Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22906/2018

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 27th January 2020	**On 6th March 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JDB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mrs H Aboni; Home Office Presenting Officer
For the Respondent: Miss E Rutherford; instructed by Immigration Advisory Services

DECISION AND REASONS

1. An anonymity direction has been made by the First-tier Tribunal. For the avoidance of any doubt that direction continues. Unless and until a Tribunal or Court directs otherwise, JDB is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any

© CROWN COPYRIGHT 2020

member of his family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is JDB. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to JDB as the appellant, and the SSHD as the respondent.

3. The appellant is a national of Sierra Leone. He arrived in the UK on 21st January 2012 with leave to enter as a spouse until February 2014. Between February 2014 and August 2014, he was convicted of four offences including battery, criminal damage and harassment. On 26th February 2015, he was convicted at Nottingham Crown Court of causing grievous bodily harm with intent. He was sentenced on 31st March 2015 to a s37 Hospital Order and a s41 Restriction Order under the Mental Health Act 1983.

4. As a consequence, on 24th October 2018, a decision was made to make a deportation order against the appellant under s5(1) Immigration Act 1971. The appellant made a human rights claim, contending that his deportation would be contrary to Articles 3 and 8 of the ECHR. That claim was refused by the respondent for reasons set out in a decision dated 24th October 2018, served on the appellant on 29th October 2018. The appellant appealed against the refusal of his human rights claim. Following a hearing on 31st January 2019, First-tier Tribunal Judge Thomas allowed the appellant's appeal on Article 8 grounds for reasons set out in a decision promulgated on 21st March 2019.

5. The appellant's immigration and offending history is set out at paragraph [2] of the decision. The Judge summarised the appellant's claim and set out the evidence, including the evidence of the appellant and his partner

at paragraphs [3] to [9] of the decision. At paragraph [21], the judge states:

> "the issue in this appeal is whether there are exceptional or very compelling circumstances in the appellant's family and private life, that outweigh the public interest in deportation…."

6. The judge's findings and conclusions are set out at paragraphs [23] to [42] of her decision. The judge noted, at paragraph [25], that the appellant's mental health condition is not life-threatening and there is evidence of mental health facilities, albeit severely limited, in Sierra Leone. The judge concluded that the circumstances are not such that removal of the appellant to Sierra Leone would be in breach of Article 3 or Article 8 on medical grounds. The judge considered the Article 8 claim on family and private life grounds by reference to the immigration rules and having concluded that paragraphs 399 and 399A do not apply, went on to consider whether there are exceptional or very compelling circumstances in the appellant's family and private life, that outweigh the public interest in deportation

The appeal before me

7. The respondent claims the judge erred in her conclusion, at paragraph [34] of her decision that the requirements of paragraph 399A(c) are met. That is, there would be very significant obstacles to his integration into the country to which it is proposed he is deported. Furthermore, the judge erred in failing to take into account the established case law in respect of the threshold for establishing "very significant obstacles", and in reaching the decision, failed to have regard to the alternative medication that would be available to the appellant in Sierra Leone to manage his mental health.

8. Permission to appeal was granted by First-tier Tribunal Judge Pedro on 15th April 2019 and the matter comes before me to determine whether

the decision of the First-tier Tribunal is vitiated by a material error of law, and if so, to remake the decision.

9. Mrs Aboni adopted the grounds of appeal and submits that having found the appellant cannot meet the exceptions set out in paragraphs 399 and 399A of the immigration rules and s117C(4) and (5) of the 2002 Act, the judge erred in finding that the public interest in deportation is outweighed for the reasons set out in paragraph [42] of her decision and is disproportionate. Mrs Abhoni submits the judge found at paragraph [30] that it would not be unduly harsh for the appellant's wife to leave her family and life in the UK, and, there are no insurmountable obstacles or very significant difficulties in family life between the appellant and his wife continuing outside the UK. However, at paragraph [41], the Judge proceeds upon the premise that if removed, the appellant will be alone in Sierra Leone, without family support or a home. She submits that in reaching her decision, the judge failed to consider the fact that the appellant had received treatment in Sierra Leone in the past and the judge did not consider the availability of treatment in Sierra Leone. She submits the judge failed to give adequate reasons for allowing the appeal.

