



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal No: DA/01574/2014

THE IMMIGRATION ACTS

Heard at Field House
On 3 March 2016

Decision and Reasons Promulgated
On 15 April 2016

Before

**THE HONOURABLE LORD BURNS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)**

Between

**OSA ROMEN COLLINS ILEKHUOBA
(No anonymity order made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: J Walsh, Counsel instructed by Howie & Company Solicitors
For the respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal promulgated on 12 October 2015 refusing an appeal against the decision of the respondent of 3 July 2014 to deport him by virtue of section 32(5) of the United Kingdom Borders Act 2007.

2. The appellant was born on 7 February 1988 and is a citizen of Nigeria. He arrived in the UK sometime in 1997. He applied for leave to remain in the UK as a dependent of a person settled here in October 2001. That application was refused on 11 August 2004. An appeal against that decision was allowed and on 14 June 2007 he was granted discretionary leave to remain until 14 June 2010.
3. Between November 2004 and January 2012 the appellant was convicted of various offences. He was convicted on eight occasions for 16 offences starting in November 2004. On 7 August 2009 he received a sentence of 30 months imprisonment for robbery. On 10 February 2012 he was sentenced on two counts of robbery and one of attempted burglary. The sentencing judge sentenced him to two and a half years' imprisonment on each of those charges. On two of them, the sentences ran concurrently but were consecutive to the sentence on the third count, that of burglary. In total that produced a sentence of five years. He applied for further leave to remain in the UK in July 2013. That application was refused on 5 November 2013.
4. In the light of the sentence imposed in November 2012 the respondent decided to issue the deportation order of 3 July 2014. The appellant claimed that deportation would breach his rights under article 8 of the European Convention of Human Rights. The respondent had regard to the sentences imposed in February 2012 and stated at page 4 of 14 of the refusal letter that he had been sentenced to a period of five years' imprisonment. The letter went on to narrate that the Immigration Rules state that it will only be in exceptional circumstances that a person's right to family and or private life would outweigh the public interest in deportation when they have been sentenced to a period of at least four years. It was found that no exceptional circumstances existed in the appellant's case. Regard was had to evidence from Dr McNulty in a report dated 14 February 2012 that the appellant had learning disability and that he was highly dependent upon the support of his parents and family for social physical care and wellbeing. However, he had available to him some family support in Nigeria and in particular, in Benin City, his place of birth and he could obtain accommodation and support there. Although he had lived in the United Kingdom for the past 17 years he had spent his formative years in Nigeria. It was not accepted that Nigerian culture or societal norms would be entirely alien to him and that in the circumstances it would not be unduly harsh to expect him to readjust to life in Nigeria. It was concluded that it would not be in breach of his rights under the European Convention to deport him.
5. He appealed that decision to the First-tier Tribunal. The grounds of appeal contended that the respondent had erred in concluding that the appellant did not have a claim under article 8 of the Convention. It does not appear to have been suggested that the respondent's description of the appellant as having been sentenced to a period of five years' imprisonment was incorrect and, as a result, it would only be if very compelling circumstances existed that the public interest in deportation would be outweighed. At paragraph 23 of the determination, the appellant's representative is recorded as accepting that he had to establish "very compelling

circumstances". The tribunal was invited to proceed on the basis that the appellant's most recent conviction attracted a sentence of imprisonment of at least four years and meant that paragraph 399 and 399A of the Immigration Rules did not apply. The tribunal considered whether there were very compelling circumstances but was not so satisfied. The judge considered the circumstances which the appellant would encounter in Nigeria and found that he would not simply have accommodation available to him but that his step-mother would be willing to support him financially there. The judge had regard to the age of the appellant, the fact he had entered the United Kingdom at eight or nine years of age, that he had learning difficulties and mental health difficulties. He noted that the appellant required very substantial support which would not be available to him in Nigeria. However, the judge had regard to the very serious criminal record of the appellant, who had been given every opportunity to change his ways and had failed to do so. In his assessment, the judge found that no very compelling circumstances had been demonstrated sufficient to outweigh the clear public interest in deportation.

6. Before this tribunal Mr Walsh raised a preliminary matter. He pointed out that there had been a change of solicitors since the hearing before the First-tier Tribunal and Mr Walsh had only seen the sentencing judge's full remarks on the morning of the hearing before me. While an extract of those remarks had been quoted in the determination there was a question as to whether the appellant was a person who had been sentenced to a period of imprisonment of at least four years within the meaning of Immigration Rule 398. I was provided with a full copy of the sentencing judge's remarks. He stated as follows:

"On each of the three counts there will be a sentence of two and a half years' imprisonment. Those on counts two and three will be concurrent to each other but consecutive to the sentence of burglary, producing a total sentence of five years".

