



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08360/2017

THE IMMIGRATION ACTS

Heard at: Field House
On: 17 July 2018

Decision and Reasons Promulgated
On: 26 July 2018

Before

THE HON. MR JUSTICE LEWIS
UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LU
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Z Ahmad, Senior Home Office Presenting Officer
For the Respondent: Ms G Peterson, instructed by CK Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing LU's appeal against the respondent's decision to refuse his human rights claim and to refuse to revoke a deportation order previously made against him.

2. For the purposes of this decision, we refer to the Secretary of State as the respondent and LU 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 February 1985. He initially entered the United Kingdom as a visitor on 9 October 1998, at the age of 13 years, and was subsequently granted leave to remain as a dependent, followed by indefinite leave to remain on 8 September 2000. Between 13 March 2001 and 16 April 2014 he was convicted on 16 occasions for 25 offences, as a result of which the respondent made a decision on 11 April 2014 to deport him from the UK.

4. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 29 January 2015 by Judge Williams. The appellant appeared without legal representation at the hearing. Judge Williams considered it significant that none of the appellant's family members had given any evidence in support of his appeal and noted the lack of any medical evidence. He found that the appellant was a persistent offender, that he was not socially and culturally integrated into the UK and that there were no very significant obstacles to his integration into Kenya. He dismissed the appellant's appeal in a decision promulgated on 6 February 2015

5. The respondent then signed a deportation order against the appellant on 11 May 2015 and he was subsequently detained for removal. He issued judicial review proceedings challenging his removal and made an application for leave to remain on human rights grounds. His application was refused under paragraph 353 of the immigration rules on 11 August 2015 and permission to seek judicial review claim was refused. The appellant then made an asylum claim, but his claim was refused and certified as clearly unfounded under section 94 of the Nationality, Immigration and Asylum Act 2002. A judicial review claim seeking to challenge that decision was unsuccessful. The appellant then made further submissions on 27 May 2016 which were refused under paragraph 353 on 8 June 2016. He sought judicial review of that decision. On 21 January 2017 the respondent made a supplementary decision refusing the appellant's human rights claim and refusing to revoke the deportation order. The appellant's judicial review claim, which considered both decisions, was eventually successful and the respondent withdrew the decision of 21 January 2017, considered further submissions made on 30 May 2017, and made a new decision on 20 July 2017 accepting the appellant's submissions as a fresh human rights claim but refusing the claim.

6. In refusing the appellant's claim, the respondent had regard to supporting statements from the appellant's mother and siblings, psychiatric reports and further supporting evidence. The respondent considered that the appellant was a persistent offender for the purposes of paragraph 398 of the immigration rules and that the public interest therefore required his deportation unless the exceptions in paragraph 399 and 399A applied. The respondent considered that paragraph 399(a) and (b) did not apply as the appellant had no partner or children. With regard to paragraph 399A the respondent accepted that the appellant had been lawfully resident in the UK for most of his life but did not accept that he was socially and culturally integrated into the UK and did not accept that there were very

significant obstacles to his integration into Kenya. The respondent then went on to consider whether there were any very compelling circumstances outweighing the public interest in the appellant's deportation and concluded that there were none. In so doing the respondent noted that none of the appellant's family members had attended his previous appeal hearing and that no support had been offered from them prior to his detention and impending departure. The respondent considered that the appellant's deportation would not breach his Article 8 human rights. With regard to Article 3, the respondent noted that the appellant suffered from Bipolar Affective Disorder and that he had been receiving treatment for the condition in the UK. Consideration was given to the psychiatric reports which had been produced. However it was noted that medical treatment was available in Kenya and the respondent therefore considered that the high threshold had not been met to make out a claim under Article 3.

7. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge Clarke on 21 February 2018 and was allowed in a decision promulgated on 19 March 2018. Judge Clarke considered, on the basis of the psychiatric evidence produced since the decision of First-tier Tribunal Judge Williams, that the appellant could not be called a persistent offender as his offending had occurred at a time when he had a serious undiagnosed and unmonitored mental health condition. She concluded that, even if that were not the case, on the basis of the further evidence, the appellant met the exception in paragraph 399A as he was socially and culturally integrated into the UK and there were very significant obstacles to his integration into Kenya. She accordingly allowed the appeal.

8. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge should have maintained the previous finding of Judge Williams that the appellant was a persistent offender, in line with the authority of *Chege ("is a persistent offender") Kenya* [2016] UKUT 187, that she had failed to give clear reasons why the previous findings in regard to the appellant not being socially and culturally integrated in the UK were not still relevant, and that she had failed to consider the ability of the appellant's family to help him in integrating into Kenya and failed clearly to identify the very significant obstacles to integration into Kenya in line with the authority in *Bossade (ss.117A-D-interrelationship with Rules)* [2015] UKUT 415.

