



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16053/2019

THE IMMIGRATION ACTS

Heard at North Shields
On 13 March 2020

Decision & Reasons Promulgated
On 14 April 2020

Before

UPPER TRIBUNAL JUDGE LANE

Between

OLUSEGUN EMMANUEL ODUBENA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Rogers, instructed by Immigration Advice Centre Ltd

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 6 August 1980 and is a male citizen of Nigeria. He entered the United Kingdom as a student in September 2007. On 24 June 2019, the appellant was convicted at City of London Magistrates Court of stealing and using a credit card and sentenced to a total of 24 weeks imprisonment. The Secretary of State made a deportation order against the appellant. On 16 September 2019, the Secretary of State refuse the appellant's human rights claim. The appellant appealed against that decision to the First-tier Tribunal which, in a decision promulgated on 25 October

2019, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Section 117C of the 2002 Act (as amended) provides as follows:

Article 8: additional considerations in cases involving foreign criminals

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C’s deportation unless Exception 1 or Exception 2 applies.
- (4) Exception 1 applies where –
 - (a) C has been lawfully resident in the United Kingdom for most of C’s life,
 - (b) C is socially and culturally integrated in the United Kingdom, and
 - (c) there would be very significant obstacles to C’s integration into the country to which C is proposed to be deported.
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C’s deportation on the partner or child would be unduly harsh.
- (6) 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.
- (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

Section 117D provides:

...

- (2) In this Part, “foreign criminal” means a person –
 - (a) who is not a British citizen,
 - (b) who has been convicted in the United Kingdom of an offence, and
 - (c) who –
 - (i) has been sentenced to a period of imprisonment of at least 12 months,
 - (ii) has been convicted of an offence that has caused serious harm, or
 - (iii) is a persistent offender.

Paragraphs 399 and 399A of HC 395 (as amended) provide:

Deportation and Article 8

A398. These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
- (b) a foreign criminal applies for a deportation order made against him to be revoked.

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

- (a) 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 4 years;
- (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 4 years but at least 12 months; or
- (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, 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.

399. This paragraph applies where paragraph 398 (b) or (c) applies if -

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
- (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
 - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
 - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if -

- (a) the person has been lawfully resident in the UK for most of his life; and
- (b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

3. Contrary to the view adopted by the Secretary of State in the decision letter, the judge found that the appellant's partner is a British citizen [33]. Consequently, the judge noted that the appellant was not required to show the existence of very compelling circumstances over and above those contained in paragraph 399 and 399A. However, the judge observed that the appellant does 'need to show that the decision is unduly harsh and that there are exceptional circumstances and weighty compassionate reasons. He is said not to be integrated because he had provided no evidence of exceptional contribution to community or wider society. That is not what integration requires. He is integrated.' [33]
4. At [36], the judge noted that the appellant had committed one offence of finding and using a contactless credit card £135 of purchases. The judge noted that the appellant said that he had 'found the credit card when working as a cleaner and then used it [the judge fails to record that the appellant *stole* the card]. The sentence seems very harsh if so. However, taking the appellant's case at its highest and assessing deportation as a consequence (*sic*), I do not consider these to be crimes which make it conducive to the public good for him to be deported...the difficulty is of that as a the stand-alone human rights claim it is very hard for the appellant to succeed.'
5. The grounds of appeal brief. The appellant asserts that he does not meet the definition of foreign criminal in the light of the judge's findings. Further, applying the leading decision in *Razgar* [2004] UKHL 27, the appellant contends that there was no need for the judge to consider proportionality as a decision to deport him was, because he did not fall within the definition of a foreign criminal, was not in accordance with the law.
6. The appellant acknowledges that he does not have a right of appeal against the decision to deport him. As the judge observed, the only appeal before the First-tier Tribunal was that in respect of Article 8 ECHR.
7. The Tribunal is not bound to accept the Secretary of State's view of what offences may cause serious harm any more than it must attach weight to the Secretary of State's assessment of persistent offending. In *SC (Zimbabwe)* [2018] EWCA Civ 929, the Court of Appeal considered persistent offending in the context of section 117 of and held:

"I would, therefore, reject Mr Pilgerstorfer's submission that the status of "persistent offender" once acquired can never be lost and I would also reject his submission that s.117D(2)(c) requires a court or tribunal, in applying that provision, to attribute "significant weight" to the Secretary of State's anterior view that paragraph 398(c) of the Rules had been satisfied for the purposes of her own decision to make a deportation order in the first place."

