



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13311/2019

THE IMMIGRATION ACTS

Heard at RCJ
On 24 February 2020

Decision & Reasons Promulgated
On 24 March 2020

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMADU HASSAN GBLA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. P Singh, Senior Presenting Officer

For the Respondent: In Person

DECISION AND REASONS

Introduction

1. In this decision the appellant is referred to as the Secretary of State and the respondent is referred to as the claimant.
2. This is the Secretary of State's appeal against a decision of Judge of the First-tier Tribunal C H Bennett ('the Judge') promulgated on 11 November 2019 in which he allowed the claimant's human rights appeal against the decision dated 9 July 2019 to

refuse his application for leave to remain on human rights grounds following the making of a deportation order on 7 January 2019.

3. Judge of the First-tier Tribunal Boyes granted permission to appeal on the one ground advanced by the Secretary of State namely that the judge failed to give adequate reasons.

Anonymity

4. The judge did not issue an anonymity direction. The parties did not seek such a direction before me.
5. In deciding not to issue a direction I observe that the claimant's conviction and sentence were covered by both local and national media and his name and photograph, as well as those of his co-defendants, were published. I further note that the unsuccessful defence of one of the claimant's defendant's, Ms. Angela Holland, as to her having been the victim of a serious sexual assault by the victim was disbelieved by the jury and such rejection was reported by the media.

Background

6. The claimant is a national of Sierra Leone. The Secretary of State has provided a copy of the claimant's expired Sierra Leonean passport confirming that the claimant was issued by the Dutch authorities with a 'permit to stay' on 12 February 1990, when aged 6.
7. At the hearing before the Judge the Secretary of State did not challenge the claimant's evidence that he had entered the Netherlands when aged 3 and had resided in that country from such time until he relocated to the United Kingdom. The Judge accepted the claimant's evidence on this issue at [28] of his decision.
8. The claimant resided in the Netherlands with his uncle and aunt until they moved to this country. He entered the United Kingdom as a dependant of an EEA national exercising EEA treaty rights in January 1991, when aged 7. He was in the care of a local authority from the ages of 7 to 18 and was a former relevant child under the Children Act 1989 until he turned 21. The claimant was granted indefinite leave to remain in this country in May 2001. He had therefore been lawfully present in this country for almost 29 years when he appeared before the Judge.
9. He visited Sierra Leone on two occasions, firstly at some time in 2004 or 2005 and again in 2007. On both occasions he travelled with his aunt and uncle undertaking charitable work and stayed in the country for approximately three weeks. He has a son in this country though he separated from his son's mother some nine months after the child's birth in 2013. Since that time, he saw his son at weekends up until his imprisonment and now talks to him by telephone once a week from prison. His son was aged 6 at the date of the Judge's decision.

10. Between November 2006 and October 2018, the claimant accumulated eleven convictions arising from fourteen offences. Such offences ranged from possession of an offensive weapon, criminal damage and possession of cannabis to failures to surrender to custody and failures to comply with the requirements of community orders. The majority of the offences resulted in the imposition of conditional discharges, fines and community penalties. On 5 February 2018 the claimant was convicted of battery and sentenced to four weeks' imprisonment. After this conviction the Secretary of State decided not to pursue deportation and issued the claimant with a warning letter.
11. On 12 October 2018 the claimant was sentenced to six years' imprisonment at Chelmsford Crown Court having pleaded guilty to aggravated burglary. He had previously been convicted following a trial for theft in relation to the victim's motor car and was sentenced to 6 months imprisonment concurrent.
12. By his sentencing remarks HHJ Christopher Morgan observed that the claimant attended the home of the victim with his two co-defendants one of whom had informed the claimant that she had been raped by the victim. A small axe and a lump hammer were carried by members of the group. The victim was physically attacked, and money was extorted from him. Items were taken from the victim's home and the victim's car was driven away.
13. At her trial, Ms. Holland repeated before the jury her allegation that the victim had raped her but was disbelieved. In sentencing the claimant HHJ Christopher Morgan noted as to underlying events:

'You, Miss Holland, had formed a close association with [TD]. Someone that you had known for a number of years. It is quite apparent that when you would visit him, you and he would engage in sexual acts. It is equally plain that in the lead up to these events, you had agreed with him to engage in sexual acts for some £50. Either to provide accommodation, as he understood, or to purchase some drugs, because you, at that time, were residing in a house of your friend's, and so it came to pass that you visited [the victim] on that evening.

