



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

Appeal Number: DA/01440/2014

THE IMMIGRATION ACTS

**Heard at Newport
On 16 March 2015**

**Decision & Reasons
Promulgated
On 23 April 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR BENJAMIN BIO
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr O J Brown instructed by M J Solomon & Partners

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier (Judge T R Cockrill) allowing an appeal against the Secretary of State's decision of 23 July 2014 that s.32(5) of the UK Borders Act 2007 applied and to make a deportation order under the automatic deportation provisions of the 2007 Act.

2. For convenience, I will hereafter refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Sierra Leone who was born on 2 October 1981. He arrived in the UK on 23 October 1998 as an unaccompanied minor. He was initially granted leave until 16 October 2000. Thereafter, he was granted further leave until 27 July 2002. On 24 July 2002, he applied for an extension of his leave but that application was refused on 3 October 2003 and his subsequent appeal was dismissed on 17 May 2005. Reconsideration of that decision was refused by a judge of the Asylum and Immigration Tribunal on 10 June 2005. In that claim, the appellant relied upon Article 8 and, in particular, his mental health as he had been diagnosed as suffering from paranoid schizophrenia.
4. On 11 July 2005, the appellant made further representations to the Secretary of State and indefinite leave to remain was, albeit some time later, granted to the appellant on 26 April 2010. A subsequent application for British citizenship was refused on 12 November 2012 on good character grounds.
5. During his time in the United Kingdom, the appellant has been convicted of a number of offences between 1 March 2000 and 20 June 2012. There were, in total, nine convictions for a total of nineteen offences including a battery, four offences of common assault, failing to surrender to custody, fraudulent use of a vehicle licence, driving otherwise in accordance with the licence, driving without insurance, failing to comply with a traffic sign, resisting or obstructing a constable, using a vehicle without a test certificate, criminal damage, burglary, theft and three instances of begging. The appellant was also in breach of a conditional discharge on two occasions.
6. Between 20 December 2012 and 14 April 2014, the appellant was convicted of a further thirteen offences relating to begging, possession of a class A controlled drug, namely cocaine and several breaches of an anti-social behaviour order.
7. On 14 April 2014, having pleaded guilty, the appellant was sentenced to eighteen months' imprisonment for robbery together with one month's imprisonment concurrently for breach of anti-social behaviour orders.
8. On 26 June 2014, the Secretary of State notified the appellant of his liability to deportation under the 2007 Act and provided him with an opportunity to make representations as to why he should not be deported. On 23 July 2014, the Secretary of State made a decision to apply the 2007 Act to the appellant - which is the decision appealed in this case - and a deportation order was signed.

The Appeal

9. The appellant appealed to the First-tier Tribunal. Before Judge Cockrill the appellant relied both upon the Immigration Rules namely paras 399 and 399A and also Art 8 of the ECHR. Judge Cockrill found that the appellant could not meet the requirements of either para 399 or 399A. That decision is not challenged. However, Judge Cockrill went on to consider Art 8 and, in particular, the impact upon the appellant's mental health if he were deported to Sierra Leone. Judge Cockrill found that the appellant's deportation would breach Art 8 of the ECHR.