Immigration Rule 398(a) states that where a person claims that their deportation would be contrary to article 8:

"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 at least four years." (my underlining)

and when assessing that claim it will only be where there are very compelling circumstances over and above those described in paragraphs 399 and 399A that the public interest in deportation will be outweighed.

7. Mr Walsh submitted that, both the Secretary of State and the First-tier Tribunal had proceeded upon the basis that the appellant was someone who had been imprisoned for at least four years and thus had to show "very compelling circumstances". If that was erroneous, this appeal must be allowed and the matter remitted to the First-tier Tribunal.

8. Mr Melvin very fairly accepted that if Mr Walsh was correct in this submission, the appeal should be allowed and the matter remitted to the First-tier Tribunal.

Discussion

9. The First-tier Tribunal proceeded upon the basis that the appellant was a person who required to demonstrate “very compelling circumstances” over and above those described in paragraphs 399 and 399A because he had been convicted of an offence for which he had been sentenced to a period of at least four years.
10. The question therefore is whether the appellant, having been sentenced to consecutive sentences for more than one offence, the total of which amounted to five years, thereby fell within the scope of paragraph 398(a) or 398(b).
11. From the terms of paragraph A398 it is clear that the subsequent paragraphs 398, 399 and 399A apply to foreign criminals. A foreign criminal is not defined in the Immigration Rules. However, both section 32 of the UK Borders Act 2007 and section 117D(2) of the Nationality, Immigration and Asylum Act 2002 state that a foreign criminal means a person who *inter alia* has been sentenced to a period of imprisonment of at least 12 months. Accordingly the appellant in this case was a foreign criminal within the meaning of those Acts.
12. The considerations set out in sections 117A to 117D of the 2002 Act required to be taken into account by the First-tier Tribunal. Section 117C(6) provides as follows:

“In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in exceptions 1 and 2”.

That language is similar to that used in Immigration Rule 398. In section 1174D(4) it is provided:

“In this part, references to a person who has been sentenced to a period of imprisonment for a certain length of time -

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;”

13. Accordingly, the appellant, because he was sentenced to consecutive periods of imprisonment of two and a half years, amounting in total to five years, would not be subject to the provisions of section 117C(6). He would therefore not be required to demonstrate very compelling

circumstances over and above exceptions 1 or 2 contained in sub-sections 4 and 5 of that section.

14. The explanatory notes to 2014 Act at paragraph 21 provide, with reference to the deportation rules, as follows:

“The Act gives the force of primary legislation to the principles reflected in those rules by requiring a court or tribunal, when determining whether a decision is in breach of article 8 of ECHR, to have regard to the public interest considerations as set out in the Act”.

That appears to fortify the view that the meaning of foreign criminal within the rules is to be considered consistently with the definition in the 2002 Act. It also indicates, in my view, that the same approach should be taken to references to a person who has been sentenced to a period of imprisonment.

15. Further, the terms of paragraph 398(a) provide that deportation is conducive to the public interest when a person has been convicted of “an offence” for which they have been sentenced to a period of imprisonment of at least four years. Although, as a matter of statutory construction, the singular might include the plural, it would still be necessary to read that paragraph so as to “tot up,” all the sentences of all the offences of which a person is convicted so as to produce thereby a total period of imprisonment which amounted to at least four years. That would be to manipulate the wording of the rule in what I consider to be an illegitimate way (see YM (Uganda) v SHHD [2014] ECWA Civ 1292 at paragraph 43 in the opinion of the Lord Justice Aikens). Further it would be surprising if the rules required to be interpreted differently than the statutory provisions of the 2002 Act to which I have referred.
16. For these reasons I conclude that Mr Walsh’s submissions are well-founded and that the appellant did not fall within the scope of Immigration Rule 398(a) because he had not been convicted of an offence for which he had been sentenced to a period of at least four years. He therefore ought to have been dealt with on the basis that he fell within the scope of 398(b) and that did not require to advance very compelling circumstances over and above those described in 399 and 399(A).
17. I therefore consider that the First-tier Tribunal materially erred in law in approaching the appellant’s appeal as it did and that its decision for that reason cannot stand. Although Mr Walsh advanced further argument in relation to a fundamental error of approach by the tribunal in respect of their conclusion that no very compelling factors existed in terms of paragraph 398, it is not necessary for me to deal with that having regard to my decision on Mr Walsh’s preliminary point.
18. I will therefore allow this appeal and remit it to a freshly constituted tribunal for a re-hearing on the basis that the appellant falls within the ambit of Immigration Rule 398(b).

Decision

19. The appeal is allowed.

Signed:

Date:

The Hon Lord Burns

No anonymity order is made.

Signed:

Date:

The Hon Lord Burns