



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15707/2018

THE IMMIGRATION ACTS

Heard at Field House
On 6 November 2019

Decision & Reasons Promulgated
On 19 February 2020

Before

UPPER TRIBUNAL JUDGE PITT
UPPER TRIBUNAL JUDGE RINTOUL

Between

FINEST [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bedford instructed by Thompson & Co Solicitors
For the Respondent: Ms J Smyth, instructed by the Government Legal Department

DECISION AND REASONS

1. The appellant appeals pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) against a decision made on 16 July 2018 to refuse his protection and human rights claims, the Secretary of State having decided that he is a foreign national offender who must be deported. His appeal against that decision

was dismissed by the First-tier Tribunal in a decision promulgated on 27 December 2018. The Upper Tribunal set that decision aside for reasons set out in a decision issued on 23 May 2019 and in which it directed the appeal be remade in the Upper Tribunal which, subsequent to a transfer order, we now do.

2. The appellant's wife has been recognised as a refugee and granted leave to remain on that basis. The appellant is, however, a foreign criminal whom the Secretary of State must deport unless he falls within one of the exceptions set out in section 33 of the UK Borders Act. His case is that he meets the requirements of the Immigration Rules to be granted leave as the spouse of a refugee; and, on that basis, his deportation is disproportionate because the Immigration Rules set out where the Secretary of State says the public interest lies. In short, that it cannot be in the public interest to deport someone who meets the requirements of the Immigration Rules. The Secretary of State does not accept that the appellant cannot be deported.

Background

3. We consider it necessary to set out in some detail the complex history of this case and how this appeal came about.
4. The appellant is a citizen of Nigeria. He first entered the UK with entry clearance as a visitor on 19 October 2005. It appears from the sentencing remarks of the Crown Court judge that in early 2007, when in the UK as an overstayer, the appellant decided to change his identity to assume British citizenship. He came across the identity of James Samuel Walters, a British citizen born in 1968 who had died in America in 1989 and whose death had never been registered in the UK. The appellant applied for and obtained a British passport, a UK driving licence and a National Insurance number in that name then travelled to Nigeria in that identity and married his wife there on 3 November 2007 in his false identity. Leaving his wife in Nigeria, he returned to the UK and obtained employment in his false identity. He then applied for visas, ultimately successfully obtaining settlement visas, for his wife and B, his son by another woman. They arrived in the UK in June 2010.
5. On 28 April 2011 the appellant's daughter C was born in the UK. In September 2011 the appellant applied for settlement for 2 more of his children (from another past relationship) but this was unsuccessful because the appellant was arrested on 16 December 2011 after he tried to re-enter the UK from Nigeria where he had travelled to assist with the applications.
6. The appellant pleaded guilty on 2 April 2012 to three counts of assisting illegal entry for which he was sentenced (on 15 June 2012) to 32 months' imprisonment to run concurrently, to two counts of dishonestly making false representations and to 12 months' imprisonment on each of two counts of possessing or controlling a false/another person's identity document, both sentences to run concurrently with each other and with the other sentences.
7. On 29 June 2012 the appellant's wife applied for leave to remain on the basis of her human rights. In August 2012 she gave birth to their second daughter.

