for me that this incident of "Violent Disorder" has caused "serious physical or psychological "harm" to any person or that it "has contributed to a widespread problem that causes serious harm to a community or to society in general" - no evidence of this latter category has been provided."

10. The Judge concluded that Mr [D] is not a 'foreign criminal', but so far as that term is defined in the UK Borders Act he never was. The Judge at [30 – 31] writes:

> 30. I therefore find that the Appellant is not a foreign criminal. Accordingly, there is no justification for his deportation and his appeal must therefore be allowed.
>
> 31. Having made this preliminary decision, it follows that this is the end of the case and that there is no need for me to make any further decisions about the Appellant's asylum, Humanitarian Protection or Article 8 appeals.

11. The Secretary of State sought permission to appeal asserting, inter alia, the Judge erred in law in failing to deal with Mr [D]'s grounds of appeal pursuant to section 84 of the 2002 Act, as the Judge was required to make findings regarding whether Mr [D]'s removal will be contrary to the Refugee Convention and ECHR.

12. Permission to appeal was granted on a renewed application by Upper Tribunal Judge Grubb in the following terms:

> 1. The First-Tier Tribunal (Judge Ince) allowed the appellant's appeal against a decision to refuse his human rights claim following a decision to deport him.
>
> 2. The grounds are arguable. Even if the appellant was not a "foreign criminal" as defined in the UK Borders Act 2007 and s. 117 D of the NIA Act 2002, all that meant was that the automatic deportation provisions in the 2007 Act and the article 8 considerations in s.117C of the 2002 Act did not apply. The Judge still had to decide the appellants Art 8 claim, albeit on the (now) rather unusual basis that he is not a "foreign criminal". In

dismissing his appeal because these two sets of provisions did not apply, the judge did not resolve the issue in the appeal: would the appellant's deportation breach Art 8.

3. For these reasons permission to appeal is granted.

Error of law

13. The self-direction set out at [17] of the decision under challenge was correct although it appears the Judge, having focused upon the question of whether the appellant caused serious harm, appears to have forgotten what the issues in this appeal actually are. It is a protection and human rights appeal.
14. It is also the case that the power to make a deportation order and, as a first step, to decide to make one, stems originally from section 5(1) and section 3(5)(a) and section 3(6) of the Immigration Act 1971.
15. Section 3(5) of the 1971 Act gives the Secretary of State power to deport a non- British Citizen (a) if he deems it to be conducive to the public good (b) if another member of the family is to be deported and (c) if a court recommends it after conviction of an offence punishable by imprisonment. Section 3(5)(a) is reflected in paragraph 363 of the Immigration Rules, which states that a person is liable to deportation where the Secretary of State deems that person's deportation to be conducive to the public good.
16. The Judge referred to the case of Andell (foreign criminal – para 398) [2018] UKUT 198 in which the Upper Tribunal held:

    (a) A decision by the Secretary of State to make a deportation order under the 1971 Act is not predicated upon an individual being a "foreign criminal" as defined by the 2002 Act or the 2007 Act;
    (b) "Foreign criminal" is a term of art in the 2002 Act and the 2007 Act whereas in the Rules the words simply denote that the individual is a "foreigner" and a "criminal";
    (c) Paragraph 398 of the Rules includes not only foreign criminals as defined in the 2002 Act and the 2007 Act but also other individuals who in the view of the Secretary of State, are liable to deportation because of their criminality and/or their offending behaviour.

17. It is also the case that as the Judge found that Mr [D]'s offending has not caused serious harm then paragraphs 398, 399 and 399A could not apply. In such a case the Judge was required to consider whether the appellant's deportation was conducive to the public good which is a question of fact.
18. The Rules assert at paragraph 397 that a deportation order will not be made if it would be contrary to the UK's obligations under the Refugee Convention or the ECHR or if not contrary to those obligations, in exceptional circumstances.
19. Even though the Judge determined Mr [D] was not a foreign criminal he was still required to determine the protection and human rights grounds and, as a result of not doing so, erred in law.
20. I set the decision aside although the conclusion Mr [D] is not a 'foreign criminal' is it was not found by the Judge his offending had caused 'serious harm' is a preserved finding.