The Appeal to the Upper Tribunal

10. The Secretary of State sought permission to appeal from the First-tier Tribunal on the grounds that:
- (1) the judge had failed to deal properly with the 2005 determination in which the appellant's appeal had been dismissed;
 - (2) the judge had failed to consider properly whether there were "very compelling circumstances" to outweigh the public interest under para 398 of the Rules given that the appellant could not meet the requirements of either para 399 or 399A of the Rules; and
 - (3) given that the appellant had committed a "series of very serious offences", including a robbery the judge had failed to give proper weight to the public interest.
11. On 27 October 2014 the First-tier Tribunal (Judge Ford) refused the Secretary of State permission to appeal on those grounds.
12. The Secretary of State renewed her application for permission to the Upper Tribunal. The Secretary of State continued to rely upon the grounds submitted to the First-tier Tribunal but also, in separate grounds, argued that the First-tier Tribunal had failed to identify "any exceptional or compelling characteristics in [the] appellant's circumstances" and failed to give effect to the "strong public interest" in deporting the appellant. Further, referring to the decision of Bensaid v UK [2001] ECHR 82, the grounds argue that it was "unclear" whether the judge had considered the relevant case law in respect of Article 8 and there was no evidence that he had "balanced the [strong] public interest in removal" against the appellant's personal circumstances.
13. In his oral submissions, Mr Richards relied upon both sets of grounds. He acknowledged, however, that the Devaseelen point raised in the grounds to the First-tier Tribunal was, perhaps, not the strongest of grounds although he did not withdraw it. Mr Richards centred his submissions on the "public interest" point. In particular, he relied upon a sentence in paragraph 40 of the judge's determination which, he submitted, demonstrated that the judge had failed properly to apply s.117C of the Nationality, Immigration and Asylum Act 2002 (as inserted by s.19 of the Immigration Act 2014) by concluding that the "public interest" was served

by the appellant remaining in the UK. Mr Richards submitted that it was clear under s.117C that the deportation of a foreign criminal was in the public interest. This was a material error of law which undermined the determination. He submitted that the judge had clearly not balanced the public interest against the rights of the individual as he was required to do.

14. Mr Brown, on behalf of the appellant, accepted that it was wrong to state that the “public interest” would be served by allowing the appellant to remain in the UK if that created an impression that the public interest was not a “foregone conclusion”. However, he submitted that if the sentence in para 40 of the judge’s determination was erroneous, it was not material. Mr Brown submitted that the judge had, in fact, considered all the circumstances and found that they prevailed over the public interest. He submitted that the remaining grounds were no more than a disagreement with the Immigration Judge’s findings.

Discussion

15. I will deal first with the Devaseelan point. As Mr Richards candidly acknowledged in his submissions, the original determination was in 2005 and there had been a considerable passage of time and more recent evidence before Judge Cockrill than was before the previous judge. That, in my judgment, disposes of this ground. Judge Cockrill had before him further evidence, including an updated psychiatric report dealing with the appellant’s paranoid schizophrenia and the impact upon his mental health if deported. He heard oral evidence, not only from the appellant, but also from other witnesses dealing with the appellant’s circumstances. The judge made specific reference at para 47 to the earlier judge’s determination. Nothing in the determination leads me to conclude that the judge did not have that determination in mind when reaching his decision but he had a body of further evidence which he was required to take into account which, as will become clear shortly, I am satisfied he properly considered.
16. Turning now to the central argument made by Mr Richards, that concerned a sentence in para 40 of the judge’s determination which is in the following terms:

“Overall then it seems to me that the public interest is in fact best served by allowing the Appellant to remain in this country knowing that he can get appropriate medical care here and knowing also that he has got the active help and support of Pastor Oniawu.”
17. Read in isolation, that sentence contradicts the terms of s.117C(1) of the NIA Act 2002 which states that: “The deportation of foreign criminals is in the public interest.”
18. The deportation of this appellant was in the public interest. The issue for the judge was whether that public interest was outweighed by the appellant’s personal circumstances, in particular the effect upon his mental health of deportation to Sierra Leone.

19. However, reading the judge's determination as a whole it is clear that the judge did not fail to carry out the balancing exercise required under Article 8 and determined whether there were "very compelling circumstances" within para 398 of the Immigration Rules.

20. That provision provides, in relation to the appellant who was sentenced to a period of imprisonment of less than four years, as follows:

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

(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 four years but at least twelve months; ...

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."

21. It is clear that the judge was alive to the relevant legal issue, having decided that paras 399 and 399A did not apply and that the appellant must establish "very compelling circumstances". At para 38 the judge said this having concluded that paras 399 and 399A did not apply:

"However, matters should not end there because this is a case where in my overall assessment and judgment there are very compelling circumstances, specific to this Appellant, that do require proper consideration. I focus really then upon his mental health issues."