It is possible, therefore, for a Tribunal to find, contrary to the view of the Secretary of State, that an appellant is not a persistent offender and, by analogous reasoning, that offending has not caused serious harm. However, in the present appeal, it is not

entirely clear what the judge is seeking to say at [36]. He speaks of 'taking the appellant's case at its highest and assessing deportation as a consequence' but does not state unequivocally that he has 'taken the case at its highest' or, if he has, why he should do so whilst I am not sure what is meant by the second part of his sentence ('assessing deportation as a consequence') What is clear is that the judge has not made an unequivocal finding that the offending of the appellant has not caused significant harm. Indeed, in his conclusions at [33] *et seq*, he has not used the words of the statute ('significant harm') at all. What the judge is very clear about is that he is required to determine a human rights appeal. That was the correct approach. I find that there is no finding in the decision to support the appellant's assertion in the grounds of appeal that the appellant does not meet the definition of a foreign criminal. I acknowledge that the judge has serious misgivings about the public interest concerned with the appellant's deportation in the light of the relatively minor nature of his crime. I also accept that the judge disagrees with the Secretary of State that the appellant's partner is not of British citizen. Otherwise, it seems to me that the judge has had regard to all relevant circumstances in determining the Article 8 appeal. He notes that the appellant and his partner are not legally married and have not been together for two years. He finds that the appellant would not face very significant obstacles to his integration into Nigerian society [39]; these are findings which the appellant does not dispute. He finds at [41] that the appellant is 'outwith all of the negative public interest considerations of paragraph 398 as his sentence was short' but he does not in terms go on to make a finding that the appellant's behaviour has not caused serious harm. Indeed, my reading of that paragraph in the context of the whole decision is that the judge is referring to the provisions for those foreign criminals who have been sentenced to more than 12 months' imprisonment.

8. At [43], the appellant finds that 'the weight to be given to the conviction is not great has was a first offence, and a small amount and did not involve violence the dishonest use of a credit card he found rather than stole. There is no possibility of his partner going to Nigeria so deportation will end the relationship.' The reasoning is inaccurate (the appellant did steal the credit card) confused and nonsequential. I assume that the judge here is applying section 117C(2) ('The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.'). At [44], judge observes that the appellant only met his partner in 2018 and that they have no children. He observes that 'the appellant never had a legitimate expectation of being able to stay [in the United Kingdom], as he came as a student.' He notes the appellant's partner's difficulties with OCD, panic attacks and low self-esteem. She also suffers from epilepsy. However, the judge observes that there is 'no evidence of severe impact on her of that separation [caused by the appellant's imprisonment]. He concludes by saying [47/48] 'the relationship was recently formed in the full knowledge that the appellant has no right to be in the UK... apart from the relationship there is no other reason of any weight to allow the appeal. The relationship alone would not suffice. The needs of the appellant's partner are not such as to make this a compelling Article 8 claim... with the additional factor of the conviction and sentence the Article 8 assessment has to be in favour of the Secretary of State.'

9. Whilst the judge's analysis is rather jumbled I consider that he has addressed all the relevant evidence in reaching his conclusion. Although he has found that the appellant's partner is a British citizen, contrary to the view adopted by the Secretary of State, he has given cogent reasons for concluding that that relationship and the effect of deportation upon the relationship does not outweigh the public interest concerned with the appellant's deportation. Although occasionally lacking in structure, I can identify no error of law in the decision which would justify setting it aside. Consequently, the appeal is dismissed

Notice of Decision

This appeal is dismissed.

Signed

Date 19 March 2020

Upper Tribunal Judge Lane