There had been some disruption to arrangements, but you chose to go round there, and events then unfolded. It was your claim that you left without having performed any sexual act upon him, but returned because your mobile phone was left within his property and when you went in, you claim that he committed a serious sexual offence against you. He denied that, as he has always denied it, indicating to the jury that you had, in fact, performed oral sex upon him during the course of the incident, and then, as it turns out, you returned to an address where your two co-defendants are and as you have said and maintained throughout, having discussed the matter, pressure was applied to you to seek some form of self-justice. You maintain that you simply went around to – with the other two – to ensure that they managed to persuade him to accompany you to the police station where it was expected that he would confess his guilt.

It is quite plain on the evidence, as far as I am concerned, that the real intention was to go round, make the allegation and extract money out of him. As you say in your letter, you realise that now and you knew that if an allegation of a sexual nature was made, he would be unlikely to report what, in fact, had happened to

him by way of aggravated burglary and theft ... it is also quite plain that because of your need and the other's needs for drugs which you had consumed that night, both before and after your visit to [the victim], that you all anticipated that there would be drugs in the property.'

14. As to the claimant, the sentencing judge observed:

'It is said by the Crown that there is high culpability because there was significant planning. You went equipped with weapons and they were present on entry. Well, it seems to me that whilst there was some planning, it cannot, in this case, be described as significant. All of you had taken drugs. All of you, I suspect, were influenced, and not one of you had been capable of working out the significance of what you were about to do.

...

The effect on [the victim] has been profound he has lost his home through no choice of his own and he had suffered, he says, post-traumatic stress disorder.'

Hearing before the FtT

15. The appeal came before the Judge sitting at Hendon Magistrates' Court on 25 October 2019. The claimant was unrepresented. The Judge recorded the claimant's oral evidence at [11(q)] as to events surrounding the index offence as he understood them at the time:

'[The claimant] was sorry for having offended. He had become involved in the offence because [Ms. Holland] has returned to the house at which he had been living and had stated that she had been raped. She had been upset. It has then emerged that she had left her mobile telephone at [the victim's] home. He had gone with her and with [Mr. Wilson] to help her to get her mobile telephone back. It had not been his intention to extort money from [the victim]. But when he and the others had arrived at [the victim's] home, [the victim] had begun fighting. At the time of the offence, [the claimant] had been under the influence of cocaine.'

16. As to the claimant's personal circumstances, the Judge accepted that his father is dead and that he does not know the whereabouts of his mother, nor does he know of any other relatives residing in Sierra Leone: [29(d), (e)].
17. Whilst acknowledging that the sentence of six years' imprisonment required the appellant to be considered under section 117C(6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') and paragraph 398 of the Immigration Rules alone, the Judge proceeded to consider whether, save for the length of sentence, the claimant would have met the exceptional requirements established by sections 117C(4) and (5) of the 2002 Act and paragraphs 399(a) and 399A of the Rules.
18. The Judge accepted that the claimant saw his son at the weekend, from Friday until Sunday, until his imprisonment: [30]. However, I observe that the claimant provided no evidence as to his son's nationality and so did not establish by means of documentary evidence that his son is a British citizen. In any event, the Judge concluded that there was no evidential basis for concluding that the hardship his son

would suffer by remaining in this country with his mother whilst the claimant was deported would be unduly harsh and so the claimant was unable to satisfy the requirements of paragraph 399(a) of the Immigration Rules: [33]. The claimant has not cross-appealed this finding.

19. Upon considering paragraph 399A of the Rules, the Judge found that the claimant satisfied two of the three requirements: paragraph 399A(a) and (c). As to paragraph 399A(b), the Judge determined at [37] that the claimant was not socially and culturally integrated in the United Kingdom:

‘... It is apparent that, from c. mid 2015 until December 2017, [the claimant] was not living as a law-abiding citizen. The fact that a number of the offences involved failures to comply with requirements of community orders is not, so far as ‘social and cultural integration’ is concerned, to the point. Consistently with the above guidance, ‘social and cultural integration’ requires that an individual complies with orders of the above kind as much as with the provisions of the criminal law forbidding, by way of example, theft, violence and disorderly conduct. By contrast, there is no evidence of [the claimant] having been involved in useful voluntary community activity and/or in sporting or other clubs or associations. I am therefore not satisfied that he is properly categorised as being ‘socially and culturally integrated’ into the United Kingdom.’