8. On 20 August 2012 the appellant was notified of his liability to deportation. He claimed asylum on 27 February 2013 but withdrew his claim on 12 March 2013.
9. On 17 April 2014 the respondent refused the appellant's wife's human rights application. She appealed against that decision.
10. On 25 June 2014 the respondent made a deportation order in respect of the appellant and served that decision together with one dated 1 July 2014 finding that he is a person to whom the automatic deportation provisions set out in the UK Borders Act 2007 applied.
11. Meanwhile, on 30 September 2014, the appellant's wife's human rights appeal was dismissed, the judge noting that the appellant's wife had raised the first time, in the bundle of documents prepared for the hearing, a claim that her daughters would be at risk of FGM if removed to Nigeria, but concluding that it was a new matter and so could not be considered. The appellant's wife sought permission to appeal the decision but this was refused on 1 December 2014.
12. On 9 December 2014 the appellant's wife claimed asylum on the basis of fear of FGM for her daughters. The appellant and the children were named as dependents on her claim. On 23 April 2015, the appellant and his wife's third child was born.
13. By a decision promulgated on 3 June 2015, Judge Phull allowed the appellant's appeal to the limited extent that the decision was not in accordance with the law and the appellant awaited a lawful decision. Her reasons (at [50]) were that the respondent had failed to give any consideration to the risks of FGM that the appellant's daughters might face on return to Nigeria, this preventing the judge from making a proper assessment under Articles 3 and 8 ECHR.
14. On 26 January 2016 the respondent refused the appellant's wife's claim for asylum. She appealed but her claim was dismissed by Judge O'Hagan by a decision promulgated on 14 October 2016. The appellant's wife gained permission to appeal to the Upper Tribunal and, by a decision promulgated on 10 May 2017, Deputy Upper Tribunal Judge Eshun allowed the appeal finding that the children would be at risk of FGM in Nigeria. The respondent sought permission to appeal to the Court of Appeal but was unsuccessful, permission to appeal being refused on 30 June 2017.
15. On 22 December 2017 the appellant's wife and children were granted leave to remain in the UK on asylum grounds for five years.
16. By a letter of 1 February 2018, the appellant was told that his case fell for consideration under section 72(2) of the 2002 Act. The same letter included a one-stop notice and invited the appellant to put forward reasons why he should not be deported.
17. On 16 July 2018, for the reasons set out in the refusal letter of that date, the Secretary of State decided that she was required to make a deportation order against the appellant as he did not fall within any of the exceptions to deportation set out at

Section 33 of the UK Borders Act 2007. Having concluded that section 72(2) of the 2002 Act applied to the case, the respondent stated in the refusal letter:

“76. Your legal representatives have relied on Paragraph 349 of the Immigration Rules in that they claim you are a dependant of a refugee and, as such, you should be granted asylum and Leave to Remain in line with your partner and children. However, you are subject to a signed deportation order, dated 25 June 2014, and were at the time of your partner's application for asylum, in which she named you as a dependant, dated 9 December 2014. As such, your deportation order would need to be revoked prior to a grant of leave and there are no issues raised in your case that would result in this action.

77. You and your partner are not in need of protection in Nigeria, your partner's appeal was allowed due to the Immigration Judge finding that she would be unable to resist societal pressure to have your daughters subjected to FGM because of a lack of her education; there are therefore no protection issues for you on your return to Nigeria.”

Decision of the First-tier Tribunal

18. The First-tier Tribunal noted that it was accepted by the respondent that it would be unduly harsh for the appellant's children to live in Nigeria given the grant of asylum to them and their mother but that it was not accepted it would be unduly harsh for the children to remain in the United Kingdom without the appellant. The judge found that:
- (i) the appellant had rebutted the statutory presumption under s.72 of the 2002 Act;
 - (ii) it would not be unduly harsh for the children to be separated from their father [58];
 - (iii) there were no very compelling circumstances such that the appellant should not be deported as Article 3 would not be breached if he was returned because the wife and daughters would not be returned and so would not be at risk of FGM;
 - (iv) paragraph 349 of the Immigration Rules was not absolute, given the guidance set out in the Asylum Policy Instructions, and that this was permissible having had regard to Article 23 of the Qualification Directive;
 - (v) there were no sufficiently compelling circumstances such that deportation would be disproportionate [90, 91].
19. The appellant sought permission to appeal on the grounds that the judge had erred:
- (i) in her interpretation of paragraph 349 of the Immigration Rules;
 - (ii) in failing to appreciate the effect of the grant of refugee leave to the appellant's family members would have upon the appellant's own outstanding Article 3 claim;

(iii) in taking an erroneous approach to the “unduly harsh” test.

20. On 18 March 2019 Upper Tribunal Judge Storey granted permission stating:

“It is arguable that the judge erred in failing to properly assess the significance, when assessing the proportionality of deportation, of the fact that the appellant, a foreign criminal, was the dependant of a refugee. It is also arguable that the judge failed to properly approach the issue of whether the appellant’s deportation would be unduly harsh to the child who could not visit him in Nigeria as she has refugee status.”

21. The appeal then came before the Upper Tribunal sitting as a panel (the Honourable Mrs Justice Whipple, DBE and Upper Tribunal Judge Freeman) at a hearing on 14 April 2019. A copy of that decision is attached to this decision.

22. The panel noted that the judge had been referred to paragraph 349 of the Immigration Rules rather than paragraph 339Q. They took note of Mr Bedford’s submission that, unless the terms set out at 339Q applied, the appellant was entitled to leave to remain as a dependant, despite his otherwise continuing liability to deportation. The panel also noted that at [74] the judge, again referring to paragraph 349, found “the rule appears to be absolute in the way it is worded”, and at [79]:

“Paragraph 349 of the immigration rules is written in an absolute way, but it is clearly not intended to be completely absolute as explained above. I consider that the making of a deportation order can prevent leave under paragraph 349 being granted or invalidate it if it has been granted in the same way as any other leave can be invalidated or the grant prevented.”

23. For reasons to which we will turn, we consider it necessary to set out the previous panel’s conclusions at [20] to [25]:

“20. The answer to that point is that paragraph 339Q does contain the conditions on which the dependant of a refugee may be refused a residence permit, and those include the 'reasons of national security or public order', mentioned in article 23 (see 15 above). While those might or might not be directly applicable in this case, the exclusion of cases where the person's character, conduct or associations otherwise require" is more obviously relevant.

21. Because the judge was not referred to paragraph 339Q by either side, she never considered either of those bases for exclusion of a dependant on their own merits on the facts of the case. We did raise the 'character, conduct or associations' point at the hearing; but Mr Bedford's answer was simply that the Home Office had put their case on the basis of the s. 72 presumption, and were not entitled to succeed on any other.

22. Despite the immense trouble and thought given to the case by the judge, we do not think her decision can be upheld on the basis she gave for it. On the other hand, Mr Bedford put his case squarely on the terms of paragraph 339Q on the

basis set out by the Senior President of Tribunals in TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109 at paragraph 34:

“...where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed.”

23. Although the subject-matter of the cases involved in that decision (the 'insurmountable obstacles' test under the private and family life Rules) was quite different from the main point in the present case, the argument on it was entirely on the same lines: the appellant satisfied the provisions of the relevant rule, and that has to be treated as decisive on his human rights appeal.

24. Given the history of this case (see 2 – 5 above), there was an obvious point (see Robinson [1997] EWCA Civ 3090) as to whether the appellant's past conduct did require him to be excluded from being given a residence permit in line with Joy. While the judge found that conduct was not likely to be repeated, there might well be a significant public interest in not allowing it to succeed to the extent of achieving the perpetrator's object of regularizing his own status in this country

25. For those reasons we set aside the judge's decision, with considerable regret for the trouble and thought she gave to it, no doubt very much in view of the same public interest considerations we have had in mind. There does not seem to be any previous decision on this point, and in our view the decision on it should be re-made by the Upper Tribunal, so that an authoritative one can be given. Ground (b) will become relevant if that goes against the appellant.”

24. Subsequent to this decision a transfer order was made and the matter then came before Judge Rintoul on 24 June 2019. He heard submissions from both representatives. In the event, having reserved the decision, he considered it appropriate to issue directions for a further hearing and for submissions to be made. In reply to those directions, both representatives provided skeleton arguments; and, in Mr Bedford's case, a response to Ms Smyth's skeleton argument.
25. Mr Bedford's submission is that the Upper Tribunal had accepted in its error of law decision, in line with TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109, that a foreign criminal who satisfies the requirements for leave to remain under the Rules is entitled to succeed in an Article 8 claim. He submitted that in this case the appellant fulfils the requirements of paragraph 352A of the Rules and thus, following R (Alvi) v SSHD [2012] UKSC 33 he cannot be required to pass any further character, conduct or association test unless it is an additional requirement of the Rules.
26. Having noted that the Secretary of State no longer contends that paragraph 339Q does not permit her to refuse leave to the partner of a refugee, Mr Bedford submitted that the appellant met all the requirements of paragraph 352A submitting that these were in fact more generous to the appellant the guarantees under Articles 20 to 24 of Directive 2004/83/EC (“the Qualification Directive”) which underpinned paragraph 339Q of the Immigration Rules. He submitted that at best, paragraph 339Q was an

exception in the terms of the length of a permit that its conferred. He submitted that at most, all the Secretary of State could do would be to reduce the period of leave granted. He submitted further that, given the finding that the appellant no longer presents a real risk of offending again or being a danger to his community, the provisions in the Qualification Directive permit restrictions on the rights of dependents to be imposed only for compelling reasons of national security or public order, did not apply. He did not accept the respondent's position that the threshold of refusing a residence permit is the lower one in Article 23 and not 24. He submitted that in any event the justification of "public order" presupposes a serious breakdown of the social order etc. in line with T v Land Baden-Wurttemberg [2016] 1 WLR 109 at [75]. He submitted that in this case it was understandable that the restrictions on refusing entry to dependants of refugees was stronger.

