



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

Appeal Number: HU/14619/2019 (P)

THE IMMIGRATION ACTS

**Decided under rule 34
On 26 May 2020**

**Decision & Reasons Promulgated
On 29 May 2020**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between:

**Enock [A]
(no anonymity direction made)**

Appellant

and

Secretary of State for the Home Department

Respondent

DECISION AND REASONS (P)

1. The Appellant is a national of Ghana born on the 29th January 1980. He appeals with permission against the decision of the First-tier Tribunal (Judge MA Khan) to dismiss his human rights appeal.
2. This appeal was due to be listed for an oral hearing at Field House but due to the Covid-19 pandemic, emergency measures necessitated suspension of all such hearings. By my directions of the 3rd April 2020 (sent to the parties on the 29th April 2020) I invited submissions on a) whether the decision of the First-tier Tribunal contained material error of law and b) whether the Upper Tribunal could dispose of the proceedings before it on the papers. To date I have received a response only from the Secretary of State, who answers both my questions in the affirmative. I have received no response from the

Appellant or his representatives. The deadline for submissions passed on the 20th May and I now proceed to determine the appeal.

3. The background to this appeal is that the Secretary of State seeks to deport the Appellant on the grounds that his presence in the United Kingdom is not conducive to the public good. The Appellant sought to appeal on human rights grounds, submitting in particular that he had a genuine and subsisting relationship with his British born son that would render his deportation disproportionate.
4. The First-tier Tribunal proceeded to determine the appeal with reference to paragraphs 398-399A of the Immigration Rules. Finding that the Appellant failed to demonstrate that any of the 'exceptions' at 399 or 399A applied to him, it dismissed the appeal. By her letter dated 1st May 2020 (signed by Senior Presenting Officer Mr C. Avery) the Secretary of State accepts that in doing so the First-tier Tribunal erred in its approach. The error was in its apparent assumption that the Appellant was liable to the 'automatic' deportation process at all. The Appellant has never received a sentence of 12 months or more and so did not meet the definition of 'foreign criminal' contained at s32(2) of the United Kingdom Borders Act 2007. The question remained whether he met the definition of a 'foreign criminal' at s32(3), or alternatively whether the Secretary of State had shown, by reference to the criteria at paragraph 398(c) of the Rules, that the Appellant's deportation was conducive to the public good in accordance with s3(5) of the Immigration Act 1971. Whether he had committed an offence "specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal)" [s32(3) BA 2007] or whether his offending had "caused serious harm or [he is] a persistent offender who shows a particular disregard for the law" [paragraph 398(c)] were matters in relation to which the Secretary of State bore the burden of proof. The First-tier Tribunal decision contains no clear reasoning on whether the offence committed by the Appellant – possessing or controlling identity documents, for which he received a six-month sentence – would engage either provision. That being the case the Secretary of State accepts that the decision of the First-tier Tribunal is flawed for material error of law.
5. By the letter from Mr Avery the Secretary of State further invites the Tribunal to remit the matter to the First-tier Tribunal for hearing *de novo*. I accept that in light of the fundamental failing in the First-tier Tribunal decision this is the appropriate disposal. The Appellant has indicated that he has further evidence to submit about his relationship with his son, including orders of the family court. He has leave to submit any such evidence upon which he wishes to rely but he must do so in accordance with the Protocol between the Family Courts and the IAC¹ – in particular the Appellant must not disclose any

¹ <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Protocols/spt-pfd-joint-protocol-comms-judges-0713.pdf>

document relating to the proceedings in the Family Court without the consent of that court. If the Appellant considers it appropriate to do so he should seek directions from the First-tier Tribunal in accordance with the Protocol. Given this evidential issue I will remit this matter to the First-tier Tribunal with directions that it be listed for a 'Case Management Review' prior to hearing.

6. The decision of the First-tier Tribunal is set aside. The matter is remitted for hearing *de novo* in the First-tier Tribunal.
7. Neither party sought an order for anonymity and no such order is made.



Upper Tribunal Judge Bruce
26th May 2020