



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01732/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 29 September 2015

Decision & Reasons Promulgated
On 9 October 2015

Before

The President, the Hon. Mr Justice McCloskey and
Upper Tribunal Judge Bruce

Between

SALIM POPOOLA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellant:

Ms G Brown (of Counsel), instructed by Michael Stevens Solicitors

Respondent:

Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

INTRODUCTION

1. The origins of this appeal lie in the decision of the Respondent, the Secretary of State for the Home Department (“the *Secretary of State*”), dated 20 August 2014, to make a deportation order in respect of the Appellant, a national of Nigeria aged 15 years.

The Appellant appealed, unsuccessfully, to the First-tier Tribunal (the “*FtT*”) and now appeals, with permission, to the Upper Tribunal.

IMMIGRATION HISTORY

2. This is as follows:
- (a) The Appellant asserts that he entered the United Kingdom in March 1986 and, *qua* dependant of his parents, was granted leave to remain expiring on 31 October 1988.
 - (b) Between December 1988 and April 1992 the Appellant was the beneficiary of successive finite grants of leave to remain.
 - (c) On 07 April 1990 the Appellant was granted indefinite leave to remain in the UK.
 - (d) On 30 August 2000 the Appellant was convicted of possessing an offensive weapon and an offence of dishonesty, punished by monetary orders totalling some £85.00 and a conditional discharge.
 - (e) On 05 January 2004, the Appellant was convicted, having been prosecuted on indictment, of resisting or obstructing arrest, possessing Class A Heroin, handling stolen goods and failing to surrender to bail, giving rise to an 80 hour community punishment order, a 12 month community rehabilitation order and a 3 month curfew order.
 - (f) On 12 March 2004, the Appellant was convicted, again upon indictment, of 17 counts of supplying Class A heroin and one count of supplying Class B cannabis, punished by 4 years imprisonment concurrently.
 - (g) On 11 September 2004, the Appellant’s application for naturalisation (made in June 2003) was refused on the ground of bad character.
 - (h) On 14 April 2009 the Appellant was convicted of battery, punished by a community order requiring unpaid work of 200 hours and a compensation order of £300, together with costs of £200.
 - (i) On 14 February 2011 the Appellant’s community order was varied to a community residence order of 7 days and he was convicted of failing to comply with the earlier order.
 - (j) On 13 April 2011 the Appellant was convicted of possessing cannabis and cannabis resin, punished by modest monetary orders.
 - (k) On 30 July 2011 the Appellant was again convicted of the aforementioned offence, punished by a fine of £100, a victim surcharge of £15 and costs of £85.
 - (l) On 22 November 2011 the Appellant was convicted again of the same offence, receiving a 6 month community order entailing unpaid work and activity requirements, together with costs of £85.
 - (m) On 24 March 2012 a child was born of the Appellant’s partner in the United Kingdom.

- (n) On 09 April 2013 the Appellant was punished by concurrent fines of £50 in respect of two further counts of possessing cannabis and cannabis resin and failing to surrender to custody.
- (o) On 26 April 2013 the Appellant was sentenced to a further community order and ordered to pay £60 compensation having been convicted of destroying or damaging property.

THE SECRETARY OF STATE'S DECISION

3. On 02 June 2014 the Appellant received the customary 'minded to deport' notification. In his response, dated 20 June 2014, he made the case that to deport him would be unlawful as it would infringe his and other's rights under Article 8 ECHR, contrary to section 6 of the Human Rights Act 1998.

4. The deportation decision, having rehearsed the Appellant's immigration and criminal histories, followed by a number of general policy type statements, contains a section entitled "Metropolitan Police Intelligence". The essence of what follows may be discerned from the following extracts:

"Evidence has been submitted by the Metropolitan Police which adds further weight to arguments in favour of a decision to deport you. The Secretary of State concludes that this evidence demonstrates that your presence in the United Kingdom is not conducive to the public good ...

In addition to your criminal record of 10 convictions for 32 offences, the MG11 shows a further 3 non-convictions between 04 September 2009 and 10 June 2011. These non-convictions relate to money laundering and possession of cannabis, kidnap and false imprisonment and common assault. **Full details of these incidents can be found in the MG11**

It is evident from the MG11 provided by the Metropolitan Police that you are a man who is not on the fringes of criminality, but is actively engaged in a criminal lifestyle whose behaviour and associations cause serious risk to innocent individuals

It is clear that you were actively involved in drug dealing [in 2003] and you probably still are."

[Emphasis added.]

It is common case that "MG11" is a compilation emanating from the Metropolitan Police and, further, that a copy of this was attached to the decision letter.

5. The decision maker then considered the Appellant's Article 8 claim, noting that this was based on the existence of his daughter, aged two years, born to his former partner. Under the rubric "*very compelling circumstances*", the decision maker, having noted the legal rule that the public interest required the Appellant's deportation "*unless there are very compelling circumstances, over and above those described in the exceptions to deportation set out at paragraphs 399 and 399A of the Immigration Rules*", continues:

“In order to outweigh the very significant public interest in deporting you, you would need to provide evidence of a very strong Article 8 claim, over and above the circumstances described in the exceptions to deportation. You have failed to provide evidence of a very strong Article 8 claim.”

It was concluded, accordingly, that very compelling circumstances sufficient to outweigh the public interest in deporting the Appellant had not been demonstrated.

DECISION OF THE FtT

6. The appeal was conducted on the basis that since the Appellant’s sentence of four years imprisonment pre-dated the UK Borders Act 2007, the automatic deportation provisions of the latter were not engaged and the question was whether under section 3(5) of the Immigration Act 1971 his deportation would be conducive to the public good. It was submitted on the Appellant’s behalf that he is a reformed character and that his drugs offences were mainly stimulated by his dependency. Certain aspects of other offences documented in the Appellant’s criminal record were disputed by him. The absence of any negative reoffending assessment was highlighted. The Appellant presented as a person who is employed, is self sufficient and supports his child and step son. Finally, it was claimed that he has no enduring links to Nigeria.

7. The decision of the FtT contains the following damning assessment of the Appellant’s veracity:

“... We did not find him to be credible. We found that his evidence contained many inconsistencies and when dealing with his responses to the matters contained within the CRIS reports, we found his evidence to be highly implausible and not consistent with the matters recorded therein and we did not accept his explanation of the matters ...

We were not satisfied that we were able to rely upon the Appellant’s evidence or that of the other live witnesses as being the truth of the matters that they gave evidence about.”

The other “live” witnesses were the Appellant’s mother, sister and current girlfriend. The above passage in the determination is followed by a series of supporting particulars. For the reasons given, the Tribunal disbelieved the Appellant’s several claims relating to aspects of both his offending and his *soi-disant* “non-convictions”. The decision also contains reasoned grounds for rejecting the Appellant’s claims about the depth of his relationship with his daughter and step son, giving rise to the omnibus conclusion:

“.. We are unable to accept that he has significant involvement in their lives.”

The Tribunal made a further, discrete finding that the Appellant is not in a genuine or subsisting relationship with the person presented as his current girlfriend.

8. In its conclusions, the FtT pronounced itself satisfied, on the balance of probabilities, of both the Appellant’s convictions and “*the allegations of conduct*”, clearly referring to the so-called “non-convictions”. Next, the Tribunal concluded that the Appellant’s

case is embraced by paragraph 398(a) of the Immigration Rules, as he had been sentenced to 4 years imprisonment in 2004, has had a string of further convictions subsequently and "... still remains unable to accept responsibility for some of his previous actions ...". Next, the Tribunal expressed its assessment that "... there is a real likelihood that he will reoffend". This is followed by the overall conclusion:

"On the facts established, viewed as a whole, we are satisfied that he is a persistent offender and that his conduct has reached such a level of seriousness as to justify a decision to deport and we find that deportation is conducive to the public good."

