Upper Tribunal
Immigration and Asylum Chamber

Appeal Number:
DA/00838/2012

THE IMMIGRATION ACTS

Heard at Field House
On 5 August 2013

Promulgated on:
On 6 August 2013

Before

Upper Tribunal Judge Kekić

Between

Mr Larry Uwaila Osayowen Lorracher
(no anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation
For the Appellant: Mr O Oshurinade, Legal Representative
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission to the Secretary of State, whom I continue to refer to as the respondent in this determination. No anonymity order was granted to the appellant by the First-tier Tribunal and none was requested of the Upper Tribunal.

2. The appellant is a citizen of Germany where he was born on 27 February 1993. His parents who also have German citizenship are of Nigerian origin. He came here in April 2002 and obtained a five year residence permit as the dependant of his mother however an application for permanent residence was refused on 29 August 2007 because his mother had not provided evidence that she had been exercising her treaty rights in the UK. On 6 November 2007 a registration certificate was issued.

3. On 4 April 2012 the appellant was convicted at Woolwich Crown Court of five counts of robbery and two counts of attempted robbery. The offences were committed during a period of one week and a knife was used each time. He was sentenced to two years in a young offender's institution. There was no appeal against the conviction or sentence which he completed on 19 November 2012. He was then detained under immigration powers, was granted bail by the First-tier Tribunal on 31 December 2012 but was re-detained in February 2013 due to a breach of his conditions with regard to accommodation. He has a previous conviction for sexual assault on a 13 year old child when he was 11.

4. On 8 October 2012 the Secretary of State decided to make a deportation order. She was not satisfied that the appellant had shown residence for a continuous period of five or ten years in accordance with the Regulations and considered that the appellant may be deported on grounds of public policy or public security. Having considered Regulation 21(5) and the NOMS1 report, the Secretary of State noted that the appellant posed a high risk of harm to the public particularly lone females and considered that it was not reasonable to leave the public vulnerable to the effects of his potential re-offending. She considered that the factors noted by his offender manager – bad associates, residential address, poor problem solving and consequential thinking – continued to be an area of concern and increased his potential for future harm. She considered that the appellant had not sought to address his offending behaviour by attending programmes like victim awareness and concluded that he represented a genuine, present and sufficiently serious threat to the public to justify his deportation.

5. The Secretary of State also considered Article 8, noted that he had parents and three siblings in the UK but had failed to provide any evidence of dependency on them. She noted that he had spent the first ten years of his life in Germany where he would be able to study if he wished to or find employment. It was also considered that his family could relocate or visit him there.

6. The appeal then came before First-tier Tribunal Judge Abebrese and a non legal member at Kingston Crown Court on 2 May 2013. No oral evidence

was called and after hearing submissions, the judge found that the appellant did not have any social or cultural ties in Germany because his family was in the UK. It also relied on the remarks of the sentencing judge to the effect that the appellant would in all likelihood stay out of trouble in the future. It found that the appellant had been of previous good character and that the reports complied during his time in prison showed he was committed to change. Accordingly, the Tribunal allowed the appeal under the Immigration Rules.

7. The respondent sought permission to appeal and this was granted by Designated First-tier Tribunal Judge Murray on 20 June 2013.

Error of law Hearing

8. At the hearing on 5 August I heard submissions from Mr Avery and Mr Oshurinade. Mr Avery submitted that the decision had been taken under the EEA Regulations as the appellant was a German national but that the appeal had been allowed under the Immigration Rules without any finding having been made under the Regulations. He argued that was a fundamental flaw in the determination. Secondly, the presenting officer had not conceded that the appellant had no ties with his country of origin and that links to the UK and the position of his family had not been properly reasoned. The entire determination needed to be set aside and the matter remitted for rehearing.

9. In response, Mr Oshurinade submitted there had been no error of law. The judge applied paragraph 399 and found that the appellant met the requirements. Whilst there should have been a finding under the Regulations, its absence was not material if the appellant met the requirements of the rules which applied to everyone. He had been living here over 10 years and a concession had been made by the presenting officer at the last hearing. His parents (who appear to be separated) and siblings were also in the UK.

10. Mr Avery replied. He stated that whilst paragraph 399 may be considered in terms of Article 8, it did not directly apply to the appellant who was an EEA national. The decision was accordingly made under the Regulations and there were no findings in that respect. The determination was deficient. The claim that he had been living here for ten years in accordance with the Regulations was not made out as there was reference ion the evidence to the appellant having been back to Nigeria after his 2005 conviction. He submitted no part of the determination could be salvaged and the issues had not been addressed.

11. At the conclusion of the hearing I reserved my determination which I now give.

Findings and Conclusions

12. Despite Mr Oshurinade's submissions, I agree with Mr Avery that this determination is wholly deficient. It fails entirely to deal with the issue of deportation under the EEA Regulations. The Tribunal allowed the appeal under paragraph 399 of the rules and failed to make any findings at all under Regulation 21. That flaw renders the determination unsustainable.

13. It was submitted on behalf of the appellant that the lack of findings under the Regulations was immaterial once the Tribunal found that paragraph 399 applied. Paragraph 399 has to be read in conjunction with paragraph 398. They state:

> 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 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 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 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, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.
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> 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 not be reasonable to expect the child to leave the UK; and
> (b) there is no other family member who is able to care for the child in the UK; or
> (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and
> (i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and
> (ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.
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> 399A. This paragraph applies where paragraph 398(b) or (c) applies if –
> (a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment)

and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or
(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

399B. Where paragraph 399 or 399A applies limited leave may be granted for a period not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate.

14. There has been no decision to deport the appellant under section 3(5)(a) of the Immigration Act 1971, that is to say, on grounds conducive to the public good. Paragraph 398 makes it plain that it is only where there *are* such grounds *and* where one of the other scenarios in sub sections (a)-(c) applies, that paragraph 399 comes into play. Quite how the judge came to allow the appeal under paragraph 399 grounds is wholly unclear and Mr Oshurinade is wrong to maintain that paragraph 399 applies to "everyone". Further, it is plain that in any event the appellant does not meet either of the requirements of paragraph 399 in that he has no child in the UK and no partner. It may be that the Tribunal meant to refer to 399A but that is not what the determination records at paragraph 9. Even 399A, however, requires the decision to have been made under the 1971 Act.

15. I also note that despite Mr Oshurinade's misplaced reliance on paragraph 399 at the hearing, there is no reference to it whatsoever in the skeleton argument which appears to accord more with Mr Avery's submission of what the issues for determination were. The legal background is set out and primary reliance is placed on the Regulations followed by paragraph 276ADE(v) and (vi) and finally Article 8.

16. In conclusion then, the judge failed to appreciate that this was a deportation order made under the EEA Regulations and that findings had to be made in that context. He also failed to take into account the NOMS 1 report when making his assessment on the appellant's conduct, offending and risk to the public. When finding that the appellant had previously been of good character, he failed to have regard to the fact that the appellant's convictions related to seven offences carried out over a one week period and that there was a previous conviction for sexual assault in 2005. Full findings of fact will be required on the nature of the appellant's ties to the UK and Germany (given that he was at school there until he left), the relationships he has here with his relatives, on whether his residence here and that of his mother on whom he was a dependant has been in accordance with the Regulations and of course on the risk he poses to the public and whether his deportation is justified on the grounds of public policy.

Decision

17. The First-tier Tribunal made errors of law. I re-make the decision and allow the appeal of the Secretary of State and remit it to the First-tier Tribunal for a fresh decision to be made on all issues.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

5 August 2013