Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11847/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 October 2020	**On 12 November 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MR KENNETH [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F. Allen, Counsel instructed by Paul, John & Co. Solicitors
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the respondent dated 3 July 2019 to refuse the appellant's human rights claim and to refuse to revoke a deportation order made against him on 22 April 2009. The appellant's appeal against the 3 July 2019 decision was originally allowed by First-tier Tribunal Judge Hussain, in a decision and reasons promulgated on 21 January 2020. At a remote hearing on 16 July 2020, I held that the decision of Judge Hussain involved the making of an error of law, and set it aside in its entirety, with no findings of fact preserved. I directed that the matter be

reheard in the Upper Tribunal, and it was against that background that I conducted the resumed hearing, on a face-to-face basis.

2. My error of law decision is in the **Annex**.

Factual background

3. The appellant, Kenneth [S], is a citizen of Nigeria born on 14 January 1964. I set out the procedural background to the proceedings at [2] of my error of law decision in these terms:

> "Mr [S] has a history of entering the United Kingdom using false documents. He claims to have done so for the first time in 2000. He did so again in January 2007 and was detained and removed the next day. That process was repeated in early February 2007. He returned. It is not clear when. On 28 August 2008, he was convicted of two counts of the possession of false or improperly obtained ID documentation and sentenced to 15 months' imprisonment. That conviction triggered the automatic deportation provisions in the UK Borders Act 2007 ["the 2007 Act"] which led to the deportation order under consideration in these proceedings being made. The appellant claimed asylum; his claim was refused, and an appeal against that refusal was dismissed. The appellant became appeal rights exhausted on 10 July 2009. He did not leave."

4. On 30 January 2019, the appellant made further submissions in support of a human rights claim to remain in the country, based on his private and family life. The Secretary of State treated that application as an application to revoke the deportation order made against him, refusing the application, and refusing to revoke the deportation order on 3 July 2019. It is that decision which the appellant now challenges in these proceedings.

5. It is common ground that the automatic deportation provisions contained in the 2007 Act are engaged by the appellant's 2008 convictions and concurrent sentences of 15 months' imprisonment for document fraud. The issue in these proceedings is whether Exemption 1 to automatic deportation, contained in section 33(2) of the 2007 Act, is engaged on the basis of the appellant's rights under the European Convention on Human Rights ("the ECHR"), in particular Article 8, the right to private and family life.

6. The appellant relies on the family life he has with his partner Gladys, and their four adult children, whose ages range from 19 to 26. His case is that they live together as a family unit, and have strong bonds, such that it would be unduly harsh on both Gladys and the adult children for him to be removed. None of the family would be willing or able to relocate to Nigeria, and the appellant himself is deeply concerned about the prospect of doing so, on account of what they describe as the "security situation" there. In this respect, the appellant relies on the narrative he advanced in his failed asylum claim, which was based on the risk to him from militants with whom he refused to cooperate to engage in kidnapping and extortion in the Nigerian oil fields. He remains at risk from the same militants, he claims. He also contends that he has lost all ties to Nigeria, and that he would face significant obstacles to his

integration. He no longer has significant use in his right arm, due to having been stabbed in the shoulder, which would make obtaining work harder. He is 55 years old and will struggle to find work in any event. He has led an unblemished life since his imprisonment in 2008 and presents no risk of reoffending. He is reformed. His children would be deprived of the father figure they currently enjoy.

7. On behalf of the respondent, Mr Lindsay submits that the appellant's deportation is in the public interest, and none of the matters outlined above amount to the required "very compelling circumstances" necessary to defeat the public interest in the deportation of the appellant as a foreign criminal.

Legal framework

8. Section 32 of the 2007 Act defines those, such as this appellant, who have been sentenced to a period of imprisonment of at least 12 months as a "foreign criminal". Pursuant to subsection (5), the Secretary of State must make a deportation order in respect of such a foreign criminal. There are a number of exceptions contained in section 33, of which the only relevant exception is "Exception 1", namely that "removal of the foreign criminal in pursuance of the deportation order would breach – (a) a person's [ECHR] rights…" (see section 33(2)(a)).

9. The essential issue for my consideration is, therefore, whether it would be proportionate under the terms of Article 8(2) of the Convention for the appellant to be deported to Nigeria. This issue is to be addressed primarily through the lens of public interest considerations contained in Part 5A of the Nationality, Immigration and Asylum Act 2002, in particular section 117C (additional considerations in cases involving foreign criminals): see section 117A(2). The Immigration Rules also set out the Secretary of State's views as to where the public interest balance lies in relation to matters relating to Article 8.

10. While, as is her practice, the Secretary of State addressed the appellant's human rights application as an application to revoke a deportation pursuant to paragraphs 390 to 392 of the Immigration Rules, it was common ground at the hearing that my assessment must be pursuant to the considerations in Part 5A of the 2002 Act. When deciding whether to revoke a deportation order, paragraph 390A requires the factors contained in paragraphs 398, 399 and 399A of the Immigration Rules to be considered. Those paragraphs replicate the statutory framework contained in section 117C of the 2002 Act which, pursuant to CI (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 2027 at [21] meant that it is, "generally unnecessary for a tribunal or court in a case in which a decision to deport a "foreign criminal" is challenged on article 8 grounds to refer to paragraphs 398-399A of the Immigration Rules, as they have no additional part to play in the analysis."

11. The parties therefore agreed that paragraph 390A's requirement that there be "exceptional circumstances" to outweigh the public interest in maintaining a deportation order where paragraphs 399 or 399A do not apply corresponds to the requirement in section 117C(6) for there to be "very compelling circumstances."