22. That is a correct direction in law consistent with para 398 of the Rules.

23. Then at paras 39-40, the judge dealt with the appellant's circumstances, in particular his mental health issues as follows:

"39. What seems to be very important is for the Appellant to have appropriate medication regularly and properly given to him in order to maintain some sort of stability for his mental health. The current drug that he is receiving is Haloperidol once a month. I am concerned that the Respondent, in relation to that specific drug, is saying that it is available in Sierra Leone. The information that is relied upon strikes me as being old. It is material from 2013 in a reply given by the Country of Origin Information Service in entirely different circumstances in relation to someone else where there is reference to Kissy Mental Hospital having that drug and, frankly, only that hospital seemed to have it. What we really do not know is what the present position is in relation to that drug and Kissy Mental Hospital because it is absolutely crucial that if the Appellant does not get that drug he is going to deteriorate mentally. That point is made plain, as I see it, by the doctor who had got control of the Appellant's care at the prison, Dr. Govindarajula who is a Consultant Forensic Psychiatrist. Although the Appellant can rightly be described as fit for travel and removal, matters really do not end there. What the doctor says, and this has already been highlighted in the determination, is that there are "high risks of deterioration of the Appellant's mental health if he does not receive adequate mental health treatment in Sierra Leone. What I underscore heavily in this case is that

it really has not been shown that there is adequate mental health treatment in Sierra Leone. That doctor was not aware as to whether there was appropriate treatment available and also, perhaps equally importantly, whether the Appellant could access it. It should be borne in mind that this Appellant has demonstrated what I see as a high degree of vulnerability. Even within the organised and restricted regime of a prison the Appellant still suffers blackouts frequently, I accept that as a fact. That shows just how physically vulnerable he is and that is when he is still getting his regular prescribed medicine. It surely must be the case that if the Appellant is exposed to life in Sierra Leone as a single male, with this diagnosis of Paranoid Schizophrenia, he is going to find it extraordinarily hard to cope and to survive. As I see it the reality is that he faces a significant risk of deterioration in his mental health and the real risk, as I find, of ending up on the streets destitute. He would be forced back into begging or worse in order to try to survive. It does not seem to me unduly speculative to be saying that, given his history which is well documented. Basically, I am concerned that there isn't adequate mental health care in Sierra Leone for this Appellant. It seems plain enough that there is a real question mark over whether Procyclidine is available. The COI response from July 2012 indicates that it is unlikely to be available. There is no material at all which would suggest that the situation has improved from 2012. That drug would deal with the side effects and, because it is a sensitive balance that needs to be struck with the Appellant's medication, it seems wholly wrong as I see it to adopt what I might term a rather blanket approach by saying there is medication available, there are some psychiatric services available and, therefore, the Appellant can go to Sierra Leone. It seems to me that that is not really perceiving the reality of the situation which is that this man would be very vulnerable indeed if he was sent back on his own to Sierra Leone with all the uncertainties that exist in trying to gain access to appropriate medication and for the Appellant to take that medication reliably and consistently to preserve his mental health stability. All in all then, it seems to me that there are insufficient safeguards and insufficient information about the clinical situation in Sierra Leone which is current to persuade me that it really would be safe to let this Appellant go back to Sierra Leone. It cannot be right, in my judgment, consistent with his country's obligations under the Human Rights Act, to put the Appellant in a situation almost in the knowledge that he is going not only to suffer mentally, because he would be then suffering hallucinations and hearing voices if he does not get his prescribed medicine but, worst than that, that he would not have any sort of support structure whatsoever to help him on a day to day basis.

40. By contrast, there are some encouraging signs in this country. The Pastor who came to give evidence is obviously someone who cares for the Appellant and is trying to look after him in a thoroughly Christian way. The Appellant obviously is prepared to work closely with the Pastor and it does seem to me that that provides the best prospect for the Appellant to remain in reasonably good mental health and not to become a threat to society. Overall then it seems to me that the public interest is in fact best served by allowing the Appellant to remain in this country knowing that he can get appropriate medical care here and knowing also that he has got the active help and support of Pastor Oniawu. The alternative is taking a course which involves a very high degree of risk, as I see it, with the Appellant's life and safety and, given his obvious vulnerabilities, given the clinical diagnosis of Paranoid Schizophrenia, it seems to me that the balance does fall in favour of the Appellant being permitted to stay, that it would be a disproportionate interference with his right to respect for private life by the decision of

