**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers: DA/01985/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision and Reasons Promulgated** |
|---|---|
| **On 6 May 2015** | **On 15 May 2015** |

**Before**

**UPPER TRIBUNAL JUDGE PITT**
**DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**PTA**

Respondent

**Representation:**
For the Appellant: Ms Isherwood, Senior Presenting Officer
For the Respondent: Ms O Momoh, instructed by Shan & Co

**DECISION AND REASONS**

The Appeal

1. In a decision promulgated on 5 December 2014, the Upper Tribunal found an error of law in the determination of First-tier Tribunal Judge Callow and Dr T Okitikpi which allowed the deportation appeal of PTA. The decision of the First-tier Tribunal was set aside and the deportation appeal now comes before us to be remade. The error of law decision is appended and gives the background to this matter.

2. We continue the anonymity order made in the error of law decision for the reasons given there. This appeal falls to be considered in line with Section 19 of the Immigration Act 2014 which inserted Part 5A of the Nationality, Immigration and Asylum Act 2002 with effect from 28th July 2014. All deportation appeals heard after that date, whether the decision to deport or the deportation order was made prior to that date or not, are subject to this new statutory scheme.

3. The amendment to Part 5A reads as follows:

117A Application of this Part

(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).

117B Article 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.

117C Article 8: additional considerations in cases involving foreign criminals

(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.

(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.

117D Interpretation of this Part

(1) In this Part—"Article 8" means Article 8 of the European Convention on Human Rights; "qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;
(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and (d) include a person who is sentenced to imprisonment or detention, or ordered or

directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

4. The Immigration Rules were amended at the same time as s117A to s117D came into effect and read, in so far as relevant to this appeal, as follows:

"A362.Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

…

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

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

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

(c) the deportation of the person from the UK is conducive to the public good and in the public interest 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 paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

399B. Where an Article 8 claim from a foreign criminal is successful:

(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of State considers appropriate;

> (b) in the case of a person who has not been served with a deportation order, any limited leave to enter or remain may be curtailed to a period not exceeding 30 months and conditions may be varied to such conditions as the Secretary of State considers appropriate;
>
> (c) indefinite leave to enter or remain may be revoked under section 76 of the 2002 Act and limited leave to enter or remain granted for a period not exceeding 30 months subject to such conditions as the Secretary of State considers appropriate;
>
> (d) revocation of a deportation order does not confer entry clearance or leave to enter or remain or re-instate any previous leave."

5. There was agreement before us that the appellant is a foreign national criminal as defined in s117D.

6. It was common ground also that the appellant who has received a sentence of 3 years and 6 months, so coming under paragraph 398(b), could not meet the requirements of paragraphs 399 or 399A of the Immigration Rules.

7. This was because the appellant does not have any children of his own in the UK. Whilst he was in prison his partner had a child on 13 January 2013 by another man. The appellant met that child only once before coming out of prison in 2014 so a relationship of any meaning, at best, in our view, can only have begun after he came out of prison less than a year ago. He has not been living with his partner and her child since leaving prison. It was not suggested to us that he had a genuine and subsisting parental relationship with that child or that it would be unduly harsh for the child to remain in the UK without him. Given the very limited nature of his relationship with his partner's child, it appeared to us that paragraph 399(a) could not be met.

8. The finding of the First-tier Tribunal that the appellant has a genuine and subsisting relationship with his partner who is settled is preserved before us. The relationship was not formed whilst the appellant was in the UK lawfully, however as he only regularised his status in 2009, however and the evidence is that the relationship began in approximately 2001. Paragraph 399(b)(i) could not be met for this reason.

9. In any event, it was not our view that the appellant's removal could be said to result in unduly harsh circumstances for the partner where the evidence indicates that the relationship has an unsettled history, she managed to continue working and looking after her child whilst the appellant was in prison and that she has good support from other family members including her mother.

10. The appellant has been in the UK for most of his life, from 1990 to the present. He cannot meet the provisions of paragraph 399A where he was in the UK unlawfully from 1990 to 2009, however. It was also our view that even where the First-tier Tribunal found that the appellant has no ties to Nigeria, having come to the UK whilst relatively young, this was not something that in his circumstances would necessarily amount to significant obstacles to integration where he has family

members such as his mother who grew up there who can advise him about life in Nigeria and who can continue to offer the support he has received since leaving prison.

11. Where those matters were so, we proceeded to consider whether there were "very compelling circumstances over and above those described in paragraphs 399 and 399A" as required by paragraph 398.

