



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/15075/2018

THE IMMIGRATION ACTS

Heard at Field House

On Wednesday 20 November 2019

**Decision & Reasons
Promulgated
On Monday 25 November
2019**

Before

**THE HON. MR JUSTICE NICOL
UPPER TRIBUNAL JUDGE PLIMMER**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**AB
ANONYMITY DIRECTION MADE**

Respondent

Representation:

For the Appellant: in person

For the Respondent: Ms Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the SSHD against the decision of First-tier Tribunal Judge ('FTTJ') Shore given on 8th August 2019. The appeal is brought with the permission of Upper Tribunal Judge ('UTJ') Blum given on 23rd September 2019.

2. The respondent is a citizen of Nigeria. He has a lengthy criminal and immigration history.
3. He was born in 1961. The SSHD has no record of when he entered the UK. He first came to the attention of the immigration service on 17th October 2007 when he was arrested following his attempt to procure employment with a counterfeit indefinite leave to remain stamp. He claimed to have entered the UK 10 years previously (so presumably in about 1997). He said he had used his own passport with a 6 month visit visa. He had since overstayed and worked without permission. On 27th November 2007 he pleaded guilty to possession and use of a false instrument. He was sentenced by HHJ Lyons at Wood Green Crown Court to 3 months imprisonment. The Judge recommended the Respondent for deportation. The SSHD made a decision to deport on or about 1st December 2007. The respondent appealed. The appeal was dismissed on 27th February 2008 by Immigration Judge Kealy and Ms P.L. Ravenscroft.
4. On 4th March 2008 the Respondent was released under reporting restrictions. However, he absconded on or about 25th November 2008.
5. The appellant's partner is Augustine [M]. On 2nd April 2009 Ms [M] gave birth to a baby girl, called M, in Hackney.
6. On 2nd July 2012 the Respondent applied for leave to remain as someone who had been resident for 14 years. Fresh reporting obligations were imposed. The Respondent failed to comply until 24th January 2014 when he did resume reporting.
7. On 10th February 2014 Ms [M] applied for leave to remain naming M as a dependent. Her application was refused on 10th April 2014 with no right of appeal.
8. On 19th March 2014 the SSHD made a fresh decision to deport the Respondent. The Respondent appealed against this decision. On 19th June 2014 the appeal was allowed by F-tJ Morgan on the grounds (as the Judge mistakenly understood) that Ms [M] and her daughter had an outstanding application for leave to remain.
9. Ms [M] applied again for leave to remain on 4th April 2016, naming Michelle as her dependent. This application was again refused on 12th November 2016. She appealed. Her appeal was dismissed on 22nd February 2017. She applied again for leave to remain on 20th November 2017, but the application was refused on 12th March 2018.
10. On 27th March 2018 notices were sent to the Respondent, and Ms [M] saying that he was liable to deportation and suggesting that he should

raise any objection he might have. In response the Respondent relied on his right to private and family life. In the letter of 2nd July 2018 the SSHD concluded that there would be no breach of Article 8 ECHR by deporting the Respondent. This is the decision under appeal.

11. The SSHD noted that by paragraph 396 of the Immigration Rules, there is a presumption that the public interest requires the deportation of a person who is liable to deportation. By Immigration Act 1971 s.3(6) a person who is over 17 and has been convicted of an offence punishable with imprisonment who is recommended for deportation by a criminal court (as the Respondent had) is 'liable to deportation'.
12. The SSHD applied to the Respondent the criteria in Immigration Rules paragraph 399(a)(i). These provisions apply where a 'foreign criminal' resists deportation on Article 8 ECHR grounds (see Immigration Rules paragraph A398). We shall need to return to the question of whether that was appropriate in the Respondent's case. For the time being, though, we are setting out the background to the case.
13. After noting that the language in Nigerian schools was English, and her young age, the SSHD concluded that M would not face difficulty when living in Nigeria. It was not therefore considered that the Respondent met the requirements for the exception to deportation based on family life because of his daughter. So far as family life with Ms [M] was concerned, the SSHD considered the provisions in paragraph 399(b) of the Immigration Rules. It was accepted that he had a genuine and subsisting relationship with Ms [M]. However, Ms [M] was not a British Citizen. She had no leave to remain. She and her daughter were also Nigerian nationals.
14. So far as the Respondent's private life was concerned, the SSHD applied paragraph 399A of the Immigration Rules. Since he had not lived most of his life in the UK, he could not satisfy paragraph 399A(a) which was a mandatory requirement.
15. Finally, the SSHD did not accept that there were very compelling circumstances, such that Article 8 would be violated by his deportation, notwithstanding that he fell outside the Immigration Rules.
16. As we have said, the Respondent's appeal was allowed by FTTJ Shore. He observed that Michelle had applied for British Citizenship, having reached the age of 10 in April 2019.

