



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00602/2014

THE IMMIGRATION ACTS

Heard at North Shields
On 24 September 2014
Given extemporary at the hearing.
Signed 1st October, 2014

Determination Promulgated
On 3 October 2014

Before

UPPER TRIBUNAL JUDGE RICHARD CHALKLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ORIVALDO DE JESUS BERNARD RICARDO NETO

Respondent

Representation:

For the Appellant: Ms H Rackstraw Senior Home Office Presenting Officer
For the claimant: Ms E Mendoza, Counsel instructed by Brar & Co

DETERMINATION AND REASONS

1. The Appellant is the Secretary of State for the Home Department and to avoid confusion I refer to her throughout as “the claimant” or the “Secretary of State”
2. The Respondent is a citizen of Angola who was born on the 30 March 1992.

Immigration history

3. He has a vague immigration history and the exact date of his entrance to the United Kingdom is not known. He says that he entered the United Kingdom in order to join his father. His step-mother entered the United Kingdom on the 14 August 2000 and his father claims to have entered the United Kingdom clandestinely on the 5 February 2001 and so it is likely that he came into the United Kingdom at some stage between August 2000 and February 2001.
4. The Respondent's father and step-mother claimed asylum in their own right, but the Respondent was not included as a dependant on either claim. He was however listed as a dependent on his step-mother's application for Indefinite Leave to Remain dated 5 August 2008. He was advised on the 19 September 2011, that he was not eligible for leave to remain in line with his step-mother, because he was not a dependant on her original asylum claim and he was not therefore granted Exceptional Leave to Remain in line with her.

The Respondent's Criminal Activities

5. On the 11 October 2010, the Respondent was convicted at Newcastle upon Tyne District Magistrates Court of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence and sentence to six weeks imprisonment suspended for twelve months. He was also convicted of assault occasioning actual bodily harm, for which he was sentenced to twenty weeks imprisonment suspended for twelve months and ordered to pay costs of £40 and £50 compensation.
6. This sentence was subsequently varied at Newcastle upon Tyne Crown Court on the 21 June 2013, when the Respondent's original suspended sentence was imposed and he was sentenced to twenty weeks concurrent imprisonment. On that day the Respondent was convicted at Newcastle upon Tyne Crown Court of affray which offence had been committed on the 26 June 2011. He was sentenced to sixteen months imprisonment.
7. The Respondent applied for leave to remain under Family and Private Life Ten Year Rule on the 26 June 2013, and on the 30 July 2013, he was served with notice of liability for deportation. He completed a questionnaire and representations were made on his behalf to the Secretary of State. It was decided that automatic deportation applied in the Respondent's case and on the 19 March 2014, the Secretary of State signed a Deportation Order. The Respondent appealed this decision to the First-tier Tribunal and his appeal was heard at North Shields on the 14 July 2014, by First-tier Tribunal Judge Gordon.

The First Tier Tribunal's decision

8. At paragraph six of the determination the judge noted that the appeal had been advanced on the basis that the Respondent was entitled to the benefit of the exception in Section 33(4) of the 2007 UK Borders Act. This was because it was asserted that the deportation would breach his Article 8 rights. The judge refers to

Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC), dealing with paragraph 398 and noted that the new Immigration Rules, in respect of claims advanced by foreign criminals seeking to resist deportation, are a complete code and the exceptional circumstances be considered as the balancing exercise involves the application of a proportionality test as required by Strasbourg Jurisprudence.

9. Having allowed the Respondent's appeal and concluded that Article 8 Family and Private Life require that the Respondent should not be deported, she said in paragraph 29 "I consider that the Immigration Rules particularly Paragraph 276ADE(6) is applicable." She allowed the appeal.
10. The claimant challenged the determination and on the 11 August 2014 First-tier Tribunal Judge Page granted permission to the Secretary of State and in doing so said this:

"2 The grounds of appeal raise a number of points that amount to a complaint that the judge made a very generous balancing exercise in the [Respondent's] favour under Article 8 and failed to give proper reasons as to why the [Respondent's] circumstances were exceptional. There is a paucity of reasoning in the judge's determination which makes evident that the [claimant's] grounds of appeal are arguable. The judge has acknowledged the [Respondent's] criminal offending was serious but concluded at paragraph 24 that the [Respondent's] deportation was "likely to be a punishment to the [Respondent] rather than protection of the interests of the British society." At paragraph 29 the judge said she did not consider that it was "necessary in a democratic society for the [Respondent] to be returned to Angola."

3 The grounds of appeal argue that the judge erred in law by allowing the [Respondent's] appeal under Paragraph 276ADE. The [claimant] submits that Paragraph 276ADE had not application to the [Respondent's] case as this was a deportation appeal. The issue before the judge was not whether the [Respondent] could meet the requirements of Paragraph 276ADE but whether he had established an exception to deportation under Section 33 of the UK Borders Act 2007. Given the paucity of reasoning in the judge's determination it is not clear what approach the judge has taken so all the grounds of appeal are arguable."