12. It is for the appellant to establish his case to the balance of probabilities standard. It is for the Secretary of State to demonstrate that any interference with the Article 8 rights of the appellant or his family would be justified.

The hearing

13. At the hearing, which was conducted on a face to face basis, the appellant gave evidence, and was followed by his partner Gladys, and their children Udeme (19), Esther (22), and Blessing (25). All adopted their witness statements and were cross examined. The appellant's eldest daughter, Hope, was unable to attend due to confusion with the hearing date (I make no criticism of her for this). She provided a statement. I will outline the salient aspects of their evidence to the extent necessary to reach and give reasons for my findings.

14. Shortly after I rose having conducted the hearing and reserved my judgment, I was informed by the clerk that the appellant, Gladys and Udeme had mistakenly given incorrect addresses at the beginning of their evidence. I recalled the parties into court, and it was confirmed by Ms Allen that the appellant and all witnesses live together at an address in London. Mr Lindsay accepted that they all live together at the revised address provided, and it was not necessary to hear any further oral evidence on the point.

Documentary evidence

15. The appellant relied on the bundles he prepared for the proceedings before Judge Hussain. The respondent relied on her bundle from below. Ms Allen prepared a helpful skeleton argument, which I have considered.

Discussion

16. I reached the following findings have considered all evidence in the case, in the round.

17. Section 117C(1) of the 2002 Act provides that the deportation of foreign criminals is in the public interest. The appellant satisfies the definition of foreign criminal as he is not a British citizen, and has been convicted of an offence which led to a period of imprisonment of at least 12 months: see section 117D(2) of the 2002 Act.

18. The appellant's convictions fall into section 117C(3) of the 2002 Act; he has not been sentenced to a period of imprisonment of four years or more, with the effect that, if Exception 1 or 2 applies, his deportation will not be in the public interest. Those exceptions are:

> "(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."

19. Subsection (6) also applies to foreign criminals sentenced to less than four years' imprisonment, it has been held. The extent to which an individual satisfies the criteria in Exceptions 1 and 2, even if not meeting their requirements fully, is relevant to the assessment of "very compelling circumstances…" See NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662.

Exception 1

20. I deal first with exception 1. It was common ground that the appellant is unable to satisfy the letter of this exception; he has never been lawfully resident in this country, still less for "most" of his life.

21. As to whether the appellant has "socially and culturally integrated into the United Kingdom", there is evidence of cultural integration in the materials before me. The appellant writes at [38] of his statement dated 24 September 2019 that he is an active member of the Redeemed Christian Church of God, and has been for 10 years. The family are all involved, and Esther and Udeme are in the choir. He writes that the family grew up in the church community. The four children all either study or work, and write in glowing terms about the positive influence their father has had in their lives, and continues to do so, even as the children have now all reached the age of majority. Following his convictions in 2008, the appellant has not been convicted of any further offences. I will consider below the full impact of the absence of convictions since the appellant's release from prison, but for present purposes I simply highlight it as a facet of the appellant's integration.

22. I accept, therefore, that the appellant is socially and culturally integrated.

23. I do not accept that the appellant would face very significant obstacles to his integration in Nigeria. His reliance on what he describes to be "the security situation" in Nigeria is not supported by any evidence. The specific claims that he made concerning the risk that was said to be posed to him from militants was found not to be reasonably likely to exist by a different constitution of the First-tier Tribunal, in a decision promulgated on 23 June 2009. While the panel on that occasion accepted that the scarring on the appellant's shoulder was likely to have been caused by a knife wound, they did not accept that it had been caused as described by the militants. They did not accept the appellant's account to be credible, and found that Gladys, who gave evidence to support the appellant on that occasion, had embellished her evidence to support the appellant's account. See [53] of the decision of Judge Bryant and Mrs RM Bray JP. At [54], the panel rejected the

appellant's account of having been approached by militants in Nigeria, and rejected his contention that he was at any form of risk from them. The panel noted that the appellant had returned to Nigeria from the United Kingdom at least twice, despite having subsequently claimed to be at risk of being persecuted upon his return. While I note the appellant's renewed evidence in these proceedings is that he continues to be at risk on that basis, the decision of the First-tier Tribunal promulgated on 23 June 2009 is the starting point for my analysis. The appellant has not provided any additional evidence subsequent to the earlier decision of the First-tier Tribunal which provides grounds to revisit the conclusions of the tribunal on that occasion. He has not provided any evidence concerning Nigeria generally, such that his overall concerns surrounding the "security situation" may properly be said to amount to an obstacle, or a "very significant obstacle" to his integration.

24. The appellant is a man of working age, and although he has impaired use of his right arm, still has a degree of mobility. He accepted in his evidence that he would not be prevented altogether from finding some form work due to the difficulties he has with his right arm He would be able to find some work, and I find that he would not, on the evidence provided to me, be destitute. The appellant spent most of his life in Nigeria before coming to this country, and, pursuant to the findings of the First-tier Tribunal on 23 June 2009, still has access to his military pension there. The appellant has not sought to challenge those findings, or to demonstrate that there have been changes in the time that has passed since then. Indeed, in his evidence before the tribunal on that occasion, the appellant explained that the reasons he had returned to Nigeria following his initial arrival here in 2000 was in order to activate his military pension: see [33]. I find the appellant would have some financial resources available to him in Nigeria such that the difficult impact of his enforced return could be mitigated, and that he would, in time, be able to establish a private life of his own, and integrate.

25. I find, therefore, that the appellant would not encounter very significant obstacles to his integration in Nigeria.

26. Exception 1 is met only on the basis that the appellant is socially and culturally integrated in the United Kingdom. I accept that his return to Nigeria would be difficult, but he would not encounter very significant obstacles to his integration.