The Tribunal then made the following further discrete conclusions:

- (i) Deportation of the Appellant is harmonious with the Secretary of State's policy, currently reflected in the relevant Home Office Immigration Directorate Instruction.
- (ii) If paragraph 399 or 399A of the Rules had been applicable, the Appellant would not have satisfied either.
- (iii) Further, and in any event, very compelling circumstances over and above those specified in paragraphs 399 and 399A had not been demonstrated.
- (iv) The Appellant is not currently employed, despite his claim to the contrary.

The appeal was dismissed accordingly.

APPEAL TO THIS TRIBUNAL

9. Permission to appeal to the Upper Tribunal was granted on all of the grounds advanced, with varying degrees of enthusiasm. We dismantle the extensive grounds of appeal thus:
 - (a) There are three complaints of procedural unfairness.
 - (b) The FtT failed to apply the correct provisions of the Immigration Rules.
 - (c) Certain findings and conclusions of the FtT are contaminated by irrationality and/or inadequate reasoning and/or a failure to take into account material evidence.

We shall address each of the grounds, thus condensed, seriatim.

Procedural Unfairness

10. The three complaints of procedural unfairness are:
 - (a) The members of the FtT panel were informed in advance of the hearing of the planned arrest of the Appellant at the Tribunal premises upon completion of the hearing. It is common case that the panel members were indeed thus informed and did not declare to either party their possession of this information.
 - (b) At an early stage of the day when a delay in the hearing became necessary in the interests of fairness to the Appellant, the judicial member of the panel

expressed his anxiety that the hearing be completed within the day in question in view of his impending retirement from service.

- (c) It is asserted by the Appellant that the so-called “Nexus” bundle of documents was first served on his representatives on the morning of the hearing.

11. We consider that the first complaint of procedural unfairness falls to be determined by the application of the appearance of bias principle. The governing principles have been reviewed by this Tribunal recently in Alubankudi (Appearance of bias) [2015] UKUT 542 (IAC), at [6] – [8]. In short, the question to be addressed is whether the hypothetical reasonable, balanced and properly informed observer would consider that possession of the information in question predisposed the panel to an adverse view of the Appellant’s appeal, to the extent that they were biased against him. The observer, in evaluating this issue, would take into account, *inter alia*, what the lay member has said about this issue, when alerted to it subsequently:

“Thinking back, I can recall the clerk making a comment about the Appellant being arrested for non-payment of fines and something about it being agreed that it would occur after the hearing ... I had understood it to be a general observation of why the parties had not been ready to proceed ... [this] was not something that we would or did give any weight to or place any reliance upon ...

During the hearing ... there was no reference to the Appellant having failed to pay any fines and we didn’t think any more of it ... It was not a matter discussed in our post-hearing discussions, which concentrated on the evidence that we had had ... and no further thought had been given to it.”

The hypothetical observer would, in our judgment, draw much reassurance from this account. He would also take into account the knowledge which the panel had, without objection from any quarter, of matters seriously adverse to the Appellant, in particular his serial offending during a period of some 13 years, rehearsed in [2] above. The observer would further bear in mind that the panel were possessed of the additional damaging material contained in the “Nexus” bundle. The ultimate question for the observer would be whether the panel was subconsciously predisposed against the Appellant by virtue of its possession of the impending arrest information. Drawing together the various ingredients, we are satisfied that the hypothetical observer would have no reservations about the fairness and impartiality of the adjudicating panel.