Discussion

21. The Upper Tribunal was able to go on to remake the decision.

22. Mr [D] was sentenced to 6 months imprisonment after a public order offence in October 2017. He came to the United Kingdom as a child aged 6 and based his protection claim on an assertion that he had lived in the UK for the majority of his life and did not know what life was like in the DRC, fears what he sees in the news regarding Ebola and individuals being kidnapped, and confirmed in his asylum interview that his fears are more to do with leaving his family in the UK.

23. The facts relied upon by Mr [D] do not establish any particular fear of returning to the DRC for a Convention Reason. The decision-maker considered sufficiency of protection if Mr [D] should face problems on return to the DRC but concludes that as he had not established any specific Convention or other reasons for why he would require state protection he had not established he was in need of the same.

24. In October 2019 it was known the Secretary of State was reviewing her position in relation to return to the DRC following the publishing of the “Unsafe Return III” report by Justice First in May 2019. At that time the internal review team were waiting for further information in response to a request made to one of the key NGOs mentioned in the report before finalising their review. It was anticipated that the review would have been completed by the end of November 2019, but this has been shown to be an optimistic estimate. In the meantime, no decisions were being made in relation to foreign national offenders from the DRC.

25. In reply to a question asked in Parliament to the Secretary of State regarding such returnees it was stated on 13 June 2019: “*We only return those who are without a legal right to remain in the UK, including foreign national offenders, when we and, where the individual has exercised a right of appeal, the courts deem it is safe to do so, on a case by case basis. We are currently reviewing our assessment of risk faced by rejected asylum seekers and foreign national offenders on return to the Democratic Republic of Congo (DRC). An updated country policy and information note setting out our position will be published in due course. The Home Office has regular discussions with the Foreign Office on a range of issues and has on a number of occasions discussed the subject of returns to the DRC to establish as full an assessment of the situation as possible.”*

26. The decision in this case was made on the 14 November 2018 before the review was though to be necessary and so did not consider the Unsafe Return III report.

27. In the country guidance case of BM and Others (returnees –criminal and non-criminal) DRC CG [2015] 293 (IAC), heard in March and April 2015, the Home Office acknowledged, amongst other things, that, owing to the poor prison conditions, a period of detention of more than approximately one day would result in a breach of Article 3. The Upper Tribunal accepted this assessment as ‘clearly warranted by

substantial and compelling evidence' (paragraph 13). Conditions in detention centres and prisons continue to be very poor, with ill-treatment reportedly commonplace. It therefore remains the case that a person detained for more than a day, even for short period of time, is likely to face conditions that breach Article 3.

28. Although it is not made out Mr [D] will be persecuted for a Convention reason, as he is not a known opposition member or a person with an adverse profile, either actual or imputed, he is a foreign national criminal who will be deported from the United Kingdom. He will be questioned on arrival and if imprisoned is likely to receive treatment sufficient to breach his article 3 rights.

29. The issue of whether he will be detained on arrival and ill-treated was considered at the core of the Unsafe Returns III report. Mr [D] seeks to rely upon a country expert report prepared by Catherine Ramos who is the author of the Unsafe Return, Unsafe Return II and Unsafe Return III reports. The report is dated 15 May 2019. At the latter part of the report it is written:

> Returnees I have monitored since 2012 have faced the following difficulties and barriers to integration. I believe that Jonathan [D] will be exposed to the same difficulties and barriers to integration into society.
>
> - Destitution and hunger and homelessness if returnees have no family in Kinshasa. Returnees do not know who they can trust. People who have taken in returnees expect payment which puts a burden on families in the UK. Case Study 16 (Unsafe Return III P.33) met a human rights activist who described him in 2017 as 'durty' [sic] and crazy. He was sleeping on the streets. In 2012 the human rights group RENADHOC had stated to the UK Fact Finding Mission delegates that 'Returnees without family in Kinshasa, they become mentally affected, with no one to care for them, no support, so become mentally ill, some just die.'
>
> - Lack of ID (voters card) to present at checkpoints on the street will lead to risk of arrest. It is not possible to prove nationality.
>
> - Jonathan [D] does not speak the national languages. Speaking English puts returnees at risk of being identified as spies in communities where there are Secret Service/police informers. People in DRC believe Rwanda is infiltrating their country. Rwanda's official language is English.
>
> - Gaining employment has not proved possible for returnees.
>
> - Even when returnees have been released from the airport or prison following payment, officers have gone to the address to re-arrest the returnee. The returnees have had to move on.
>
> - Returnees have no support and no recourse for protection from United Nations Joint Human Rights Office, British Embassy or IOM as the returnees are not within their mandate.
>
> - Money sent from UK families via Western Union cannot be accessed directly due to lack of ID. Intermediaries have to be used, putting the returnee at risk of exploitation. Returnees are threatened with

exposure to the DRC authorities as a spy/combatant, if they do not hand over items/money sent from UK.

- Mental health problems exasperated by worries about their families in the UK and fears about personal safety.

- Phones and belongings have been stolen at N'djili airport and in prisons.

Communication with family by phone is difficult because phones cannot be charged, places of hiding are outside of network coverage and electricity cuts.

Based on my monitoring and research, I believe that as an offender and asylum seeker, Jonathan [D] will be at risk of imprisonment and ill-treatment which will breach the ECHR, if removed to DRC. He will not be able to avail himself of protection from the DRC authorities. I also believe there are substantial barriers to his integration into Congolese society.

30. No evidence was called, or detailed submissions made by Mr Diwnycz to counter the expert report. I find based upon the report and research behind it that Mr [D] on return to the DRC faces a real risk of harm which will involve at least a period of detention which, in accordance with the current country guidance case, will give rise to ill-treatment sufficient to breach article 3 ECHR.

31. In relation to article 8 ECHR, it is accepted Mr [D] is not a 'foreign criminal' and not subject to the automatic deportation provisions or the Immigration Rules referred to above. Assessment of the merits of human rights claim has to be undertaken in accordance with the Razgar principles and based solely on the facts as found in relation to his situation. It is also the case that Mr [D] is not the subject of a deportation order. The Secretary of State on 15 December 2017 served a decision to make a deportation order. It is only if the appeal against the refusal of the claim for international protection or leave on human rights grounds is refused that the deportation order will be made. This stage has not been reached in these proceedings to date.

32. The judgment in Razgar provides a five-stage process, as follows:

1.Does the [refusal] amount to an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

2. If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8.

3. If so, is such interference in accordance with the law?

4. If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

5. If so, is such interference proportionate to the legitimate public end sought to be achieved.

33. It was not disputed that Mr [D] has established a private life in the United Kingdom. Mr [D] has lived in the United Kingdom for the most significant proportion of his life with over 50% of his life now being spent in the United Kingdom. Mr [D] is fully integrated into British society and culture having been educated and having attended college in this country. Mr [D] speaks excellent English and obtained GCSE's in 2012 and a BTEC Diploma in 2015. A number of supporting letters confirming Mr [D]'s integration and contribution to the community have been provided in the appeal bundle.

34. Mr [D] was granted Indefinite Leave to remain when he was 13 years of age and has been free of immigration control since.

35. The Sentencing Judge when dealing with Mr [D] stated:

> "Jonathan [D], you are 21 years old, you have no previous convictions and after the mayhem broke out and things were being thrown towards your group you went around the room and joined the Wakefield group and were involved in a confrontation. You put your drink down and rushed towards the Leeds group. That was a catalyst for a bout of sporadic fighting which drew in others who had been passive bystanders by then. You didn't manage to land a blow but you were knocked to the floor and stamped on by Buss.
>
> In mitigation, I have borne in mind, as I say, your lack of previous convictions, that this is out of character and that you behaved irrationally and you got assaulted yourself. I have borne in mind your good work as a support worker and the good work you have done for people with learning disabilities. The sentence is 6 months imprisonment; it would have been 9 months after a trial, and you may go down. Thank you.