Exception 2

27. Turning to Exception 2, I will address first the appellant's relationship with Gladys and their children individually and collectively.

28. The respondent accepted in the refusal letter at [15] and [19] respectively that the relationships the appellant enjoys with the children and with Gladys are genuine and subsisting. I accept that family life for the purposes of Article 8 ECHR exists between Gladys and the appellant, and the children. They are a single family unit, living together. The support they provide to each other is real, committed, and effective.

29. Gladys is not "a qualifying partner", as she is neither British, settled, nor here with refugee status: see the criteria in section 117D(1). Although at [20] of the refusal letter, Gladys is referred to as being "settled", that must be a mistake as Ms Allen confirmed to me at the outset of the hearing that she holds only limited leave to remain, and has a renewal application pending. It appears that she was granted leave to remain on the basis of her human rights, following a successful appeal against a separate refusal decision by the Secretary of State: see [3.bb] of the refusal letter. I have not been provided with details concerning her allowed appeal, or the basis upon which renewal application was submitted. At [21] of Judge Bryant's decision, there is a suggestion that the family applied "based on the seven year concession for a child".

30. None of the children is a "qualifying *child*", for they have each attained the age of majority, albeit, in the case of Udeme, relatively recently (December 2018).

31. Even though neither Gladys nor the children are "qualifying", it is still necessary to address the extent to which the appellant's deportation would be "unduly harsh", either for them to stay without him, or go with him.

32. Gladys writes at [6] of her statement dated 23 September 2019 that she cannot imagine being separated from the appellant, and that if she were, her life would be a state of complete disorder and frustration, and that she would lose herself. It would, she writes, be a "catastrophe". The appellant provides meaning and purpose to her, and supports her emotionally, psychologically, mentally and financially (I observe that the source of the appellant's financial support is not clear, as he is not permitted to work).

33. Each of the children write in similar terms about the impact the appellant's deportation would have on them individually, and the family collectively. Udeme's evidence is that he remains at a crucial stage in his development, and requires the presence of his father in order to avoid being drawn into crime and "illegal activities such as fraud, the selling of drugs and other illegal activities." In cross examination, Udeme emphasised the protective nature of his father's role, and the corresponding pressure that he would face if, following his father's departure, he would be the only male in the household. Gladys had provided a similar explanation when she was cross examined, saying that, simply because the children are adults, it does not mean that they do not look to both parents for advice, and how to live every day, in particular concerning gangs and knife crime. In her handwritten statement dated 23 September 2009, Esther writes that a lot of other young black men the same age as Udeme are drawn into crime, and fall into that lifestyle due to the absence of a father figure in their lives, including the bitterness, emptiness and pain of not having a father figure.

34. The term "unduly harsh" conveys an elevated threshold.

35. In order to meet the enhanced threshold, it is necessary to demonstrate that the deportation of the individual concerned would have an impact on the qualifying

partner (or, as set out below, the qualifying child(ren), applying the criteria by analogy to the children in this case) which meets the elevated threshold of "unduly harsh". See HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 at [44] and following for a recent discussion of the evolving understanding of the meaning of the term. See also [51] in HA, and the discussion at [12] of AA (Nigeria) v Secretary of State for the Home Department [2020] EWCA Civ 1296.

36. In relation to Gladys, I do not consider that the evidence demonstrates it would be "unduly harsh" for her to remain in this country without the appellant. I accept that his departure would be a very great loss to the family life they enjoyed together. They have been together for at least three decades, or the best part of. I do not underestimate the impact that the appellant's departure would have, but there is no evidence that the enhanced threshold would be met if Gladys were to remain in the United Kingdom without the appellant. The reasons given by Gladys for seeking to resist the deportation of the appellant relate to the "mere undesirability" of him being removed (to adopt the terminology of the Court of Appeal in HA (Iraq) at [51]), rather than providing any substantive basis to conclude that the enhanced "unduly harsh" threshold is met.

37. Similar considerations apply in relation to the appellant's adult children. The reasons they have each provided, individually and collectively, do not demonstrate that it would be "unduly harsh" for them to remain in this country without their father. I accept that his departure would be a significant loss, but not a loss of the magnitude necessary to engage the elevated threshold involved in this assessment.

38. I note the candidness with which Udeme has spoken of the potential impact of his father being removed, a sentiment which is shared among the siblings, as is demonstrated by Esther's letter, and that of Blessing. Deportation can, sadly, have tragic consequences. The reality is that it drives a wedge through the lives of many families, and it is often the innocent members of the family who are the most affected. The family fear for Udeme's future life without his father in this country, as set out above. While life without the appellant would be difficult for Udeme and his sisters, the harshness that will necessarily follow will not surpass that which is "*due*" following the deportation of foreign criminals. Without wishing to sound glib, it is by no means certain that he would be destined for a life of crime without his father. In August 2019, he was offered a place to study Foundation Engineering at a respected English university (see page 25, appellant's bundle). He has the support of a loving family here; his mother and sisters evidently care deeply for him. There is no reason why, in the absence of sufficient resolve, and a commitment to the academic potential he clearly has, he would be destined for such a life of crime. And, of course, in the event that his father is removed to Nigeria, they will be able to stay in touch using modern means of communication.

39. Hope, Blessing and Esther write of the tragedy that their father's deportation would be. Esther writes of the positive influence he has been in her live, and that of the family. Hope I accept their evidence that it would be very difficult, harsh indeed.

But the question is whether the elevated threshold of being *unduly* harsh would be met. On the evidence before me, there is nothing to support that contention.

40. Each of the witnesses said that it would not be possible for them to return to Nigeria with the appellant. I reject the reasons they gave for this. Gladys said that it would not be possible for any of them to return due to the safety situation, and the fact that none of them have lived in Nigeria for some time. Judge Bryant dismissed the appellant's appeal on asylum grounds, and those findings of fact demonstrate that the appellant does not have an objective fear of being persecuted. There are no background materials that have been provided demonstrating that the general security situation is so bad as to prevent the appellant from being accompanied by his family to Nigeria.

41. I accept that Gladys and the children have been granted limited leave to remain on the basis of their human rights. I have not been provided with the allowed appeal which led to the grant of leave to remain to Gladys. Hope and Esther currently enjoy extant grants of leave to remain on human rights grounds; Gladys, Udeme and Blessing have submitted further applications, in time, which are pending before the Secretary of State. The fact that Gladys and the children have each been granted limited leave to remain on human rights grounds is a factor of some significance. However, the precise bases upon which they were granted such leave are not before me. I accept that it would be highly disruptive for the children to leave the United Kingdom, having spent most of their lives and education here. However, addressing the elevated threshold of what is *unduly* harsh, there is nothing about their situations which demonstrates that the harshness which would inevitably follow should they choose to accompany the father back to Nigeria would meet that threshold. The family's immigration statuses are precarious, in the sense that none is settled. While settlement may well be a future option for them, the possibility of their return to Nigeria is entirely consistent with the precarious quality of their immigration status.

42. Drawing the above analysis together, neither Gladys nor any of the children would suffer "unduly harsh" consequences if the appellant is deported. I accept that that would be hardship if they stay here without him, or choose to accompany him there, but that would not be hardship that reaches the elevated "unduly harsh" threshold.

Very compelling circumstances

43. In addition to the extent to which the appellant claims to meet exceptions 1 and 2, he relies additionally on the delay he claims has infected the Secretary of State's conduct, and the fact he has not reoffended since the commission of the index offences in 2008.

44. I accept that there is a degree of delay on the part of the respondent. I also accept that the appellant did not seek to "go underground" following his exhaustion of all available avenues of appeal against the decision of the First-tier Tribunal promulgated on 23 June 2009. He remained in touch with the respondent, to an extent, and those then representing him engaged in extensive correspondence concerning the position of the children, who were minors at that stage. The

respondent initially acted with a degree of expedition, arranging a telephone interview with the Nigerian High Commission on 6 July 2011, for the purposes of confirming the appellant's Nigerian nationality. The refusal letter records the appellant being invited to an emergency travel document telephone interview in December 2014, stating that he did not attend. The appellant provides an explanation for this at paragraph 25 of his witness statement dated 24 September 2009, which states that he was invited to attend Becket House, but that one of the respondent's officials realised that Hope and Blessing already had leave to remain "and apologised for the mistake". It is not clear how the position of Hope and Blessing was relevant to the appellant's emergency travel document, but seeing as Mr Lindsay did not seek to challenge the above account in cross-examination, for the purposes of this analysis, I will not hold this issue against the appellant.

45. Thereafter, the refusal letter records a number of applications made by the appellant, Gladys and the children in 2015, 2016, 2017 and 2019, with no attempts at removal.

46. I accept that there has been delay on the part of the Secretary of State, in the sense that she has not initiated enforced removal. There is a sense in which the respondent tolerated the appellant's presence. However, the legal duty was on the appellant to leave the country pursuant to the deportation order. This he failed to do. While the respondent is responsible for the maintenance of immigration control and associated enforcement matters, the respondent was entitled to expect the appellant to comply with the obligation to leave the country to which he was subject. The delay in this case is primarily attributable to the actions of the appellant who accepted under cross examination that he knew that he has never had a right to be in this country. He could have been in no doubt about that in light of the decision of the First-tier Tribunal in June 2009.

47. I find that it is the appellant who is ultimately responsible for the length of his residence in this country. That the respondent could have removed him at an earlier stage is a factor of minimal relevance. He was under an obligation at all times to leave yet chose not to do so.

48. A further factor which the appellant contends demonstrates that there are "very compelling circumstances" is the fact that he has not committed any further criminal offences following the sentence of imprisonment imposed in August 2008. He contends that he is a reformed man, and that he is remorseful for his past actions. There is little information concerning the details of the offences for which the appellant was sentenced in the Crown Court in August 2008, however it is clear that it was for the possession of false identity documents. Some indication is given by the decision of Judge Bryant at [36]; the appellant said he used a false passport in order to obtain work. What is less clear is whether he did so on a separate occasion, not captured by the indictment to which he pled guilty before the Crown Court, or whether the offences for which he was imprisoned related to the same underlying conduct as he admitted before Judge Bryant. The distinction does not matter. The appellant has used false documentation to obtain work unlawfully and has been imprisoned for the possession of false identity documentation.

49. It is, in principle, relevant to the public interest in deportation that an appellant has not committed further offences for a considerable period, in this case 12 years. However, the nature of the appellant's underlying offence is relevant. Mr Lindsay submits that the appellant's offending propensity relates to the use of false immigration documentation in order to obtain an immigration advantage to which he was not otherwise entitled. So much is clear, submits Mr Lindsay, from the appellant's track record of entering the country illegally, and re-entering following his previous removals. The appellant's entire period of residence in this country has been pursuant to entry that was unlawful, and has been sustained, at least initially, through working unlawfully, using false documents. The advantage the appellant sought unlawfully to obtain for himself has enabled him to establish a private and family life in this country. Put simply, he has obtained everything he reasonably could sought to have achieved through his unlawful entry and use of false documentation. That he has not need to commit similar or other offences since is of minimal relevance, submits Mr Lindsay, as the appellant is already enjoying, the benefits of his criminal conduct. It matters not, therefore, that he has not seen fit to commit further offences, for he has had no need to do so.

50. It is necessary to assess the appellant's post-imprisonment conduct holistically. He has not committed further offences. There is no suggestion that he is a danger to the public; his conduct has not been violent or sexual, and nor does it relate to drugs. Those are important factors to take into account. But the extent to which the appellant can legitimately claim to be at no risk of further immigration misconduct is limited, for at least two reasons. First, as Mr Lindsay submits, the appellant has already reaped the benefits of his unlawful immigration conduct and has had no need to commit further immigration offences. Secondly, and more significantly, the appellant has demonstrated that he is willing repeatedly to commit immigration offences. He entered unlawfully at least in 2000, twice in early 2007, and again in 2008. Judge Bryant's decision reveals that there was a further departure from, and unlawful re-entry to, the country in 2004: see [20] and [29]. The appellant has demonstrated that he is willing to commit further immigration offences; he has had less of a need to do so during his current unlawful stay in this country, save for the index offences. I find that the circumstances of the appellant's immigration misconduct mean that, despite the relatively lengthy crime-free period following his release from custody, it is difficult to ascribe much significance to the submission that he is unlikely to reoffend.

51. The appellant did not rely on any health-based reasons to resist deportation.

52. In order to draw the above analysis together, I will adopt a balance sheet approach to determine whether there are "very compelling circumstances" over and above the Exceptions.

53. Factors in favour of the appellant's deportation include:

    a. The public interest in the deportation of foreign criminals (section 117C(1));

b. The deportation of foreign criminals sentenced to less than four years' imprisonment is in the public interest, unless Exception 1 or 2 applies (section 117C(3)). Neither Exception applies.

c. The appellant does not meet the substance of Exception 1. While I accept that he is socially and culturally integrated, he has not lived here lawfully for more than half his life, or at all, and will not face very significant obstacles to his return to Nigeria. He does not have a well-founded fear of being persecuted and there is no evidence that the "security situation" will present barriers to his integration.

d. The appellant does not meet the substance of Exception 2. Gladys is not a qualifying partner, and it would not be *unduly* harsh on her to remain here without him, or to return to Nigeria with him.

e. None of the appellant's children are minor children and so none are "qualifying children". While family life exists between all children and the appellant and Gladys, it would not be *unduly* harsh for any of the adult children to remain here without the appellant, or to relocate to the country of their citizenship with their father.

f. There is minimal significance to the appellant's claimed rehabilitation, in view of the nature of his underlying offending, and his past repeated immigration misconduct, for the reasons set out above.

54. Factors mitigating against the appellant's deportation include:

a. The family enjoy family life together, within the meaning of Article 8 ECHR. There is a deep bond of love and affection between the appellant, Gladys and the adult children. The appellant's deportation, while not unduly harsh, would rupture family life as the family know it. Udeme has particular fears of facing life as a fatherless young man in South East London.

b. The children have grown up here and have been granted limited leave to remain by the Secretary of State, in recognition of their links here.

c. The appellant has a subjective, albeit not objective, fear of harm in Nigeria.

d. There was a delay in the enforcement of the deportation order by the Secretary of State, and the appellant's tolerated presence has enabled him to forge a private life, and develop a family life, during that time.

e. The offence was at the lower end of the spectrum by reference to the penalty imposed.

f. The length of time for which the appellant has not committed further offences, and he has not committed any offences of violence or of a sexual nature, and nor were drugs involved.

g. While the appellant will not encounter *very significant* obstacles to his integration in Nigeria, relocation will nevertheless be problematic for him, at least initially.

h. The appellant speaks English and, in the sense that he has not relied on public funding, he is financially independent.

i. The appellant has remained in contact with the Secretary of State at various points during the chronology of his unlawful residence here.

55. Weighing the factors in favour of the appellant's deportation against those mitigating against it, I find that those in favour of deportation outweigh those against. The deportation of foreign criminals is in the public interest. This appellant does not meet either of the statutory exceptions and cannot claim to do so partially to any significant extent, for the reasons set out above. The limited extent to which the appellant even partially meets some elements of the exceptions is minimal, and does not go a significant way towards demonstrating that there are very compelling circumstances *over and above* the exceptions.

56. While the Secretary of State could have acted with greater expedition by removing the appellant, that does not have the effect of absolving the appellant from the obligation to which he has always been subject to leave the country, which he has failed to do. This is not a case of the Secretary of State delaying taking a decision; she acted expeditiously in doing so. As the appellant accepted during his evidence, he has always known that he has not been here lawfully.

57. The appellant's offence-free period since being released from custody must be viewed in the context of the nature of his convictions, and the fact that he has repeatedly, albeit some time ago, committed offences to breach immigration control requirements. His financial independence and English skills are of neutral weight.

58. For the above reasons, informed by the balance sheet exercise above, I find that there are no "very compelling circumstances, over and above those described in Exceptions 1 and 2" mitigating against the appellant's deportation, with the effect that the public interest requires his deportation. Accordingly, the appellant's deportation would be proportionate for the purposes of Article 8 ECHR, and "Exception 1" to the automatic deportation regime in section 33(2) of the 2007 Act is not engaged.

59. This appeal is dismissed.

Notice of Decision

I dismiss this appeal on human rights grounds.

No anonymity direction is made.

Signed *Stephen H Smith* Date 15 October 2020

Upper Tribunal Judge Stephen Smith

Annex – Error of Law Decision

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11847/2019

THE IMMIGRATION ACTS

Heard remotely at Field House
On 16 July 2020 ***via Skype for Business***

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KENNETH [S]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S. Walker, Home Office Presenting Officer
For the Respondent: Mr P. Richardson, Counsel, instructed by Paul John & Co. Solicitors

DECISION AND REASONS (V)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

The documents that I was referred to were primarily in the form of the Secretary of State's grounds of appeal and the decision of the First-tier Tribunal, and I also had access to the entire case file.

The order made is described at the end of these reasons.

Neither party indicated any concerns with the fairness of the remote nature of the proceedings or raised any other concerns.

1. This is an appeal by the Secretary of State. In a decision promulgated on 21 January 2020, First-tier Tribunal Judge Hussain allowed an appeal by the respondent, Kenneth [S], a citizen of Jamaica born on 21 January 2020, against a decision of the Secretary of State dated 3 July 2019 to refuse his human rights representations taken in the course of a decision to refuse to revoke a deportation order dated 22 April 2009.

Factual background

2. Mr [S] has a history of entering the United Kingdom using false documents. He claims to have done so for the first time in 2000. He did so again in January 2007 and was detained and removed the next day. That process was repeated in early February 2007. He returned. It is not clear when. On 28 August 2008, he was convicted of two counts of the possession of false or improperly obtained ID documentation and sentenced to 15 months' imprisonment. That conviction triggered the automatic deportation provisions in the UK Borders Act 2007 which led to the deportation order under consideration in these proceedings being made. The appellant claimed asylum; his claim was refused, and an appeal against that refusal was dismissed. The appellant became appeal rights exhausted on 10 July 2009. He did not leave.

3. On 6 July 2011, the appellant participated in a telephone interview with the Nigerian High Commission regarding a travel document. A further appointment was scheduled for 5 December 2014. The appellant did not attend. The appellant applied, unsuccessfully, for recognition as an extended family member of his sister and became appeal rights exhausted from that process in December 2016.

4. On 23 January 2017, the appellant submitted an application for leave to remain on the basis of his private life, and family life with his partner and her daughter. That was refused on 3 July 2019. It was the refusal of that application that led to the proceedings before the judge below.

5. Throughout the period covered by the appellant's immigration history, his own partner had engaged with the Secretary of State to regularise her status. She, along with Udeme, one of the appellant's adult children, now have limited leave to remain, valid until 21 August 2020

The decision of the First-tier Tribunal

6. The judge heard evidence from the appellant, his partner, and his four adult children. The judge noted that the respondent had treated the appellant's human rights application as an application to revoke his deportation order, and that she had considered the application under paragraphs 390 and 390A of the Immigration Rules

(revocation of deportation orders), even though the appellant had remained in the United Kingdom at all relevant times. The judge noted that paragraph 390A incorporates the criteria contained in paragraphs 398, 399 and 399A concerning the making of deportation orders, identifying the operative provisions of those paragraphs to which he was to have regard: see [41]. The judge observed that neither of the exceptions available in paragraphs 399 or 399A were available to the appellant. He does not have a relationship with a child under the age of 18 and nor was he in a relationship with a British citizen, settled person, or person with refugee status (para 399), nor had he been lawfully resident for more than half of his life (para 399A). As such, the judge correctly identified that only "very compelling circumstances over and above those described in paragraphs 399 or 399A" could outweigh the public interest in the appellant's deportation.

7. The judge noted at [46] that paragraph 391A of the Immigration Rules, again concerning the revocation of deportation orders, ascribes potential significance to the "passage of time since the person was deported…" Although this appellant had not been deported, the judge said, "the sentiments expressed in these provision [*sic*] must blunt the otherwise harshness of the 'very compelling circumstance' [*sic*] test in Paragraph 398…" He added that:

> "Despite signing the deportation order on 22 April 2009, the Secretary of State, inexplicably has not sought to remove the appellant pursuant to that. This lapse of time between the signing of the order and lack of practical action at removal must somewhat undermine the imperative of immigration control in removing him from this country."

8. There was no suggestion, said the judge at [47], "that the appellant's children must uproot themselves from this country in order to continue the family life, the respondent accepts they enjoy between them…" The adult children continue to enjoy family life for the purposes of Article 8 with the appellant, found the judge: [48]. The appellant was a positive influence on his children "and a strong pivotal figure in the household" [49]. He had not reoffended since the 2008 conviction [50], and "the ultimate question", at [51], was whether family life with his wife [*sic*] and children "should be ruptured". It was unreasonable to expect the adult children to leave the country and opt for a life in Nigeria "which they left behind when they were young…" As such, found the judge, there were very compelling Circumstances over and above those described in paragraph 399 and 399A, and he allowed the appeal: [52].

Grounds of appeal

9. In her grounds of appeal, the Secretary of State contended that be reasons given by the judge for finding that there were "very compelling circumstances" fell short of meeting the "very high threshold" imposed by that test. The judge had failed properly to apply the relevant provisions of the immigration rules and section 117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The judge failed to address himself concerning what amounts to "unduly harsh", and failed to consider the extent to which the appellant was able to satisfy the substantive

requirements of either of the exceptions, in order to calibrate what was meant by "very compelling circumstances over and above", pursuant to NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662. The grounds also contend that the judge fell into error in his reliance on paragraph 391A of the rules, given the appellant had never left the country, and the 10 year timer had not, therefore, begun to run. Delay does not mitigate the public interest "in cases where the public interest favouring the deportation of an immigrant is potent and pressing…": see RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 00330 (IAC).

10. Upper Tribunal Judge Martin, sitting as a judge of the First-tier Tribunal, granted permission to appeal on the basis that, "it is arguable that the judge erred in finding very compelling circumstances over and above those contained in paras 399 and 399A of the Immigration Rules when the appellant could not meet the requirements of those paragraphs."

Submissions

11. Mr Walker relied primarily on the written grounds of appeal and Judge Martin's grant of permission to appeal.

12. On behalf of the appellant, Mr Richardson resisted the appeal on the basis that the grounds of appeal mischaracterised the judge's decision. This was not, he submitted, a decision where the judge reached an irrational decision finding the presence of very compelling circumstances when the facts could not justify that finding. The operative reasoning on the part of the judge was, in fact, the issue of the Secretary of State's delay, submitted Mr Richardson. The judge adopted the spirit of paragraph 391A of the rules, reflecting the broad approach of the Secretary of State's regime in reaching his decision. Not only was the judge right to take that into account, he was bound to do so, in Mr Richardson's submission. There was a lack of action by Secretary of State in attempting to enforce removal, and the appellant had sought to regularise his status under the EEA regime in the meantime. The overall passage of time was a very compelling circumstance. As the Court of Appeal noted in Akinyemi v Secretary of State for the Home Department (No. 2) [2019] EWCA Civ 2098, the public interest in deportation is flexible, meaning that there can be a corresponding reduction in the public interest of this appellant's deportation given the passage of time. This was not a case where the appellant's deportation was "potent and pressing" in view of the seriousness of the offence, as was the case in RLP (Jamaica), and the judge was entitled to identify the lack of enforcement activity as a relevant factor. It was legitimate for the judge to consider the appellant's rehabilitation since the 2008 offence, given that the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 noted that the risk of re-offending, and the success of rehabilitation, were factors relevant to the public interest: see Lord Kerr at [64]. Pursuant to EB (Kosovo) [2008] UKHL 41, delays in enforcement result in (i) further ties being developed; (ii) an expectation of being permitted to remain; and (iii) a diminished public interest in removal.

13. Towards the end of the hearing, when responding to Mr Richardson's submissions, Mr Walker stressed that the Secretary of State's main objection to the decision was that it did not disclose sufficient reasons. In response to a question from me, Mr Walker appeared to suggest that, with sufficiently expressed reasons, it would be possible for a person the appellant's position, with the same factual matrix, to succeed in their appeal, provided the reasons were sufficiently cogently expressed. I was concerned that this appeared to be a departure from the grounds of appeal, which were essentially a rationality-based challenge. The Secretary of State contended at [4] of the grounds of appeal that the reasons given by the judge for finding that there were "very compelling circumstances" could not, on any view, meet that threshold. In response to my further request for clarification, Mr Walker stressed that he did not seek to resile from the grounds of appeal, clarifying what he said to mean that, if it could be shown by this appellant that there were very compelling circumstances, then his appeal should succeed.

Discussion

14. As set out above, the judge below allowed the appeal on a number of bases. They were (i) the delay in enforcement; (ii) the impact on the appellant's family; and (iii) his rehabilitation. Delay was not the only factor. But it was a factor.

15. Mr Richardson is correct to point out that the judge was, in principle, entitled to take into account delay on the part of the Secretary of State. It is right that "delay" can diminish the public interest in removal.

16. While not all judges would characterise the chronology in this matter as delay at the fault of the Secretary of State, the judge's overall observations on delay were open to him on the evidence before him. The most recent emergency travel document interview appears to have been in December 2014, and the Secretary of State does not appear to have taken further enforcement steps since then. The application which led to the impugned decision was submitted in January 2017, and the decision was not taken until July 2019, a period of two and a half years. The Secretary of State had not exactly moved at pace, and the judge was entitled to reach the findings he did (although not all judges would have laid the blame at the feet of the Secretary of State in that way).

17. The question then arises as to whether it was open to the judge to characterise the delay, along with the other facts, as amounting to "very compelling circumstances over and above…"

18. I consider the judge fell into error with his application of paragraph 391A, in particular with his reliance on it as authority for the proposition that the Secretary of State's "sentiment" was to diminish the public interest in deportation in where the deportation order was made over ten years ago, with the effect that the "harshness" of the very compelling circumstances test was "blunted".

19. Paragraph 391A only applies where a person *has been deported* and is able to point to a period of (at least) ten years *outside* the United Kingdom as a possible change in

circumstances. There is no support in the rules, or in any policy of the Secretary of State, which indicates that the "sentiment" of the Secretary of State towards a person who has remained in defiance of a deportation order, even in circumstances where there was a degree of "delay" on the part of the Secretary of State, is that the public interest in deportation is diminished. So much is clear from the wording of paragraph 391A itself:

> "391. **In the case of a person who <u>has been</u> deported** following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:
>
> > (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained…" (Emphasis added)

20. Paragraph 391A must be read in the context of an individual *already deported*. By definition, the public interest in the deportation of foreign criminals (see section 117C(1) of the 2002 Act) will already have been served to a certain extent in such a case. The removal, pursuant to a deportation order, of the person concerned will have been in the public interest, and their continued absence from the country for ten years *may* mean that the public interest has been served to the extent that their return could be countenanced. That is provided the individual meets the requirements for entry clearance; all that revocation does is pave the way for the person to demonstrate that they meet separate requirements of the rules for their subsequent re-admission: see paragraph 392 of the rules. This appellant's situation could not be more different; far from reflecting the public interest in the deportation of foreign criminals, this appellant has remained in the United Kingdom in defiance of the legal obligation upon him to leave. Even if, as the judge found, there was some delay on the part of the Secretary of State, the appellant's own obligation to leave the country was undiminished throughout. Not only was the public interest in his deportation not honoured by the actions of this appellant, the appellant undermined the requirements of immigration control by remaining here, continuing to build a private and family life, even though he had no right to do so.

21. As such, to the extent that the judge considered paragraph 391A to be authority for the proposition that there is a diminished public interest for the enforcement of a deportation order made over ten years ago, that was an error of law.