17. In evidence the Respondent had acknowledged that he had four adult children in Nigeria. Their mother had died in 2018. He acknowledged that his statement to the SSHD that he had no one to whom he could turn in that country was untrue. Judge Shore noted that neither the Respondent, nor Ms [M] (who also gave evidence) were asked any questions about M or their relationship with her.
18. Judge Shore commented that the SSHD had relied on the misunderstanding which had lain behind the Respondent's successful appeal in 2014. He noted that the Home Office Presenting Officer could have made inquiries about whether Ms [M] did have an outstanding application. Secondly, neither the HOPO nor the Tribunal on that occasion had challenged the Respondent as to whether there had been an outstanding application. Judge Shore concluded he was not persuaded on the balance of probabilities that the Respondent had deliberately misled the Tribunal in 2014 about this matter, but even if he had, Judge Shore said it would not have affected his decision.
19. Judge Shore noted that the Respondent had committed no further offences since 2007. In Judge Shore's view, the Respondent was fully rehabilitated.
20. He reminded himself that the best interests of the child were a primary consideration. He observed that the Respondent had not been deported in 2008. He noted that Ms [M] had diabetes and a brain tumour which still caused her pain.
21. Judge Shore found that the Respondent was not a threat to society and it would cause serious damage to remove him, Ms [M] and the child.
22. In the section of his decision entitled 'Decision and Reasons', Judge Shore directed himself by reference to Part 5A of the Nationality, Immigration and Asylum Act 2002 and appears to have assumed that the Respondent was a 'foreign criminal'. Indeed, in paragraph 80 Judge Shore says in terms that the Respondent meets this definition. But, as we have said, this is a matter to which we will need to return.
23. Judge Shore found in the same paragraph that the Respondent was not a persistent offender. He was not someone who showed a particular disregard for the law. He had not reoffended. He had sought to regularise his status. His single offence had led to a sentence of 3 months imprisonment which Judge Shore did not accept caused serious harm. Judge Shore then considered Immigration Rules paragraph 399.

24. Judge Shore found that the Respondent and Ms [M] were credible in their evidence on the large majority of their evidence. Such discrepancies as there were did not undermine their general credibility.
25. He said that the Respondent would be leaving Ms [M] if he was deported. She had health issues of diabetes and a historic brain tumour. M had been born in this country and had lived here all her life.
26. Judge Shore specifically considered the factors in the 2002 Act s.117B. He found
- a. The Respondent could speak English;
 - b. The Respondent could not show that he would not be dependent on state benefits;
 - c. Little weight could be given to the Respondent's private life since his status had been precarious since his original visa had expired;
 - d. He had a genuine and subsisting relationship with a qualifying child
 - e. He had a qualifying partner (this is another matter to which we shall have to return).
27. Judge Shore then found that it would be unduly harsh for the child to travel to Nigeria 'because the child would then be separated from her mother'. If both parents were removed it would still be unduly harsh 'because of the private life which the child has built up over the 10 years of her life. It would also be unduly harsh to leave the child in the UK without the Respondent 'because of their (we assume the child and Ms [M]'s) reliance on him' and the effect it would have on their education and general upbringing. Judge Shore considered that it was in the best interests of the child to remain in the UK with both parents. In conclusion Judge Shore considered that the requirements of Exception 2 in s.117C(5) were satisfied.
28. The SSHD's grounds of appeal to the UT essentially argued that Judge Shore had not sufficiently explained why the 'unduly harsh' test had been satisfied. There were no more than the ordinary incidents of upset and concern which the child of any deported person would experience.
29. Permission to appeal was initially refused by FTTJ Povey who noted that the Respondent was not a 'foreign criminal' as defined in s.117D(2) because:
- a. His only sentence had been of 3 months and so not 'at least 12 months';