20. At [38], the Judge accepted that there are very significant obstacles to the claimant’s integration on return to Sierra Leone.

‘I accept that [the claimant] left Sierra Leone when he was c. 3 years old and has returned there on only 2 occasions on holiday, on each occasion for c. 3 weeks, in 2004 or 2005 and in 2007. I accept also that his father is dead and that he has no knowledge of any relatives living in Sierra Leone. Specifically, I am satisfied that he does not know what has become of his mother (or whether she is still living, and if so where), he has had no contact with her since he was c. 3 years old and that he does not know whether he has any brothers or sisters or other relatives living in Sierra Leone. And because I am satisfied that he left Sierra Leone when he was only c. 3 years old and has only returned for the 2 periods of 3 weeks (as above), I am satisfied that there are no childhood or school friendships which he could revive and that he has no friends in Sierra Leone.’

21. The Judge accepted that the claimant does not speak Creole, that English is only nominally spoken in Sierra Leone, and having left when aged 3 the claimant does not have familiarity with non-verbal cues or cultural norms in his home country. The Judge found, at [38(e)]:

‘... I am satisfied that, if [the claimant] were removed to Sierra Leone, he would have no relatives or friends there to assist him and would, and at the very least, have the most substantial difficulties in understanding the local speech and of being understood by those to whom he spoke. He would, I am satisfied, be a ‘stranger in a foreign land’. In these circumstances, I am, additionally, satisfied that he has no realistic understanding of how life in Sierra Leone is carried on, no realistic capacity to participate in life or to be accepted there or to be able to operate on a day-to-day basis. In these circumstances, I am satisfied that he would be at the most substantial disadvantage on the open labour market in

Sierra Leone. His position would be comparable with that of the appellant in AK (Sierra Leone) [2016] EWCA Civ 813.’

22. As the claimant is a foreign national criminal upon whom a custodial sentence of over 4 years has been imposed, the Judge considered whether very compelling circumstances arose, as required under section 117C(6) of the 2002 Act and paragraph 398 of the Rules. Such consideration runs over 5 pages and the Judge found, *inter alia*, at [44(b)]:

‘I am satisfied that [the claimant’s] case goes well beyond a ‘bare case’ of the kind described in paragraph 399A, even bearing in mind my conclusions in paragraph 37, that, because of his past offending behaviour, he is not properly categorised as ‘socially and culturally integrated’ into the United Kingdom. The factors which lead to the conclusion that his case goes well beyond a ‘bare case’ of ‘very significant obstacles’ to integration into Sierra Leone and that there are ‘very compelling circumstances over and above those described in paragraph 399 and 399A’ are those which I have set out in paragraph 38, taken with the factual matters identified in the extracts from the judgements in MK (Sierra Leone) and AK (Sierra Leone), which I have set out in paragraphs 24 and 25 and, crucially (in summary) that:

- (1) he left Sierra Leone when he was c. 3 years old;
- (2) apart from the two holidays, each of 3 weeks in 2004 or 2005 and 2007, he has not returned to or lived in Sierra Leone;
- (3) his father is dead, he has no news of his mother, has had no contact with her since c. 1986, does not know whether he has any brothers or sisters and there are no relatives or friends whom he knows and/or who might assist him to integrate, to find employment and/or provide him with a home and/or a base on his arrival in Sierra Leone;
- (4) there are no childhood or school friendships which he might seek to revive (necessarily, because he left Sierra Leone at the age of 3 before he could have formed any such friendships);
- (5) he cannot speak or understand Creole, or any other language of Sierra Leone and his English is not understood by Creole speakers (or speakers of other languages of Sierra Leone);
- (6) he does not have the familiarity with the ‘non-verbal cues or cultural norms’ which an adult who has lived in Sierra Leone for a substantial period of time would have;
- (7) he will be at a very substantial disadvantage on the open labour market there and because of his
 - (i) having no relatives or friends to assist him, and
 - (ii) inability to speak and/or understand Creole, and the corresponding difficulties which Creole speakers (and speakers of other languages in Sierra Leone) will have in understanding him,

and because his history of employment in the United Kingdom is not likely to be of substantial assistance to him in finding employment in Sierra Leone, I conclude that he is not likely to be able to find employment, and;

(8) Sierra Leone's past history and its present substantial poverty.'