11. Before me today Ms Rackstraw on behalf of the claimant relied on the lengthy grounds. She pointed out that the grounds make it clear that the judge has erred in two main respects. Firstly, by considering the appeal under Paragraph 276ADE of the Immigration Rules, where that paragraph is not at all relevant to deportation appeals and secondly in failing to recognise that the Respondent needs to demonstrate that his circumstances are something above and beyond that in Paragraph 399A or 399B to succeed under exceptional circumstances.
12. The claimant maintained that the judge had simply failed to identify what it was that made the Respondent's circumstances exceptional. She has failed also to undertake the balancing exercise and did not weigh the balance of the public interest against that of the Respondent.
13. Ms Mendoza pointed out that at paragraph 6 of her determination, the judge certainly alludes to Paragraph 398 and 399 and, she submitted, it must have been in the judge's mind that Paragraph 398 and 399 were relevant when she made her decision. Counsel suggested that the judge adopted the right approach to the Respondent's credibility and applied the guidance set out in *Masih (Deportation: Public Interest Basic Principles) Pakistan* [2012] UK UT 00046.

14. At paragraph 21 of her determination, the Judge considers the background to the offences and at paragraph 23 she demonstrates that she has taken into account the judge's sentencing remarks. She properly considered the situation as it was at the date of the hearing. Counsel drew my attention to paragraph 16 of the determination, which states that the Respondent has made a good start to his licence, attending appointments offered and presents as very motivated to engage in offence focus work, sentence planning and complying with conditions of licence. This is taken from a report entitled "*A Request for Offender Management Information on a Foreign National Prisoner*" dated 20 February 2014.
15. The judge also had regard to the *Resolve Post Programme* report, paragraph 17 and to the psychological assessment carried out by Barry Fowler on the 12 May 2014. That report concludes that it was not seen that the Respondent's continued presence in the United Kingdom would be a detriment to British society.
16. The judge makes her own assessment as to the risk the Respondent presents to the public in the absence of an OASYS report, but in the light of the psychologist's report and also the *Offender Management Information and a Post Programme Report* (at paragraph 24) the judge concludes that deportation is likely to be a punishment for the Respondent rather than the protection of the interests of British society. She comments that while the punishment of the Respondent with its consequent deterrence of others may be a perfectly legitimate aim of the policy behind automatic deportation it is required to be balanced against the Respondent's individual interests in not being deported, namely his rights pursuant to Article 8.
17. The judge undertook a balancing exercise, Counsel submitted, and found exceptional circumstances at paragraphs 25, 26, 27 and 28 of the determination. At paragraph 25 the judge noted that the Respondent had not been to Angola since his early childhood, did not know the language, knows no one there except his father who was aggressive towards him. The Respondent has lived in the United Kingdom during his formative years, has siblings here who are British subjects, been educated in the United Kingdom, speaks English and has achieved UK qualifications. He knows nothing but the United Kingdom since he arrived here at the age of 5. He has a partner here who is the mother of his child and lives with her parents.
18. I have concluded that the judge did materially err in her determination. Her determination is slightly confused. Paragraph 276ADE(vi) had no application in this appeal since this was a deportation appeal.
19. Whilst the judge does refer to *Kabia* and to *MF Nigeria* at paragraph 6 of the determination, she does not demonstrate that she has taken into account the requirements of Paragraphs 398, 399 and 399A. Neither has she undertaken any proper assessment of the risk which the Respondent poses to the United Kingdom and has not, therefore, undertaken a proper proportionality balancing exercise.

20. The judge refers to the post programme report. This is *Resolve Post Programme* report which actually says on the front page "Resolve is a moderate intensity cognitive behavioural intervention that aims to reduce violence in **medium to high risk adult male offenders.**" [My emphasis]. It should have been apparent to her on reading this, that at some stage the Respondent has been assessed as being either a medium, or a high risk offender.
21. The judge does refer to the request for *Offender Management Information* but, section 2 of it makes it clear that the OASYS assessment completed on the 18 November 2013, assessed the risk of serious harm as being medium and those who are at risk are the general public. The report says:

"A risk of physical harm should a disagreement turn violent. There is also a risk of emotional harm at being the victim of a physical assault and the impact this has when having to deal with a confrontational situation or dealing with a difference of opinion under the influence of alcohol and/or when looking to defend friends at a time of perceived conflict."
22. When considering the report of Mr Fowler, the judge should have considered the OASYS assessment and considered whether Mr Fowler had taken it into account in his report. Her failure to adequately consider the evidence before her meant that she was not in a position to undertake a proper proportionality balancing exercise and I have concluded that the judge's determination cannot stand. I set it aside. None of her findings shall stand.
23. The matter will be remitted to the First-tier Tribunal to be heard afresh by a judge other than First-tier Tribunal Judge Gordon. There will be I believe six oral witnesses and it is suggested that a time estimate of at least four hours be allowed for this appeal. There is no need for an interpreter.

I DIRECT that if it is available or can be obtained from those previously representing the Appellant, the OASYS report should be filed with the First Tier Tribunal and served on the respondent **by the Appellant**, but in the absence of the OASYS report the First-tier Tribunal will of course consider the other documents to which I have referred.

Richard Chalkley
Upper Tribunal Judge Chalkley