



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/16418/2019

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3 August 2021

Decision & Reasons Promulgated  
On 01 September 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

NGIPHILE NKULULENKO NGEMA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr. J Walsh, Counsel, instructed by Gulbenkian Andonian  
Solicitors

For the Respondent: Mr. D Clarke, Senior Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. The appellant appeals against a decision of Judge of the First-tier Tribunal Hembrough ('the Judge') who dismissed his appeal against a decision of the respondent to refuse him leave to remain in this country on human rights grounds and to deport him to South Africa having concluded that he is a persistent offender. The decision was sent to the parties on 10 March 2020.
2. Upper Tribunal Judge Lindsley granted the appellant permission to appeal by a decision dated 21 September 2020.

### **Anonymity**

3. The First-tier Tribunal did not issue an anonymity order and neither party sought one before me.
4. I note the recent observation of Elisabeth Laing LJ in *Secretary of State for the Home Department v. Starkey* [2021] EWCA Civ 421, at [97]-[98], made in the context of deportation proceedings, that defendants in criminal proceedings are usually not anonymised. Both the First-tier Tribunal and this Tribunal are to be mindful of such fact. I am satisfied that the appellant in this matter has already been subject to the open justice principle in respect of his criminal convictions, which are a matter of public record and so considered to be known by both the local community and the wider public.
5. I find that the common law right permitting the public to know about Tribunal proceedings, a right further protected by article 10 ECHR, outweighs the appellant's rights under article 8 ECHR: *Cokaj (anonymity orders, jurisdiction and ambit)* [2021] UKUT 202, at [17]-[28].
6. I do not make an anonymity order in this matter.
7. The appellant has been convicted of a serious sexual offence. Whilst there is no requirement for the victim to be named in my decision, I take the opportunity to observe that consequent to section 1 of the Sexual Offences (Amendment) Act 1992 ('the 1992 Act') there is a prohibition upon the reporting of any matter which may lead to the identification of a complainant in respect of certain sexual offences, including exposure contrary to section 66 of the Sexual Offences Act 2003: section 2(da) of the 1992 Act. Such anonymity is for life.

### **Background**

8. The appellant is a national of South Africa and is presently aged 28. He was granted entry clearance on 14 November 2003 as a dependant of his father, who enjoyed leave to enter as a work permit holder. The appellant entered this country when aged 11. The appellant enjoyed lawful leave until securing indefinite leave to remain on 24 March 2006.

*Criminal convictions*

9. The appellant was convicted of two counts of exposure at South Somerset and Mendip Magistrates Court on 8 June 2012. He was sentenced to a community order, a supervision requirement, an unpaid work requirement and was made the subject of a sex offenders' notice for five years.
10. By means of his witness statement dated 18 February 2020 the appellant stated that he was high on drugs at the time of these offences and only possesses a faint recollection of being around a care home and exposing himself.
11. At Taunton Crown Court on 4 January 2013, the appellant was convicted of exposure and sentenced to a community order, an unpaid work requirement of 150 hours, a programme requirement of 60 days, a supervision requirement for three years and made the subject of a sex offenders' notice for 5 years. The community order imposed by South Somerset and Mendip Magistrates' Court was revoked.
12. The appellant details in his witness statement that he was high on drugs in the middle of the night, naked in his room whilst watching pornography and was observed as he had failed to draw his curtains.
13. On 21 September 2015, at Bristol Crown Court, the appellant was convicted of a failure to comply with the requirements of a community order and sentenced to the order being varied with the programme requirement being revoked and a £200 fine was imposed. He was ordered to pay costs in the sum of £85.
14. At Bristol Crown Court on 6 January 2016, the appellant was convicted of failure to comply with the requirements of a community order. The order of Taunton Crown Court was varied to a community order and a curfew requirement for four weeks with electronic tagging.
15. On 12 April 2017, the appellant was convicted at Avon and Somerset Magistrates' Court on three counts of failing to comply with notification requirements and was sentenced to a community order, an unpaid work requirement, £85 costs and £85 victim surcharge.

*Index offence*

16. As recorded in the OASys from information obtained from relevant CPS documents, at 08.10 on 9 August 2018 the female victim was walking through a park in Bristol and approaching a 'zig-zag' path when she saw the appellant run down a hill and cut across her path, continuing in the direction of the exit from the park which leads into a neighbouring road. As the victim approached the same exit, she observed the appellant standing in an alcove by garages, making a fast

and rhythmic movement. She noticed that he had both hands down by his groin, that his penis was exposed, and he was very clearly masturbating. The victim informed the police that the appellant made no attempt to hide from her, and that he was looking at her straight in the eye while he was performing the act. Her opinion was that the appellant wanted her to see what he was doing, and this added to her alarm and distress.

17. During his police interview, the appellant denied events. He asserted that he had been out for a run and his penis was exposed because he was urinating. He repeats this version of events in his February 2020 witness statement, further detailing:

‘I denied that I had exposed myself this time and after the duty lawyer came to me and advised that there was no case against me, I was relieved. I did not get a representative nor did I plead guilty. But the victim then changed her statement and I was sentenced to just over 6 months in prison.’

18. On 29 October 2018, at Avon and Somerset Magistrates’ Court, the appellant was convicted of exposure and sentenced to 26 weeks’ imprisonment, placed on the sex offenders’ register for 7 years and required to pay a £115 victim surcharge.

#### *Deportation proceedings*

19. On 22 March 2019 a deportation order was signed in respect of the appellant. It was served on 25 March 2019. Following receipt of human rights representations, the respondent refused to grant the appellant leave to remain on human rights grounds by means of a decision dated 24 September 2019.

#### **Hearing before the FtT**

20. The appeal came before the Judge sitting at Hatton Cross on 18 February 2020. The appellant attended with his parents. Unusually in respect of deportation proceedings, the Home Office Presenting Officer declined to cross-examine the appellant. A decision was also taken not to cross-examine the appellant’s parents. The Judge recorded the observations of the representatives that ‘there was nothing controversial in their evidence as set out in their respective witness statements.’ This observation was made as to the evidence of the appellant as well as his parents.

#### **Grounds of Appeal**

21. The grounds of appeal in this matter are addressed in two documents: the grounds seeking permission to appeal from the First-tier Tribunal to this Tribunal, dated 23 March 2020, and the addendum document renewing the application to this

Tribunal, dated 21 August 2020. Both were carefully drafted by Mr. Haywood, Counsel, who represented the appellant before the First-tier Tribunal.

22. Five grounds of complaint are advanced, though the representatives before me agreed that I should initially consider ground 1 because if a material error of law were established, it would be determinative in respect of the appeal.
23. Ground 1 is identified in the original document as:

‘10. The Judge erred in his analysis when concluding that A was a ‘persistent offender’. The Judge so found on the basis that A had, over a protracted period, continued to commit exactly the same type of offence despite the penalties imposed on him [determination at §28].

11. In so finding, it is submitted that the Judge’s analysis is inadequate and fails to take account of the range of considerations that were relevant: see *Chege* (‘is a persistent offender’) [2016] UKUT 00187: Inter alia:

(a) The question is whether the person *is* a persistent offender [*Chege* at §36]: I.e. looking at A’s current position. It is not clear that that is the question the judge has addressed.

(b) The analysis must take account of the overall picture and pattern of offending (the judge refers only to the repeated commission of offences over a period of time: it is a range of facts, including in relation to the nature and circumstances of offending that are relevant);

(c) Reasons underlying the behaviour, such as drug dependency or other considerations leading to particular behaviour, are relevant [*Chege* at §57]. A’s clear evidence was that his circumstances were now very different, given that he was no longer using drugs and was in stable accommodation and supported by his family.

(d) A pattern of rehabilitation may lead to a conclusion that the person is no longer a persistent offender [*Chege*, at §60].

24. The respondent filed and served a detailed and helpful skeleton argument, authored by Mr. Clarke, dated 22 October 2020.

### **Decision on Error of Law**

25. At the outset of the hearing Mr. Clarke accepted that in respect of the challenge advanced by ground 1 the Judge had erred in law. However, he submitted that it was open to the Tribunal to consider the materiality of such error and on the facts arising in this appeal it could not be said that they were material because the appellant could not possibly succeed in respect of his underlying appeal.

26. Mr. Clarke's submissions were thoughtful and well-constructed. However, as I explained at the hearing, the facts arising in this case could not be said to be such that a reasonable judge could only make an adverse decision in respect of the appellant's underlying appeal.
27. Further, Mr. Clarke sought to rely upon a number of factual matters such as whether or not the appellant was accurate as to the level of support he currently receives from his family, his rehabilitation, whether his lack of recent offending was consequent to these appeal proceedings hanging over his head, his ability to secure and hold employment, his continued high levels of recklessness and risk-taking behaviour, his lack of insight, his lack of understanding as to personal boundaries, and his denial of the offence which took place in 2018. However, as observed above, unusually the respondent decided not to cross examine either the appellant or his witnesses before the First-tier Tribunal. It would not be appropriate for this Tribunal when considering materiality to consider issues upon which the appellant was not given a fair opportunity to comment on matters now said to be wholly adverse to him.
28. In the circumstances, for the reasons detailed in ground 1 above, the decision of the Judge is adversely impacted by material error of law and is properly to be set aside.
29. Mr. Clarke informed me that it is likely that the respondent would wish to cross-examine the appellant and his parents at the resumed hearing. Mr Walsh acknowledged that the appellant was now on notice of such intention.
30. I make the following observation with respect to the decision of the respondent not to cross examine the witnesses before the First-tier Tribunal, a decision said to have been made on the purported basis that there was nothing controversial in their evidence. It is striking that the appellant provides very little detail as to his conviction in 2018 beyond asserting that he pleaded not guilty. Whilst complaining that the victim changed her witness statement, there is no confirmation in the appellant's witness statement as to his attending a trial and being found guilty. I am surprised that the appellant was not cross-examined on his continued denial of the offence. Nor was there any engagement with the appellant as to how such denial impacts upon his ability to address sexual preoccupation and deviant fantasies linked to voyeurism.
31. I further observe the appellant's evidence as to the circumstances of his previous offences, but at first blush they appear to minimise his offending behaviour when read alongside section R6.2 of OASys [pg C38 of the appellant's bundle]. It is surprising that potential inconsistency was not fairly put to the appellant.

32. I make two further observations about the appellant's grounds of appeal. Reliance is placed upon the appellant's use of drugs being associated with his offending. This in turn relies upon §§14-17 of the appellant's witness statement dated 18 February 2020. However, as confirmed by these paragraphs the use of drugs may be relevant to the first two convictions alone. There is no reference to the use of drugs having played a part in the 2018 offence.
33. Secondly the addendum grounds of appeal identify at §7(d) that the appellant's risk of offending is assessed as being low with reference to section R4.4 of OASys [pg C35 of the appellant's bundle]. I observe that this particular assessment relates to the statistical risk of offending identified by the OVP, or OASys Violence Predictor, which estimates the likelihood of nonsexual violent offending. In the circumstances, it is not appropriate to advance a general submission that the appellant is 'low risk' of offending when his risk relates to sexual and not nonsexual offending. The appellant is identified by OASys as being of medium risk of proven non-violent offending: section R11.12 of OASys [pg C43 of the appellant's bundle], repeated in the OASys summary [pg C45 of the appellant's bundle].

### **Resumed hearing**

34. I confirmed to the representatives at the hearing that I would allow the appellants' appeal to the extent that the decision be set aside. The representatives confirmed that this matter could properly be remade by the First-tier Tribunal.
35. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows at 7.2:

'The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:

  - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
  - (b) 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.'
36. I have reached the conclusion that it is appropriate to remit this matter to the First-tier Tribunal for a fresh decision on all matters. The appellant has enjoyed no



adequate consideration of his appeal to date and as he has not previously given oral evidence there is likely to be extensive judicial fact-finding to be undertaken.

37. I consider this matter is suitable for a face-to-face hearing, though ultimately this is a matter for the First-tier Tribunal.

**Notice of decision**

38. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 10 March 2020 pursuant to section 12(2)(a) of the Tribunal Courts and Enforcement Act 2007.
39. This matter is remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any judge other than Judge of the First-tier Tribunal Hembrough.
40. No findings of fact are preserved.

Signed: *D O'Callaghan*  
**Upper Tribunal Judge O'Callaghan**

Dated: 23 August 2021