27. Mr Bedford submitted that paragraph A362 of the Immigration Rules did not assist the respondent as it did not preclude grants of leave.
28. Further, although the appellant accepts that Section 117C of the 2002 Act is a relevant consideration, he submits that even if he does not satisfy the Rules, there are very compelling circumstances over and above the Exception as it would be unduly harsh for the qualifying children to be separated from their father without the possibility of visiting him in Nigeria because of their refugee status.
29. Ms Smyth submitted that there were five essential points which could be made in this case:
 - (i) that appellant does not qualify for leave to remain under the Rules;
 - (ii) even if he does, the case is about the removal of a deportee and is thus covered by Section 32 and 33 of the UK Borders Act 2007;
 - (iii) the appellant gets no protection from the Refugee Convention as he is not a refugee;
 - (iv) the Qualification Directive did not assist him as that did not provide protection against deportation;
 - (v) there is no basis for the appeal to be allowed due to his relationship with his children.
30. Ms Smyth relied on OA and Others (human rights; "new matter"; s.120) Nigeria [2019] UKUT 00065 (IAC) at [27] and [28] and submitted that, as was permitted by Section 79 to the 2007 Act, there was a deportation order in place which had been in place since July 2014 prior to his wife applying for leave.
31. Ms Smyth submitted that because the appellant is the subject of a deportation order, he is not entitled to leave under paragraph 394 of the Immigration Rules as paragraph 322(1B) (general grounds for refusal) apply. While accepting that the general grounds for refusal are not applied to applications for asylum, there was

nothing to prevent them from applying to the family member relying on paragraph 394 who does not himself qualify as a refugee. She submitted that even were the Rules to be met, the appellant was still a foreign national offender. She submitted further that it did not matter whether the appellant was entitled to leave or not because the question is not whether he is entitled to leave but whether he can be deported. The decision had been made and could only be revoked if one of the grounds of Section 33 of the 2007 Act were made out.

32. Ms Smyth submitted further that the Qualification Directive did not provide the appellant with protection against deportation as it did not confer a substantive right of residence nor was it a shield against deportation.
33. Ms Smyth concluded submitting that in any event separating the appellant from his children was not unduly harsh.
34. In response Mr Bedford submitted that the Secretary of State's approach was excessively formalistic. He submitted that this was an "outside the Rules" case and policy was relevant. He submitted further that the Secretary of State's approach was excessively technical and this was not an approach taken in the first appeal. He submitted that the Secretary of State's argument was circular and that in this case, the issue of paragraph 352A had been drawn attention to in submissions prior to the Secretary of State's decision.
35. Mr Bedford submitted further that the Qualification Directive did protect against deportation as could be seen at Article 14.4 and 14.5.

The Law

36. Section 79 of the Nationality, Immigration and Asylum Act 2002 provides:

79 Deportation order: appeal

(1) A deportation order may not be made in respect of a person while an appeal under section 82(1)[that may be brought or continued from within the United Kingdom relating to]¹ the decision to make the order –

- (a) could be brought (ignoring any possibility of an appeal out of time with permission), or
- (b) is pending.

(2) In this section "*pending*" has the meaning given by section 104.

(3) This section does not apply to a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007.

(4) But a deportation order made in reliance on subsection (3) does not invalidate leave to enter or remain, in accordance with section 5(1) of the Immigration Act 1971, if and for so long as section 78 above applies.

37. Sections 32 and 33 of the UK Borders Act 2007 provides, so far as is relevant:

32 Automatic Deportation

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless-

(a) he thinks that an exception under section 33 applies,

(b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or

(c) section 34(4) applies.

33 Exceptions

(1) Section 32(4) and (5)-

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

(b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach-

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention.

...

(7) The application of an exception-

(a) does not prevent the making of a deportation order;

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

but section 32(4) applies despite the application of Exception 1 or 4.

38. Directive 2004/83/EC ("the Qualification Directive") provides at Articles 23 and 24:

Article 23 Maintaining family unity

1. Member States shall ensure that family unity can be maintained.

2. Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24 to 34, in accordance with national procedures and as far as it is compatible with the personal legal status of the family member.

In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.

In these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living.

3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from refugee or subsidiary protection status pursuant to Chapters III and V.
4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred therein for reasons of national security or public order.
5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of refugee or subsidiary protection status at that time.