12. When conducting that assessment, we referred to the case of Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC) which provides in the head note that

> "… such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B"

and

> "… [c]ompelling as an adjective has the meaning of having a powerful and irresistible effect; convincing."

and, at [25]:

> "What are "very compelling circumstances over and above those described in paragraphs 399 and 399A" referred to in the closing words of paragraph 398? They can only be circumstances, which are sufficiently compelling to outweigh the public interest in deportation and render such deportation a breach of Article 8. The present Rules set out particular aspects that must be taken into account in the weighing of proportionality; they allow for consideration of other circumstances that may not fall within that rubric but, in the language of the Rules, those circumstances "must be very compelling"

and, at [28]:

> "Those individuals who do not come within paragraph 399 or 399A will need to establish very compelling circumstances over and above those described in paragraphs 399 and 399A because nothing else will be weighty enough to outweigh the public interest in deportation."

13. In our judgement there was nothing in the evidence before us which fell outside the "rubric" of or was "over and above" the provisions of paragraph 399 and 399A, certainly nothing that could be characterised as sufficiently compelling so as defeat the public interest in deportation. Paragraphs 399 and 399A provide for his relationship with his partner and her child and his length of residence. His relationship with other relatives in the UK has not been found to amount to a family life as the appellant is an adult who can be expected to and has established an independent adult life.

14. Section 117C (2) indicates that the more serious the offences, "the greater is the public interest in deportation". The appellant's index offence is of possession with intent to supply Class A drugs for which he received a sentence of 3 years and 6 months. That offence followed a number of others and the use of 14 aliases and four different dates of birth. His offending behaviour is very serious to our minds. It cannot be mitigated to any meaningful degree by the fact that he began offending at the age of 15 where he continued to offend as an adult, the offending becoming ever more serious. The

weight attracting to the public interest remains significant where he has been assessed as a posing a medium risk of serious harm to the public in the most recent OASYS report dated 18 June 2014.

15. The appellant cannot come within the exceptions of s.117C where, as set out above, he has not been lawfully resident in the UK for most of his life and it is not unduly harsh for his partner or her child that he is deported.

16. The factor weighing in his favour in s.117B, being able to speak English, is, to our minds, of little purchase in the context of the matters set out above.

17. His relationship with his partner and private life also attract little weight following s.117B (4) as he was in the UK unlawfully for an extended period. We have already given our view on the limited relationship with his partner's child and do not find that s.117B (6) assists the appellant.

18. We did not have evidence before us of the appellant being financially independent for any consistent period so s.117(3) also cannot assist him.

19. After assessing the evidence put forward in support of the appellant's case, therefore, for the reasons set out above, we did not find very compelling circumstances existed that could outweigh the public interest in deportation. We therefore refused the appeal.

Decision

20. The decision of the First-tier Tribunal disclosed an error on a point of law and was set aside.

21. We re-make the appeal, refusing it under Article 8 of the ECHR.

Signed:  Date: 7 May 2015

Upper Tribunal Judge Pitt

**ERROR OF LAW DECISION**

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers: DA/01985/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 12 November 2014**

**Determination Promulgated**

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**Before**

**THE HONOURABLE MRS JUSTICE ANDREWS DBE**
**UPPER TRIBUNAL JUDGE PITT**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**PTA**

Respondent

**Representation:**

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondents: Mr D Balroop, instructed by Shan & Co

**DECISION AND REASONS**

The Appeal

1. This is an appeal by the Secretary of State against a determination promulgated on 5 August 2014 of First-tier Tribunal Judge Callow and Dr T Okitikpi which allowed the respondent's appeal against deportation.

2. For the purposes of this decision, we refer to PTA as the appellant and to the Secretary of State as the respondent, reflecting their positions as they were before the First-tier Tribunal.

3. The appellant is a citizen of Nigeria and was born on 25 May 1980.

4. The background to this matter is that the appellant came to the UK at the age of 10 in 1990. He appears to have been here unlawfully until, on 22 January 2007, he made an application for leave and was granted indefinite leave to remain (ILR) on 15 October 2009 on the basis of 14 years long residence.

5. The appellant has a history of offending from a relatively young age, beginning with a 2 month sentence on 14 February 1996 for assault with intent to rob and including 6 further offences for some of which he received custodial sentences of varying lengths. After a conviction on 15 August 2003 for possession of cannabis for which he was fined £50, the appellant did not offend again until, on 31 October 2012, he was sentenced to 3 years and 6 months imprisonment for possession with intent to supply crack cocaine and heroin. As a result of that offence, the respondent commenced automatic deportation proceedings against him, a deportation order was made on 16 September 2013 and served on him by hand on 18 September 2103. The appellant appealed against the deportation order on 30 September 2013, giving rise to these proceedings.

6. The appellant's grounds of appeal against the deportation order relied on Article 8 ECHR. He maintains that he has a family life with a partner, SB, a British national. She has a child, J, from another relationship. He also maintains that he has established a significant private life.