12. We turn to examine the second element of this ground. Every litigant’s right to a fair and unbiased hearing attracts the protection of a series of principles which are well known. Citation of authority is unnecessary for this purpose. We accept, in the abstract, that if a hearing were hurried and compressed to the extent that a litigant did not have a reasonable opportunity to present and argue this case such a hearing would be unfair and, hence, unlawful. Having considered the evidence in its totality, we are entirely satisfied that the first instance hearing was, in this respect, conducted in accordance with appropriate standards. We are thus satisfied having considered in its totality the evidence bearing on this discrete issue, which includes the account of Counsel representing the Appellant, from which it is abundantly clear that the

fairness of the Appellant's hearing was in no way compromised. We have also considered the response of the lay member of the panel who states, with reference to the presiding Judge:

"... At the start of the hearing [he] told the representatives that if it was felt that there was a risk that the matter would go part heard or may require a second day, then they were to tell the Tribunal as it would have to be adjourned ... due to his impending retirement."

We note that this is unchallenged by the Appellant's former Counsel. We also take into account the lay member's impressively detailed notes of the hearing, which confirm that evidence was adduced from the Appellant and four witnesses and submissions were made by both representatives at the conclusion. We can find no reason not to accept the lay member's account. There is no merit in this ground.

13. Thirdly, and finally, the Appellant complains that the fairness of his hearing at first instance was impaired by the failure of the Secretary of State's representatives to serve the "Nexus" bundle until the morning of the hearing. His post-hearing witness statement contains the following passage:

"The Nexus bundle was only served that morning and my barrister was only given 40 minutes to go through it during which the court clerk twice interrupted to find out if we were ready to proceed as the Judge was still [sic] waiting to come in. In order to appease the Judge, my barrister urged us to go ahead into the hearing."

We take into account that the Appellant has an obvious interest in making a self-serving claim of this nature. We further take into account the withering rejection of his veracity generally in the determination of the FtT. Thirdly, and finally, we have had regard to the detailed written account of the Appellant's former Counsel. This, on its own, confounds the Appellant's assertions decisively. Furthermore, we have no hesitation in preferring Counsel's account to the very brief suggestion made in writing by the Appellant's solicitors long after the event.

14. We reject the procedural unfairness ground accordingly. In doing so, we take the opportunity to commend the Appellant's former Counsel for, firstly, clearly being aware of and appreciating the decision of this Tribunal in BW (Witness Statements by Advocates) [2014] UKUT 568 (IAC), which makes clear that a person who has represented an appellant at first instance cannot continue to do so on appeal in a case of this kind. Second, the Appellant's former Counsel has, assiduously and to a high professional standard, provided a detailed, balanced and measured written account of all material events at the first hearing.

The Operative Provisions of the Immigration Rules

15. The second ground of appeal involves the contention that the FtT erred in law by applying the post - 10 July 2015 provisions of the Immigration Rules rather than their predecessor. Unsurprisingly, this ground was advanced rather faintly, having regard to the decision of the Court of Appeal in YM (Uganda) - v - SSHD [2014] EWCA Civ 1292 which, in our view, renders this contention unarguable. We

consider further and in any event that the Appellant would have been unable to satisfy the more relaxed, benign provisions of the Rules in vogue prior to the operative date.

The Challenge to Assorted findings

16. Finally the determination is challenged on the ground that the Tribunal made certain irrational findings and/or failed to give adequate reasons and/or left out of account certain evidence. It is incumbent on this Tribunal to consider the determination as a whole, taking into account that there is no obligation upon a fact finding Tribunal to rehearse all of the evidence available to it. Having considered the discrete complaints which have been advanced under this heading we have come to the confident conclusion, applying the governing principles, that the various findings of the First-tier Tribunal under challenge are unimpeachable. They withstand challenge by reference to the various ways in which the appeal is put: irrationality, inadequate reasoning and leaving out of account certain evidence. We emphasise, as we did during the hearing, that this challenge, in essence, entails an elevated threshold for the Appellant and also requires this Tribunal to take into account the totality of the determination and in particular the various findings adverse to the Appellant's credibility.

OMNIBUS CONCLUSION

17. The appeal is dismissed on all grounds.

Seamus McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 03 October 2015