9. Permission to appeal was granted in the First-tier Tribunal on 11 April 2018 on all grounds.

10. At the hearing before us Ms Ahmad expanded upon the grounds of appeal and submitted also that the judge had failed to consider the new circumstances arising since Judge Williams' decision with sufficient scrutiny, as required in *Devaseelan* [2002] UKIAT 00702. Ms Peterson, in her submissions, relied upon her lengthy skeleton argument which addressed the four grounds of challenge and submitted that the judge had properly followed the principles in *Devaseelan*, that the judge's findings on persistent offending were consistent with the medical evidence which supported the view that the appellant's offending was linked to his mental health problems and that those problems were currently successfully being treated, and that the judge's findings on integration in the UK and Kenya were sustainable.

11. We advised the parties that in our view the judge had made errors of law in her decision and that the decision could not stand and had to be set aside.

12. Section 117C of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) provides that the deportation of foreign criminals is in the public interest. Foreign criminals include a persistent offender (see section 117D of the 2002) which should be interpreted as a persistent offender who shows a particular disregard for the law as explained in *Chege v Secretary of State for the Home Department* [2016] UKUT 00187. In such cases, the public interest requires deportation unless the exceptions in section 117(C) of the 2002 Act apply. The position is reflected in Rules 398 to 399B of the Immigration Rules. The relevant exception is reflected in rule 399A, and requires that the person has been lawfully resident in the UK for most of his life, he is socially and culturally integrated in the UK, and there would not be very significant obstacles to his integration into the country to which he is to be deported.

13. We consider that the judge failed to provide adequate justification for her conclusion that the appellant was no longer to be classed as a persistent offender given his lengthy history of offending, irrespective of the reasons for his offending. That is particularly relevant when some of the offending had occurred at a time when he had not been diagnosed with any mental health problems and where the evidence that he was mentally unwell for most of the period of offending was largely speculative. Nor do we understand the basis for the judge’s conclusion that the appellant was “self-medicating, using an illicit drug to assist him in managing the manic phases” of his condition. We also agree with the submission in the respondent’s grounds that there was a failure to consider whether sufficient time had elapsed since the appellant’s last offending in order that he could be considered as being rehabilitated.

14. The judge did go on to consider whether the appellant satisfied the conditions in the exception, lest she be wrong in her conclusion that the appellant was not a persistent offender. We therefore consider whether her conclusion that the exception was satisfied was flawed as a matter of law.

15 First, we agree with the submission made by Ms Ahmad that, whilst the judge had regard to the decision of Judge Williams, she did not give proper scrutiny to the new evidence in the light of the significantly adverse findings made by Judge Williams. In particular the judge placed great emphasis upon the support the appellant’s family provided to the appellant in the UK and the impact of the loss of their support on return to Kenya, yet failed to give anything other than a passing consideration to the previous lack of support from the family and the fact that they did not even attend the appellant’s deportation hearing before Judge Williams.

16 We also consider that the respondent’s challenge to the judge’s findings on whether there are very significant obstacles to integration in Kenya is well-founded. Section 117C(4)(c) of the 2002 Act, and the relevant immigration rule, requires consideration of whether there “would be very significant obstacles to [the appellant’s] integration into the

country to which C is proposed to be deported". The judge did not address that test. The judge considered, at paragraph 29 that the central feature of the case was the impact on the appellant of removal from his family and returning to Kenya to live alone. Although there is one reference to very significant obstacles, it is clear from paragraph 29, and the judgment as a whole, that the judge was focussing on the impact on the appellant of leaving the United Kingdom. That is not what section 117C(4)(c) of the 2002 Act is focussing upon. We agree with Ms Ahmad that the judge's assessment of the matter was limited to the impact on the appellant of returning to Kenya rather than a holistic assessment of all the circumstances relevant to integration such as those considered by Judge Williams at [53] of his decision, the fact that the relevant medical treatment was available in Kenya, and a consideration of the possibility of his family members accompanying him to Kenya to assist with his integration or providing support by other means. We consider there to be less merit in the assertion in the grounds that the judge was not entitled to find that the appellant was socially and culturally integrated in the UK and we would not have allowed the appeal on that ground. We understand that it is accepted that the first limb of the exception (that the appellant has been lawfully in the United Kingdom for most of his life) is satisfied.

17 For all of these reasons we consider that the judge's decision is inadequately reasoned and is materially flawed. We therefore set aside the decision in its entirety. Both parties agreed that, in such circumstances, the appropriate course would be for the matter to be remitted to the First-tier Tribunal to be heard afresh.

DECISION

18. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed and the decision is set aside.

19. 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), to be heard before any judge other than Judge Clarke.

Signed:



Upper Tribunal Judge Kebede

Dated: 20 July 2018