7. The First-tier Tribunal allowed the appeal against deportation on the basis of the appellant's long residence since the age of 10 years' old and his relationship with SB and her child.

8. The respondent's grounds of appeal were as follows:

    a. the First-tier Tribunal was incorrect to require in the Article 8 proportionality assessment that there be "very serious reasons" justifying deportation, applying an incorrect principle from Maslov v Austria [2008] GC ECHR 1638/03, that incorrect principle being identified by the Court of Appeal in R (Akpinar) v Upper Tribunal (Immigration and Asylum Chamber) [2014] EWCA Civ 937.

    b. the panel erred in finding that the appellant's family and private life could amount to "a very strong claim" under Article 8 that could succeed in

defeating the public interest in deportation and was wrong to find that the appellant had lost any meaningful ties with Nigeria

c. the errors set out above meant that the public interest was incorrectly weighed.

9. We found merit in the first ground, sufficient to require us to set aside the Article 8 proportionality assessment to be re-made.

10. At [34] the First-tier Tribunal set out a summary of Maslov. At [34(d)] the panel states:

> "For a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile"

11. Comparing this with the appellant's history as above, it will be clear that even if this was an accurate expression of a principle to be applied from Maslov, it does not apply here. The appellant has not spent all or the major part of his childhood in the UK. The offence underlying the expulsion decision here was committed when he was over 30 years' old.

12. In any event, as stated in the grounds, as explained by the Court of Appeal in Akpinar, the statement of the First-tier Tribunal as to the principle to be applied from Maslov was not correct and overstated the standard placed on the respondent to justify expulsion. At [30] and [31] of Akpinar the Court of Appeal states:

> "30. Paragraph 75 of the judgment [in Maslov] has been regarded by some, and as is submitted on behalf of Mr Akpinar, as laying down a new rule of law, creating a consistent and objective hurdle to be surmounted by the State in all cases to which it applies; in other words, irrespective of the other factors involved, unless the State can show that there are "very serious reasons" for deporting "a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country", his Article 8 rights will prevail. The phrase "very serious reasons" has been taken to mean "very serious offending".
>
> 31. I do not think that this is a correct reading of the judgment. The Court's extensive citation of its previous case law does not suggest that it intended to depart from it. The first words of paragraph 75 "In short", indicate that it was seeking to summarise the effect of the previous jurisprudence. This is how paragraph 75 was read by the Court of Appeal in *JO (Uganda) and JT (Ivory Coast) v Secretary of State for the Home Department* [2010] EWCA Civ 10, in which at paragraph 21 of his judgment Richards LJ described it as pulling together what had been stated in earlier paragraphs. Paragraph 76 of the judgment in *Maslov* shows that the State's and the courts' consideration of an Article 8 claim involves a balancing exercise, in which the factors to which the Court referred are to be taken into account. This is confirmed by the way in which it expressed its ultimate conclusion, in paragraphs 100 and 201 of the judgment … "

13. We were satisfied that the error as to the correct standard that the respondent had to show in order for deportation to be justified was material where the First-tier Tribunal at [40] stated as part of their assessment:

> "As a settled migrant who has now lived in the UK for nigh on 23 years, very serious reasons are required to justify his deportation"

that approach being reiterated at [41] and at [47]:

> "Repeating the guidance in *Maslov,* it is trite law to observe that where there has been long residence since childhood a private life claim would succeed unless there were very serious reasons to justify expulsion. Those very serious reasons do not exist in this case."

14. As regards the other grounds we found that they only really amounted to disagreement with the findings of the First-tier Tribunal. Where the appellant has not been in Nigeria since he was 10 years' old and the evidence before the panel went only one way it was clearly within the range of reasonable responses open to the First-tier Tribunal to conclude that he no longer had any meaningful ties to that country. Other than the error already identified, it did not appear to us that the panel could be criticised for its approach to the public interest given the clear and correct self-directions in that regard at [30] and [46] and identification at [39] of the offence here as "undoubtedly very serious".

Decision

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

Directions

16. No later than 7 days before the reconvened hearing the parties shall file with the Tribunal and serve on each other a consolidated, indexed and paginated bundle of all documents relied upon.

17. That bundle should include any new evidence relevant to the re-making of the Article 8 proportionality assessment.

18. No later than 7 days before the reconvened hearing the parties shall file with the Tribunal and serve on each other a skeleton argument.

Signed: Date: 17 November 2014

Upper Tribunal Judge Pitt

Anonymity

We make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which

would be likely to lead members of the public to identify the appellant, his partner or his partner's child. We do so in the best interests of the child and in order to protect the child's identity.