22. I reject Mr Richardson's submission that the delay was the main focus of the judge's reasoning. A simple reading of the decision is sufficient to reject that contention. It was *a* factor, but the operative reasoning of the judge, in addition to the delay, was the impact of the appellant's deportation on his family (see [47] to [49]) and the reform, or rehabilitation, of the appellant (see [50]). That led to the judge's global conclusion at [51] (in which I have highlighted the judge's description of the family factors as the "ultimate question", as it reveals the focus of the decision as being broader than mere delay):

> "In summary I find that the appellant has family life with his wife and children. The **ultimate question** is whether that family life should be ruptured, because that is what I am inclined to find will happen, if he is not allowed to remain in this country. It seems to me wholly unreasonable to expect the children, some of whom are in full time education, at least one is studying at university level, whilst the others are in employment, to suddenly give up their lives in this country and opt for a life in Nigeria which they left behind when they were young." (Emphasis added)

23. While the judge was correct to note that neither paragraphs 399 or 399A were engaged in this case, it was incumbent upon the judge to address the substantive exceptions contained within each provision, to assess the extent to which the appellant was able (even partially) to meet those requirements. In turn, that informs and calibrates whether there are "very compelling circumstances *over and above*…" the exceptions for the purposes of paragraph 398 (or, more accurately, section 117C(6) of the 2002 Act). Features falling outside the exceptions are also potentially relevant, but they have to be especially strong (see NA (Pakistan) at [29]). Mr Richardson did not suggest that there was any material difference between paragraph 390 of the rules' requirement for "exceptional circumstances" to be required to outweigh the public interest in the deportation of a person subject to a deportation order and the "very compelling circumstances" threshold in paragraph 398, which sets out the public interest in the deportation of foreign criminals. The statutory regime underpinning these rules, namely Part 5A of the 2002 Act, uses the terminology of "very compelling circumstances", and that is the statutory framework that guides the approach of tribunals to this issue.

24. At the heart of paragraph 399, which corresponds to section 117C(5) of the 2002 Act, is whether the deportation of the appellant would be "unduly harsh" on a qualifying (minor) child or partner. The judge was concerned about the impact of the appellant's deportation on his non-qualifying children and partner, so it was incumbent upon him to consider the extent to which the children and partner would have met the unduly harsh test, were the exception engaged.

25. A certain amount of harshness is "due", or to be expected, when a person is deported from the United Kingdom. The level of "due" harshness is that set out in section 117C(1) of the 2002 Act, arising from the public interest in the deportation of foreign criminals. The judge did not direct himself concerning the public interest in the deportation of foreign criminals in this regard. The level of "due" harshness does not correspond to the seriousness of the offending. But when considering the threshold, "*one is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent…*": see KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 at [23].

26. The judge did not have regard to the elevated threshold concerning what amounts to "unduly harsh", which is a concept to be assessed by reference to the amount of harshness that is "due". The concerns the judge had concerning the impact of deportation on the appellant's adult children and partner were, with respect, the sort of concerns that arise in most if not all deportation cases. There were no additional

factors which were capable of reaching the unduly harsh threshold: the judge did not say there were any such additional factors, nor did Mr Richardson draw my attention to any in the evidence. The impact of having to choose to continue adult life here, or return to Nigeria, as an adult, with the appellant was not, on the evidence before the judge, something that could amount to being "unduly harsh".

27. The inability of the appellant's children and partner to meet the "unduly harsh" test should have been factored into his wider assessment of whether there were "very compelling circumstances over and above" the exceptions. By failing to account for that factor, the judge failed to take into account a relevant consideration when reaching his findings.

28. I accept that, in principle, the rehabilitation of the appellant is a factor which is of some relevance. The judge was not irrational to take it into account, and questions of weight are for the judge and not this tribunal. However, while the judge was entitled to ascribe some significance to the appellant's good character since the 2008 conviction, the fact he did so is not capable of curing the defects identified above.

29. Drawing this analysis together, the judge erroneously purported to rely on paragraph 391A of the Immigration Rules as authority for the proposition that a deportation order made (but not acted upon by the appellant or otherwise enforced) over ten years ago carried diminished weight. He failed to direct himself concerning the amount of "due" harshness which can be expected by the family of foreign criminals, by failing to consider section 117C(1) of the 2002 Act, which is applicable in all cases where a court or tribunal has to consider the proportionality for Article 8 purposes of the deportation of a foreign criminal: see section 117A(2). The judge made findings concerning rehabilitation that were open to him, but those findings are not capable of curing the above defects, which fail to reflect the public interest in the deportation of foreign criminals, as set out in section 117C of the 2002 Act, and the regime of exceptions, as contained in section 117C(5) (corresponding to paragraph 399 of the Immigration Rules) and 117C(6) (very compelling circumstances over and above).

30. I consider that these errors of law are such that the decision of the First-tier Tribunal must be set aside. I set the decision aside with no findings of fact preserved. The matter will be reheard in the Upper Tribunal.

Postscript

31. I do not consider anything that Mr Walker said in response to Mr Richardson's submissions, as set out at paragraph 13, above, to call for a different conclusion. Mr Walker's final, considered, position was that *if* the appellant could demonstrate "very compelling circumstances over and above" the exceptions, then the appeal must succeed. I agree: so much is clear from section 117C(6) of the 2002 Act. However, for the reasons set out above, the judge's analysis concerning the presence of "very compelling circumstances" was flawed and must be set aside. His finding that such circumstances were present was not sustainable.

Notice of Decision

The decision of Judge Hussain involved the making of an error of law and is set aside in its entirety.

The matter will be reheard in the Upper Tribunal and will be suitable for rehearing by any judge (including a deputy judge) of the Upper Tribunal.

No anonymity direction is made.

Signed *Stephen H Smith* Date 17 July 2020

Upper Tribunal Judge Stephen Smith