- b. Judge Shore had not found that he had been convicted of an offence which had caused serious harm;
 - c. He was not a persistent offender.
- 30. In granting permission to appeal UTJ Blum appears to have endorsed the view of Judge Povey. However, Judge Blum added that the Respondent was 'liable to deportation' and by paragraph 396 of the Immigration Rules, there is a presumption that for such a person, the public interest presumptively requires deportation. Although Judge Shore's error had led him to apply the 'unduly harsh' criterion, he had arguably failed to give adequate reasons for concluding that it would be unduly harsh to require the child to accompany him to Nigeria.
- 31. In our view Judge Shore clearly did err in law. As Judge Povey observed, the Respondent was not a 'foreign criminal' as defined by the 2002 Act s.117D(2). He was not a British Citizen and he had been convicted of an offence, but he had not been sentenced to at least 12 months imprisonment. Judge Shore had found that the offence of which he had been convicted had not caused serious harm. There is not and could not be a challenge to that conclusion which is essentially an assessment of fact. Finally, the Respondent was not a persistent offender. As Judge Shore observed, he has but the one conviction.
- 32. The term 'foreign criminal' is used also in the Immigration Rules Part 13 (concerning deportation). As far as we can see, there is, as such, no definition of that term in the Immigration Rules and no express incorporation of the definition in the 2002 Act s.117D. However, this part of the Immigration Rules is clearly an allusion to Part VA of the 2002 Act and the only sensible course is to apply the same meaning in each context. Ms Jones, the Senior Home Office Presenting Officer, did not suggest the contrary. This is also in line with the decision of the Court of Appeal in *SC (Zimbabwe) v SSHD* [2018] EWCA Civ 929, [2018] 1 WLR 4474.
- 33. While Judge Shore did make this error of law, in our view it was not a *material* error of law. It caused him to investigate whether it would be unduly harsh to deport the Respondent. That, of course, is a more demanding test than was applicable since the Respondent was not been a 'foreign criminal'. Judge Shore concluded that it would be unduly harsh. He reached this view principally in relation to M. She was not a British Citizen at the date of decision (7th April 2019), but she was nonetheless a 'qualifying child' because she had lived in the UK for a continuous period of at least 7 years (see 2002 Act s.117D(1)(b)). There was no dispute that the Respondent had a genuine and subsisting relationship with M. Judge Shore said that it would be unduly harsh for the child to have to go to Nigeria because she would then be involuntarily separated from the private life which she had experienced over more than 10 years in the UK

and because it would be disruptive to her education and general upbringing. It would be unduly harsh for her to remain in the UK because she would then be separated from her father (and indeed from mother who was also had no leave to remain). It was in the best interests of the child for her to remain in the UK with both her parents.

34. It is fair to say that at times Judge Shore referred to Ms [M] as a 'qualifying partner' (see [87.5]). She is not. To be a qualifying partner, Ms [M] would have to be a British Citizen or be settled in the UK - see 2002 Act s.117D(1). Ms [M] is neither. However, elsewhere in his decision Judge Shore correctly recognised that Ms [M] was also at risk of removal (see [91] 'As at the date of this decision the child's parents are both at risk of removal'). In any case, in our judgment, the dominant (and sufficient) consideration for Judge Shore was the impact on M of either moving to Nigeria or staying in the UK without her father.
35. UTJ Blum, in granting permission to appeal, had also commented on the potential significance of paragraph 396 of the Immigration Rules. There had been no mention of this provision in the SSHD's grounds of appeal. In another case it may be necessary to consider whether it is open to the SSHD to rely on an error of law which has not been identified in her grounds of appeal. In the present case, it is not necessary to engage with that debate. In our view, there either was no such error or, if there was, it was not material. At [92] Judge Shore said 'I balanced the very strong argument of the public interest in deportation of foreign criminals with the primary interest of the child: the assessment is of the effect on the child, not the seriousness of the [Respondent]'s offending.' In that passage the FTTJ was doing what paragraph 396 required (and possibly more since, where the individual is not within the statutory definition of a foreign criminal, it may be an exaggeration to say that there is a 'very strong argument of the public interest in deportation'). It is immaterial that he did not, in terms, allude to paragraph 396 of the Immigration Rules.
36. We are grateful to Ms Jones for her skeleton argument of 10th October 2019, but, like the SSHD's grounds of appeal, it proceeds on a false premise, namely that the issue which Judge Shore had to consider was whether deportation of her father would be unduly harsh on M. That was not the issue. In the course of her oral submissions, Ms Jones maintained the SSHD's general position that the respondent should be deported, but she offered no argument as to why any error by Judge Shore was material, particularly bearing in mind the correct test to be applied as a person who is not a foreign criminal but liable to deportation. The public interest in a case such as this supports deportation: the respondent has been recommended for deportation and has a poor immigration history. However, the FTT would have reached the same conclusion had it applied the less draconian test applicable, for the reasons it provided: M's best

interests together with the length and strength of her private life in the UK clearly outweighed the public interest in this case.

37. At the conclusion of the appeal, we announced that we were satisfied that there was no material error of law in Judge Shore's decision. It followed that the SSHD's appeal was dismissed and the decision of Judge Shore allowing the Respondent's appeal against the deportation order stood.

Notice of Decision

The appeal against the decision of the FTT is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 21 November 2019

Mr Justice Nicol, sitting as an Upper Tribunal Judge.