the Respondent to deport him. It seems that the best way to preserve and maintain the Appellant with some sense of dignity and purpose in life is to enable him to stay in this country and not expose him to the very considerable risks that as I see lie ahead for him if this Appellant is expected to go back to Sierra Leone. The current Ebola virus outbreak serves to underscore the difficulties that the medical authorities have in trying to preserve the health of the population. I conclude by emphasizing that this conclusion would not be one that I draw unless the Appellant had marked mental health problems. As he does, it seems to me that it is wholly inappropriate for him now at this stage of his life to go to Sierra Leone.”

24. It is clear, on a fair reading of these paragraphs, that the judge considered that there would be a significant risk of a deterioration in the appellant’s mental health if he returned to Sierra Leone given his vulnerability and the uncertainties about whether he would be able to gain access to appropriate medication. The medical evidence was plain that without medication, including Procyclidine which dealt with the symptom caused by the other medication, the appellant’s mental health would destabilise and he would suffer as a consequence.
25. I should point out that neither Mr Richards, nor the grounds, challenge those factual findings.
26. Having made those findings, and having in para 40 set out the sentence which the Secretary of State challenges, the judge went on to conclude that the exposure of the appellant to “very considerable risks” and “his obvious vulnerabilities” given the clinical diagnosis of paranoid schizophrenia meant that “the balance” fell in favour of the appellant and it would be a “disproportionate interference” with his right to respect for his private life if he were deported.
27. That is, in my judgment, a clear application by the judge of the balancing test inherent in an assessment of proportionality (see Razgar v SSHD [2004] UKHL 27 at [20] *per* Lord Bingham of Cornhill).
28. Whilst the challenged sentence could, undoubtedly, have been better expressed it is clear that, first the judge was doing no more than expressing the outcome of the “balancing test” under Art 8.2; and secondly, he carried out that balancing exercise explicitly.
29. It is also clear that the judge took into account the seriousness of the appellant’s offending. At para 32 of his judgment, he stated as follows:

“The Appellant pleaded guilty to the offence of robbery and received a sentence of eighteen months’ imprisonment. That was a serious offence that he committed. It involved using some measure of force on an elderly lady to get her to hand over her cash which she had only just withdrawn from a cash point, this offence occurred in the early hours of the morning and the victim was someone who was seen to be vulnerable. I recognise fully, therefore, that this is a serious matter which has triggered the present deportation proceedings.”

30. In directing himself that only “compelling circumstances” could outweigh the public interest, the judge recognised, in effect, that only a “strong” claim could outweigh the public interest: see, for example SS (Nigeria) v SSHD [2013] EWCA Civ 550.
31. As I have already indicated, Mr Richards did not directly challenge the judge’s findings concerning the deterioration and the risks to the appellant’s health to which he would be exposed if deported to Sierra Leone. Whilst the grounds refer to the decision of the Strasbourg Court in Bensaid, nothing in Judge Cockrill’s decision runs counter to that decision. There, the Strasbourg Court found at [40] that the risk to that applicant’s mental health was based “on largely hypothetical factors”. Here, the judge’s findings were based upon medical evidence specific to the appellant and background evidence concerning treatment and medication available in Sierra Leone. In relation to this appellant, the impact upon the appellant was not speculative or based upon hypothetical factors. The judge’s reasoning at paras 39-40 (which I set out above) fully supports his findings. Given his finding in relation to the impact upon the appellant’s mental health if deported to Sierra Leone, it was not irrational for the judge to conclude that there were “very compelling circumstances” which outweighed the public interest to reflect the seriousness of the appellant’s offending.
32. For these reasons, I reject the Secretary of State’s challenges to the determination. The First-tier Tribunal’s decision to allow the appellant’s appeal under Art 8 did not involve the making of an error of law. That decision stands.
33. Accordingly, the Secretary of State’s appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal