Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02238/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 15 July 2014	**On : 16 July 2014**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUCHAI WAINAINA

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr J Braier, instructed by Liberty & Co Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD) against the decision of First-tier Tribunal Judge Vaudin d'Imecourt

allowing Mr Wainaina's appeal against the respondent's decision to deport him from the United Kingdom.

2. For the purposes of this decision, I shall hereafter refer to the Secretary of State as the respondent and Mr Wainaina as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Kenya, born on 27 June 1989. He entered the United Kingdom on 18 June 1995 and was granted temporary admission to join his mother who subsequently applied for asylum with him as her dependant. His mother's application was refused on 4 May 2000 but she was granted exceptional leave to remain until 4 May 2004. The appellant was granted leave in line. On 5 March 2005 he was granted indefinite leave to remain.

4. On 3 September 2007 the appellant was convicted of possession of a Class A controlled drug with intent to supply and was sentenced to three years in a young offender's institute. He claimed asylum on 7 April 2009. On 5 June 2010 he was cautioned for possession of a Class B controlled drug and on 5 March 2012 and 15 November 2012 he was convicted of various other offences. On 18 February 2013 he was made the subject of a deportation order signed against him but service of the order and the reasons for deportation letter was unsuccessful. On 18 September 2013 he was convicted of destroying or damaging property, battery and failing to surrender to custody and received a sentence of 12 weeks imprisonment.

5. On 1 November 2013 the reasons for deportation letter and deportation order were served on the appellant. In the decision of 31 October 2013, that section 32(5) of the UK Borders Act 2007 applied, the respondent rejected the appellant's asylum claim and found that paragraphs 399 and 399A of the immigration rules did not apply to him and that there were no exceptional circumstances outweighing the public interest in his deportation for the purposes of Article 8 of the ECHR. With regard to paragraph 399, it was noted that the appellant had not claimed to have a spouse, partner or children.

6. The appellant's appeal against the respondent's decision was heard on 13 May 2014 by First-tier Tribunal Judge Vaudin d'Imecourt. At the hearing, evidence was produced before the judge of the appellant's relationship with a British national, Victoria Jane Taylor, which it was claimed had commenced in April 2010 and from whom he had had one child, with another baby expected in December 2014. The judge allowed the appeal under the immigration rules on the grounds that the requirements of paragraph 399(b) applied, since the appellant had a genuine and subsisting relationship with a British citizen, that he had lived in the United Kingdom with valid leave continuously for at least 15 years immediately preceding the application and that there were insurmountable obstacles to family life continuing outside the United Kingdom.

7. The Secretary of State sought permission to appeal against that decision on the grounds that the judge had failed to give adequate reasons for concluding that the appellant met the exceptions to paragraph 399(a) and (b).

In particular with regard to paragraph 399(b) the grounds asserted that there had been a failure to give adequate reasons for finding that there were insurmountable obstacles to family life continuing outside the United Kingdom. It was also asserted that there had been a failure to consider the Secretary of State's public interest policies. Permission was granted on 8 June 2014.

8. At the hearing before me Mr Jarvis applied to amend the grounds so as to include the ground that the judge had wrongly decided the question of 15 years valid leave, since the appellant's period of leave had commenced only in May 2000 and since a period of "valid leave" did not include temporary admission.

9. Mr Braier objected to the amendment on the grounds that the Home Office Presenting Officer, at the hearing before the First-tier Tribunal, had conceded the period of 15 years valid leave and the only issue before the judge had been that of "insurmountable obstacles" in paragraph 399(b)(ii). The concession had been one of fact and it could not therefore be raised as an error of law on the judge's part. Further, the respondent ought not to be able to amend the grounds, given that there had been ample opportunity to do so prior to today's date.

10. Whilst the late application to amend the grounds was not to be condoned, it seemed to me that the amendment had to be permitted since there was no doubt that there had been an error of law in the Tribunal's consideration of the period of valid leave under paragraph 399(b). Likewise, whether or not there had been a concession made on behalf of the respondent at the hearing before the Tribunal (and it was certainly not clear from the determination that any such concession had in fact been made), the fact remained that it was legally wrong. I produced to the parties the reported decision of the Upper Tribunal in Pembele v Secretary of State for the Home Department (Paragraph 399(b) (i) – valid leave – meaning) Democratic Republic of Congo [2013] UKUT 310, in which the very issue had been determined. That was a binding decision and clearly, therefore, Judge Vaudin d'Imecourt was wrong to have found that the appellant had been living in the United Kingdom with valid leave for 15 years and was wrong to find that the requirements of paragraph 399(b) had been met.

11. In the circumstances, given that the judge, having found that the requirements of the immigration rules had been met, did not go on to make any other findings of fact, it was agreed by all parties that the matter had to be remitted to the First-tier Tribunal to be considered afresh. It was for the First-tier Tribunal to hear the appeal de novo and to make its own findings in regard to paragraph 399A and, if appropriate, exceptional circumstances under paragraph 398 of the rules.

DECISION

12. The Secretary of State's appeal is allowed.

13. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), on the grounds that the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal to be dealt with afresh, before any judge aside from Judge Vaudin d'Imecourt.

Signed

Date

Upper Tribunal Judge Kebede