23. The Judge found that the claimant had acted out of character with regard to the index offence and accepted that he had not used drugs in prison. He concluded that very compelling circumstances arose in this matter, over and above the exceptions established by paragraphs 399 and 399A of the Rules.

Grounds of appeal

24. One ground of appeal is advanced by the respondent though two elements are clearly identified as being raised:

- '7. It is submitted that as the appellant is found not to meet the requirements of 399 and 399A that the FTTJ has misdirected himself in going on to consider very compelling circumstances. These must be 'over and above' the requirements of 399 and 399A, therefore those requirements must first be met before any further consideration is to be conducted.
8. In any event, the FTTJ fails to make any reasoned assessment as to very compelling circumstances. While he states at [44] that he has in mind the very substantial weight which must be given to the public interest he fails to perform any balancing exercise and leaps to finding at [44] that the appellant's deportation would be disproportionate.'

25. No Rule 24 response was filed by the appellant and no cross-appeal was filed.

Decision on Error of Law

26. The first ground advanced by the Secretary of State, at [7] of her grounds, possesses no merit. There is no requirement that a foreign national criminal sentenced to a custodial term of 4 years or more must meet the requirements of paragraphs 399 and 399A of the Rules before being permitted to seek to establish very compelling circumstances. Nicol J confirmed in *Chege (section 117D: Article 8: approach)* [2015] UKUT 165 (IAC); [2015] Imm. A.R. 850, at [27]-[28], that the purpose of paragraph 398 is to recognize circumstances that are sufficiently compelling to outweigh the public interest in deportation but do not fall within paragraphs 399 and 399A. A foreign national criminal can rely upon being able to satisfy either or both paragraph 399 and 399A when seeking to establish very compelling circumstances, but to outweigh the public interest in deportation such very compelling circumstances must be over and above those identified within the exceptions and so a holistic approach is adopted to the assessment: *NA (Pakistan) v. Secretary of State for the Home Department* [2016] EWCA Civ 662; [2017] 1 W.L.R. 207.
27. As to the second ground, I do not accept Mr Singh's contention that a failure to adopt the 'balance sheet' approach advocated by Lord Thomas of Cwmgiedd in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 W.L.R. 4799 is a material error of law. The Court of Appeal confirmed in *AS v Secretary of State for the Home Department* [2019] EWCA Civ 417; [2019] Imm. A.R. 759 that though it is

desirable for tribunals to structure their judgments by adopting the ‘balance sheet’ approach, it is not fatal if such approach is not followed, at [15]-[17].

28. The Secretary of State further asserts that in concluding that very compelling circumstances arose in this matter, the Judge gave slim reference, at most, to the public interest and failed to engage with the seriousness of the offence. It was accepted that the Judge addressed the nature of the public interest consideration at [18]-[19] and it was further referenced at the outset of [44]. However, the Secretary of State’s position is that no application of the required weight can be observed within [44], with no express consideration being given to the starting point that the public interest ‘almost always’ outweighs countervailing considerations of private life in a case involving a serious offender: *Secretary of State for the Home Department v. KE (Nigeria)* [2017] EWCA Civ 1382; [2018] 1 W.L.R. 2610, at [34]:

‘Therefore, as Lord Reed emphasises, whatever the seriousness of the offences or length of sentence, the ultimate question is the same – would deportation be in breach of article 8 – but the sentence imposed affects the approach to the exercise of assessing proportionality for article 8(2) purposes. If it is at least four years’ imprisonment, any decision-maker must attach very considerable weight to the general assessment of the public interest in deporting foreign criminals, now directly adopted by Parliament in statute, under which such a sentence represents a level of offending in respect of which the public interest almost always outweighs countervailing considerations of private or family life, only being outweighed by countervailing factors which are very compelling (see Ali at [46]). Where there is a challenge to a decision involving the article 8(2) balancing exercise by a decision-maker on behalf of the Secretary of State in an individual case, as I have already described, the court or tribunal must give that general assessment substantial weight, because it is endorsed by Parliament; and it must also take into account – but no more than take into account – the application of that general assessment to the facts of the specific case by the original decision-maker (OH (Serbia) at [15(d)]). As independent judicial bodies, on hearing a challenge to an executive decision in an individual case, it is the duty of the court or tribunal to make its own findings of the relevant facts and then make its own assessment of the proportionality of the proposed deportation (Ali at [46]).’