Article 24

Residence permits

1. As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).
Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than three years and renewable.
2. As soon as possible after the status has been granted, Member States shall issue to beneficiaries of subsidiary protection status a residence permit which must be valid for at least one year and renewable, unless compelling reasons of national security or public order otherwise require.

39. So far as is relevant, the Immigration Rules provide:

322. In addition to the grounds for refusal of extension of stay set out in Parts 2-8 of these Rules, the following provisions apply in relation to the refusal of an application for leave to remain, variation of leave to enter or remain or, where appropriate, the curtailment of leave, except that only paragraphs (1A), (1B), (5), (5A), (9) and (10) shall apply in the case of an application made under paragraph 159I of these Rules.
Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom are to be refused

(1) the fact that variation of leave to enter or remain is being sought for a purpose not covered by these Rules.

(1A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party required in support of the application.

(1B) the applicant is, at the date of application, the subject of a deportation order or a decision to make a deportation order;

339Q(i) The Secretary of State will issue to a person granted refugee status in the United Kingdom a residence permit as soon as possible after the grant of refugee

status. The residence permit may be valid for five years and renewable, unless compelling reasons of national security or public order otherwise require or where there are reasonable grounds for considering that the applicant is a danger to the security of the United Kingdom or having been convicted by a final judgment of a particularly serious crime, the applicant constitutes a danger to the community of the United Kingdom or the person's character, conduct or associations otherwise require..

...

(iii) The Secretary of State will issue a residence permit to a family member of a person granted refugee status or humanitarian protection where the family member does not qualify for such status. A residence permit may be granted for a period of five years. The residence permit is renewable on the terms set out in (i) and (ii) respectively. "Family member" for the purposes of this sub-paragraph refers only to those who are treated as dependants for the purposes of paragraph 349.

349. A spouse, civil partner, unmarried partner, or minor child accompanying a principal applicant may be included in the application for asylum as a dependant, provided, in the case of an adult dependant with legal capacity, the dependant consents to being treated as such at the time the application is lodged. A spouse, civil partner, unmarried partner or minor child may also claim asylum in their own right. If the principal applicant is granted refugee status or humanitarian protection and leave to enter or remain any spouse, civil partner, unmarried partner or minor child will be granted leave to enter or remain for the same duration. The case of any dependant who claims asylum in their own right will be also considered individually in accordance with paragraph 334 above. An applicant under this paragraph, including an accompanied child, may be interviewed where they make a claim as a dependant or in their own right.

...

352A The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the partner of a person granted refugee status are that:

(i) the applicant is the partner of a person who currently has refugee status granted under the Immigration Rules in the United Kingdom; and

(ii) the marriage or civil partnership did not take place after the person granted refugee status left the country of their former habitual residence in order to seek asylum or the parties have been living together in a relationship akin to marriage or a civil partnership which has subsisted for two years or more before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and

(iii) the relationship existed before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and

(iv) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and

...

A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

Discussion

40. We remind ourselves that the immigration decision under appeal is a decision to refuse a human rights claim. The sole permissible ground under section 84 (2) is that that the decision is unlawful under section 6 of the Human Rights Act 1998.
41. In this case, the submission is that a refusal to revoke the extant deportation order would be in breach of the United Kingdom's obligations pursuant to article 8 of the Human Rights Convention. It is not in dispute that a family life exists between the appellant, his wife and their children, nor that deportation would interfere with that, nor that the decision is in accordance with law. The issue in contention is whether deportation would be proportionate.
42. We remind ourselves that it is established law that the Immigration Rules are a means by which the Secretary of State sets out her policy and, so far as they relate to family and private life, set out where she considers the balance of proportionality lies. Broadly speaking, they crystallise the circumstances in which the Secretary of State considers that the right to respect for family and private life are outweighed by the public interest in immigration control; and, where appropriate, in the removal of foreign criminals. The rules are in this aspect underpinned by sections 117A to 117D of the 2002 Act.
43. The appellant's case, relying on TZ (Pakistan), is that he meets the requirements of the Rules and therefore has shown that the interest in his deportation is outweighed, and thus to enforce that would be disproportionate.
44. Two issues arise from that: does the appellant meet the requirements of the Immigration Rules; and, is that sufficient.
45. We considered it appropriate to examine first Mr Bedford's submission with regards to TZ (Pakistan). We note that neither case in TZ (Pakistan) concerned deportation and, as is noted at [18(b)], neither appellant qualified for leave to remain under the Immigration Rules.