36. There is also at page A19 of Mr [D]'s appeal bundle a printout of the GCID -Case Record Sheet relating to this matter obtained following a Freedom of Information request. An entry dated 8 October 2019 is in the following terms:

> I have revisited this case after taking some time off from it to complete some other urgent work.
>
> I have been progressing the case to deportation however I have doubts over whether we are pursuing the right course of action in this case.
>
> I have discussed the case with the SCW in light of the nature of the case: 6 months sentence (3 months custody and 3 months on licence): no prior criminal history, DRC nationality; etc
>
> Following our conversation, I put forward a proposal to concede the deportation. I am now waiting for a formal response from the SCW.

37. Whilst the decision to deport was not conceded this clearly illustrates doubt in the mind of the caseworker whether it is necessary or appropriate in all the circumstances to proceed with the deportation.

38. Also within the bundle are statements from the appellant's partner [EA] and from his mother, younger brother and Ms [A]'s mother attesting to the extent of Mr [D]'s integration and strong private life, and in relation to [EA] family life recognised by article 8.

39. There will be an interference in the protected rights sufficient to engage article 8.

40. Such interference is in accordance with the law.

41. When answering the 4th of the Razgar questions, whether such inference was necessary as being in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others, the answer is more nuanced. The only reason the Secretary of State gave notice of her intention to deport Mr [D] was because it was considered to be conducive to the public good to do so as a result of his criminal conviction. It is a preserved finding that there is insufficient evidence to show Mr [D] cause serious physical or psychological harm. There is also clear evidence the offence was an isolated 'one-off' out of character incident. The factors referred to by the Sentencing Judge warranted the short sentence given below the threshold length of sentence set out in the Immigration Rules and/or the primary legislation.

42. The OASYs report dated 9 October 2018 in relation to the risk assessment assesses risk to the public in the community as medium risk and in relation to all other persons, both in the community or in custody, as low. The circumstances that led to the offending are unique and unlikely to be repeated which is relevant to the indicators of risk of serious harm. The classification 'medium' is a reflection of an offender who has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances. It was not submitted that such an event is likely to occur in relation to Mr [D].

43. Section 117 A+ B are applicable but not 117C not as he not a foreign criminal.

s.117A: (1)This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a)breaches a person's right to respect for private and family life under Article 8, and

(b)as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2)In considering the public interest question, the court or tribunal must (in particular) have regard—

(a)in all cases, to the considerations listed in section 117B, and

(b)in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3)In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

117BArticle 8: public interest considerations applicable in all cases

(1)The maintenance of effective immigration controls is in the public interest.

(2)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a)are less of a burden on taxpayers, and

(b)are better able to integrate into society.

(3)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a)are not a burden on taxpayers, and

(b)are better able to integrate into society.

(4)Little weight should be given to—

(a)a private life, or

(b)a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5)Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.

(6)In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where—

(a)the person has a genuine and subsisting parental relationship with a qualifying child, and

(b)it would not be reasonable to expect the child to leave the United Kingdom.

44. Mr [D] speaks English, is not a drain on the public purse as he is in employment undertaking valuable work with vulnerable adults, is integrated into the United Kingdom, and relies on a private and family life developed at a time his status in the United Kingdom has been lawful and not precarious, warranting due weight being given to the same.

45. When considering whether such interference is proportionate to the legitimate public end sought to be achieved I find the Secretary of State has failed to establish the balance falls in her favour, such as to make any interference with Mr [D]’s protected rights proportionate, on the specific facts of this case.

Decision

46. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed on human rights grounds.**

Anonymity.

47. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 31 December 2019