29. It is appropriate to observe that the Judge adopted an impressively meticulous approach to his assessment of the oral evidence before him and to the accompanying documentary evidence. He correctly directed himself to the exacting test to be applied and it is obvious that he took great care in undertaking his overall assessment. His decision and reasons run to 46 pages and his assessment as to very compelling circumstances amounts to 5 pages. However, the relevance of the seriousness of the offence in the proportionality exercise is greater than simply noting the sentence imposed for the serious offence. There is to be engagement with the principle that in making the seriousness of the offence the touchstone for determining the strength of the public interest in deportation, Parliament, in enacting section 117C(2), must have intended courts and tribunals to have regard to more than the mere question of whether the particular foreign criminal, if allowed to remain in the United Kingdom, would pose a risk to United Kingdom society. This Tribunal confirmed in *MS (s.117C(6): “very compelling circumstances”) Philippines* [2019] UKUT

00122 (IAC), at [49]-[52] that there is nothing in *Hesham Ali* that requires a court or tribunal to eschew the principle of general deterrence, as an element of the public interest, in determining a deportation appeal by reference to section 117C(6).

30. I am satisfied, upon careful consideration of the Tribunal's detailed reasoning at [44], that the Judge materially erred as to the weight given to the public interest in the proportionality assessment, including the weight to be given to general deterrence and the substance of the criminal offence, in this instance vigilantism involving the carrying of weapons, that was to be weighed along with the claimant's personal circumstances. Therefore, despite the clear efforts of the Judge, I find that there is such material error of law that the decision of the First-tier Tribunal has to be set aside.

Remaking the decision

31. Mr. Singh indicated that if a material error of law were to be found, this would be an appropriate matter for the Tribunal to remake the decision on the papers before it.
32. I addressed this issue with the claimant at the hearing. I sought to provide as helpful an explanation as to proceedings as possible, but I am satisfied that the claimant had not been aware that if a material error of law were established, such as to require the setting aside of the Judge's decision, then he would be expected to provide submissions as to why his human rights appeal should be allowed. I decided that it would not, in such circumstances, be just to proceed to remaking the decision where the claimant was unable to adequately engage with the remaking proceedings at the hearing before me.
33. I further observe the recent decision of the Court of Appeal in *CI (Nigeria) v. Secretary of State for the Home Department* [2019] EWCA Civ 2027, which was handed down some 11 days after the Judge's decision was promulgated. Though the appellant did not challenge the Judge's decision before this Tribunal as to his social and cultural integration into the United Kingdom, a Judge now considering this appeal would be required to consider that a person's social identity is not defined solely by their social ties, but by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situated a person in a society or social group and generated a sense of belonging: *Maslov v Austria (1638/03)* [2009] I.N.L.R. 47. The impact of offending and imprisonment upon a person's integration in this country will depend not only on the nature, frequency and duration of the offending, but also on whether and how deeply the individual was socially and culturally integrated in the UK to begin with. The latter requirement was not considered by the Judge and evidence should be heard upon it. The weight to be attributed to the fact that the claimant has very little, if any, knowledge of any other environment than that of the United Kingdom is of importance: *Akinyemi v. Secretary of State for the Home Department (No.2)* [2019] EWCA Civ 2098. I am therefore satisfied that this matter should properly be remitted to the First-tier Tribunal and further oral evidence be presented and considered.

34. In such circumstances, the First-tier Tribunal should be permitted to undertake its proportionality assessment in the round, and not be required to commence on the basis of the Judge's initial assessment of paragraphs 399 and 399A of the Rules.
35. The Secretary of State did not challenge the Judge's findings of fact, and so the following findings are preserved:
 - a. The claimant's immigration history and early life, at [29];
 - b. Unduly harsh for the claimant's son to reside in Sierra Leone, at [32];
 - c. The claimant is not in a genuine and subsisting relationship with his son's mother, at [34];
 - d. The claimant has been lawfully present in this country since the age of 7, at [35];
 - e. The claimant does not speak or understand Creole, at [38(b)].

Notice of decision

36. 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 11 November 2019 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
37. The matter is remitted to the First-tier Tribunal for a fresh hearing before any Judge other than Judge of the First-tier Tribunal C H Bennett.
38. Preserved findings of fact are detailed at [35] above.
39. No anonymity direction is made.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 23 March 2020