46. We consider that a correct analysis of TZ (Pakistan) is set out in OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 65 (IAC) at paragraphs [27] and [28]:

“27. The significance of an appellant proving to a First-tier Tribunal judge that he or she meets the requirements of a particular immigration rule, so as to be entitled to be given leave to remain, lies in the fact that - provided Article 8 of the ECHR is engaged - the respondent will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the respondent in the proportionality balance, so far as that factor relates to the particular immigration rule that the Tribunal has found to be satisfied.

28. Whether or not such a finding in favour of an appellant is likely to be determinative of the human rights appeal will depend upon whether the respondent has any additional reason, effectively overriding that particular rule, for saying that the effective operation of the respondent's immigration policy nevertheless outweighs the appellant's interest in remaining in this country. To take one simple example, an appellant who persuades the First-tier Tribunal that he meets the requirements of the Immigration Rules relating to entrepreneur migrants will not thereby succeed in his human rights appeal if the appellant has been found by the respondent (and the Tribunal agrees) that the appellant falls foul of one or more of the general grounds of refusal contained in Part 9 of the Rules; for example, because he made false representations in connection with a previous application for leave (paragraph 322(2)).”

47. In the example given, the appellant simply did not meet the requirements of the Rules but the point made is that in the circumstances where the Immigration Rules are met, the respondent cannot plead the maintenance of immigration control as a factor to be given weight. That observation relates to the effect of section 117B of the 2002 Act.
48. The position in the case of deportation appeals where those concern foreign criminals is different due to the effect of section 117C of the 2002 Act. There is a distinction to be drawn with Section 117B and 117C. Section 117B (1) which would apply in cases such as those contemplated in OA, states only that maintenance of effective immigration controls is in the public interest. In those circumstances, it is difficult to see how if an individual meets all the requirements of the Immigration Rules there is a public interest in refusing leave to remain.
49. In contrast, section 117C states clearly the deportation of foreign criminals is in the public interest. Section 117C(v) provides that the public interest requires a criminal's deportation unless one of the exceptions applies. Those exceptions are mirrored in the Immigration Rules.
50. Further, Section 117A sets out that a court considering the potential breach of a right to respect for private and family life under Article 8 must in all cases consider the deportation of criminals in light of section 117C.

51. Section 32 of the UK Borders Act 2007 provides also that deportation of a foreign criminal is conducive to the public good, that remaining so even if Exception 1 within section 33 of that Act is established.
52. In that context, it cannot properly be said that simply because an individual met the requirements of some parts of the Immigration Rules (but not those dealing directly with deportation) that would negate the weight to be attached to the public interest in the deportation of foreign criminals imposed by operation of section 117C. We consider therefore that TZ (Pakistan) and OA are of limited application in this appeal except insofar as the principle, applied in a deportation appeal, is that if an appellant meets the relevant provisions, that is, those within Part 13 setting out the exceptions to the presumption in favour of deportation, then deportation is not in the public interest, albeit that it would remain conducive to the public good.
53. We now turn to an analysis of the effect of the Immigration Rules in this case, bearing that what is being sought is the revocation of a deportation order. We bear in mind R (Alvi) v SSHD [2012] UKSC 33, but unlike the position in that case, the provisions upon which the respondent seeks to rely are set out in the Immigration Rules, in particular at A362 and 396. It cannot, we consider, properly be argued that in seeking to rely on these provisions, that the respondent is adding to or supplementing any requirement set out in the rules by a requirement not in the Immigration Rules.
54. The starting point for the appellant's case that he meets the requirements of the Immigration Rules is paragraph 349 which provides as follows:

If the principal applicant is granted refugee status or humanitarian protection and leave to enter or remain any spouse, civil partner, unmarried or same sex partner or minor child will be granted leave to enter or remain for the same duration.
55. Paragraph 352C sets out the circumstances in which leave to remain can be refused which is confined to a failure to comply with 352A(i) to (vi).
56. There is, however, a tension between paragraph 349 and the more recent provisions, including paragraph 339Q, which were introduced to give effect to the Qualification Directive. We note also that what is referred to in 339Q is a "residence permit", not leave to remain.
57. Even if it were shown that the appellant came within paragraph 352A (which would require us to accept that his wife had come here to claim asylum, a point not addressed by either party), it does not follow that his deportation is disproportionate. That is for the reasons set out above with respect to a proper understanding of TZ (Pakistan) and the application of Section 117C. We bear in mind that the appellant has not been recognised as a refugee and accordingly the non-refoulement provisions do not apply to him.
58. We also agree with Mr Bedford's submission that the respondent is wrong to rely on paragraph 322 of the Immigration Rules. We do not accept that provision is worded

in such a way as it would cover applications made under Part 11 which is not mentioned in the text. We note Ms Smyth's concession that paragraph 322 could not apply to a refugee, but that is because grants of leave to refugees are not granted under those parts of the Immigration Rules referred to in paragraph 322. That is so because the clear intention of paragraph 322 is that it applies only to applications made under certain parts of the Rules and that does not include asylum. There is no logical basis by which a provision which does not apply to classes of applications made under specific parts of the Rules could be construed as applying to certain cases (such as here) within that. Our view is strengthened by the wording of paragraph 322(1E) which is expressly said to apply to part 11 applications which it would not have to do if the whole of paragraph 322 applied across the Immigration Rules.

59. A further difficulty with the Secretary of State's argument is that if 322(1B) were to apply, then there is no reason why any of the other Rules would not apply to somebody who claims asylum and then seeks leave to enter or remain on that basis. Of particular relevance would be the use of false documents (1A) not to mention the normative grounds set out at sub-paragraphs 2 to 13.
60. That said, we bear in mind that paragraph 396 of the Immigration Rules provides that where a person is liable to deportation, as this appellant clearly is by operation of paragraph 363 of the Immigration Rules and Section 32(4) of the UK Borders Act 2007 and Section 33(7)(b) of the same Act, then it is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.
61. Further, by operation of paragraph A398, Part 13 of the Immigration Rules applies to this appeal. This in turn mandates the application of paragraphs 398 to 400 of the Immigration Rules which mirror section 117C of the 2002 Act.
62. Stepping back to look at the structure of the Immigration Rules, sections 32 and 33 of the 2007 Act and section 117C of the 2002 Act as a whole, we conclude that clear intention of the scheme is that, irrespective of whether an individual might qualify for leave in some capacity, it is in the public interest that foreign criminals should be deported, unless they fall within certain limited exceptions. The effect of these provisions is that, unlike the scenario in OA, the Secretary of State is not debarred from seeking to rely on the strong public interest in deporting a criminal.
63. Further, we do not consider the appellant can obtain any assistance from the Qualification Directive. We consider that Ms Smyth was correct in her submission that the appellant is not protected against deportation as, again, he is not a refugee. Further, the Directive refers only to the issue of documentation albeit that we accept that the Secretary of State could not refuse to issue it in his case or set restrictions as to its length and duration. We note that the Directive whilst providing for non-refoulement provisions in the case of those recognised as refugees the same does not apply to their dependants.

64. For the reasons set out above, it is our conclusion that the appellant is subject to the deportation regime provided by s.32 and s.33 of the UK Borders Act 2007, Part 5A of the 2002 Act and Part 13 of the Immigration Rules. The Qualification Directive does not assist the appellant as it does not provide a shield against deportation; the existence of leave or a permit to remain is obviously not in itself a bar to removal that would defeat the whole purpose of mechanism as to how deportation operates. Further, we note that even in the case of those recognised as refugees, as with Articles 32 and 33 of the Refugee Convention, Article 22 of the Qualification Directive permits expulsion.
65. Before us the appellant also maintained that the high threshold for a finding of undue hardship was met here because, over and above the expected harshness when a child is separated from a parent by deportation, his children would be unable to visit him in Nigeria as they are refugees. It is uncontentionous that when considering undue hardship for the appellant's children that it is in their best interests for their father to remain in the UK with them. It is our conclusion, however, that even where that is so, the inability of a child to have very little or no direct contact with a parent is an expected hardship arising from deportation and there remains the option of the children visiting the appellant outside Nigeria, for example, in a neighbouring country. We also did not find, even taking the appellant's length of residence in the UK, the status granted to his wife and children and the hardship they will all inevitably experience if he is deported, that anything in the materials before us showed very compelling circumstances capable of outweighing the public interest in the deportation of the appellant.
66. Accordingly, we dismiss the appeal on all grounds.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
2. We remake the decision by dismissing it on all grounds.
3. We make no anonymity order.

Signed:

Date: 18 February 2020



Upper Tribunal Judge Rintoul