10. In reply, Ms Rutherford submits the reasons given by the judge for allowing the appeal are entirely adequate and rational. She submits the judge had in mind throughout, the strong public interest in the deportation of foreign criminals and the judge's reasons for allowing the appeal are to be found at paragraphs [35] to [42]. At paragraph [39], the judge recognised that the reality is that given her responsibility for her grandchildren, the appellant's partner would not leave the UK to accompany the appellant to Sierra Leone. The availability of treatment was considered by the judge and at [25], the judge noted that there is evidence of some medical and mental health facilities in Sierra Leone, albeit on a severely limited basis. The evidence before the Tribunal of previous treatment in Sierra Leone was referred to in a letter from Dr

Obinwa, a Consultant Forensic Psychiatrist, who referred to a medical discharge summary dated 21 September 2018. It was said that throughout his time in Sierra Leone, the appellant was treated by *"traditional spiritual medicine in the form of prayer and fasting"*. The evidence was that in 2010, the appellant was treated by Dr Nahim *(who is now deceased)* who worked in a local church. The treatment included the first generation antipsychotic Largactil (*Chlorprozamine)* for about three months at an unknown dose.

Discussion

11. The judge noted that in assessing the claim by the appellant that his deportation would be contrary to the United Kingdom's obligations under Article 8 ECHR, she had to consider whether paragraphs 399 or 399A of the immigration rules apply.

12. The judge noted, at paragraph [24], that the appellant is in a genuine and subsisting relationship with his partner. The judge was impressed by the evidence of the appellant's partner, and her care and commitment to the appellant. The judge noted the appellant's partner has three young grandchildren in her care and accepted her evidence that her two sons and adult daughter are living abroad. The judge accepted that although the appellant has to reside in supported accommodation, he spends the daytime hours at his family home, and he is involved in the day-to-day care of his partner's grandchildren.

13. At paragraph [28] of the decision, the judge found that the requirements of paragraph 399(b)(i) of the immigration rules are met. That is, the relationship was formed at a time when the appellant was in the UK lawfully. Paragraph 399(b)(i) in fact required the judge to consider whether the relationship was formed at a time when the appellant was in the UK lawfully and his immigration status was not precarious. The judge did not consider that additional requirement, but that is immaterial because the judge found, at paragraph [30], that although it would be

difficult for the appellant's wife to leave her family and life in the UK, it would not be unduly harsh for her to do so. The judge concluded there are "no insurmountable obstacles" to the family life between the appellant and his partner continuing outside the UK. Furthermore, at paragraph [31], the judge found it would not be unduly harsh for the appellant's partner to remain in the UK without the appellant. The judge found the requirements of paragraph 399(b)(iii) are not met.

14. Insofar as private life is concerned, the judge found, at [32], that the appellant has not been lawfully resident in the UK for most of his life and therefore paragraph 399A(a) does not apply. The judge found the appellant is socially and culturally integrated in the UK for the reasons set out at paragraph [33] and that there would be very significant obstacles to his integration into Sierra Leone, for the reasons set out at paragraph [34]. I accept, as the respondent submits, there is a high threshold, and that the test 'very significant obstacles' directs a self-evidently elevated threshold such that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even where multiplied, will generally be insufficient. Here, the judge considered the matters that weigh in favour of, and against the appellant. The judge was entitled to take into account her finding that the appellant has no close relatives or other form of support in Sierra Leone, and, in the particular circumstances, it is extremely unlikely that the appellant would be able to support himself. The judge noted that without support, the appellant is unlikely to be able to access any available mental health care or medication and his condition would relapse. In any event, whether or not there would be very significant obstacles to his integration into Sierra Leone, was immaterial to the outcome of the appeal. The appellant could not benefit from paragraph 399A of the immigration rules because all three requirements were not met, and the appeal was not allowed because paragraph 399A applied.

15. It is uncontroversial that the deportation of criminals is in the public interest. Section 117C(2) of the 2002 Act confirms that the more serious the offence committed by the foreign criminal, the greater is the public interest in deportation of the criminal. At paragraph [36], the judge acknowledged the public interest in the deportation of foreign criminals is high and noted the offence committed by the appellant caused serious harm to a police officer, and, that increases the weight of the public interest. At paragraph [37], the judge stated:

> "It is accepted the Appellant's criminal activity was caused by his mental illness. He has responded well to medical treatment and has cooperated fully with his medical carers and his medication plan. The authorities no longer consider him a risk to the public or to his family, as demonstrated by him being permitted to visit his wife, her children and his home daily, and to undertake voluntary work. In MM (Zimbabwe) v SSHD [2012] EWCA Civ 279...the CA said that when considering the risk to the public of the claimant's continued presence in the UK, it is of great importance to assess the extent to which continued medication and support would remove the risk of further offending. Although the risk could not be entirely removed, if the risk would be minimal, that was a powerful factor in considering the proportionality of the deportation order. In the Appellant's case, whilst there is no official assessment of current risk, it is reasonable to conclude from the medical evidence, the progress report of Mr Tills and the appellant's current circumstances, that providing he takes prescribed medication, as he is doing, he is unlikely to reoffend or cause harm."

16. Applying s117C(3) of the 2002 Act, the public interest required the appellant's deportation unless Exceptions 1 or 2 set out in s.117C(4) and (5) apply. It is uncontroversial that the appellant was unable to establish that Exceptions 1 or 2 apply, essentially for the reasons given by the judge for concluding that paragraphs 399 and 399A of the immigration rules do not apply.

17. In NA (Pakistan) -v- SSHD [2016] EWCA Civ 662, Lord Justice Jackson held that the fall back protection set out in s117C(6) also avails those who fall outside Exceptions 1 and 2 and that on a proper construction of section 117C(3), the public interest requires the person's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

As to the meaning of “very compelling circumstances” over and above those described in Exceptions 1 and 2, Lord Justice Jackson said:

> “28. … The new para. 398 uses the same language as section 117C(6). It refers to “very compelling circumstances, over and above those described in paragraphs 399 and 399A.” Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C , but they do so in greater detail.
>
> 29. In our view, the reasoning of the Court of Appeal in JZ (Zambia) applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that “there are very compelling circumstances, over and above those described in Exceptions 1 and 2”. As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

18. Whether there are “very compelling circumstances” is a demanding test, but nonetheless requires a wide-ranging assessment, so as to ensure that Part 5A produces a result compatible with Article 8.

19. At paragraph [23], the Judge states:

> “The evidence shows this Appellant was mentally unwell with paranoid schizophrenia at the time of his offending…. The evidence suggests the likelihood that all offending, which was committed in a 12 months period occurred when the appellant was mentally unwell, undiagnosed and untreated. The appellant remained in Kedleston Low Security Unit, Kingsway Hospital Site from 26 September 2016 until 11 July 2018 when he was granted conditional release to live at St Chads Supported Housing Ltd accommodation and to engage in psychiatric supervision and accept prescribed medication. The evidence of Dr Chinwe Obinwa and Mathew Till confirm the Appellant’s extensive cooperation and recovery following release to date and his ongoing progress with support. He is now permitted daily home leave and does voluntary work. There has been no further offending.”

20. The Judge found, at [40], that the appellant’s relationship with his family in the UK is real and very strong, and one from which he receives emotional, physical and social support. The judge believed it to be

essential to continued improvement in the appellant's mental health. The judge stated, at [41]:

> "If removed, the appellant will be alone in Sierra Leone, without family support or a home. It is unlikely without support, the appellant will be able to secure employment to access accommodation, or any form of medical treatment that may be available. The appellant is assessed as needing medication and practical support from mental health carers. The background information is that there are is no such support available in Sierra Leone. It is therefore highly likely in these circumstances the appellant could be homeless, destitute and suffering a serious mental illness with no prospect of recovery. He will inevitably relapse and is highly likely to be exposed to stigmatisation and type of dire circumstances facing those with mental health illness as detailed in the background information, in a poor country virtually devoid of such humanitarian care. Indeed, I have found at paragraph 34 above, for these reasons, there are very significant obstacles to his integration in Sierra Leone. In the UK, where the appellant has real family and receives essential support from the authorities and family, his mental health status controlled, and the risk of reoffending is low."

21. The judge concluded at paragraph [42] as follows:

> "Considering the case in the round, I find the strong public interest in the deportation of foreign offenders who commit serious offences as in this Appellant's case, is outweighed because the appellant (a) is integrated in the UK and has lived here lawfully; (b) the offending resulted from the appellant's mental illness, namely paranoid schizophrenia; (c) that illness is now controlled, so the risk of reoffending is low; (d) the appellant has no family or other support in Sierra Leone; (e) without support it is extremely likely he will not have access to medical treatment or care, and will suffer a relapse; and (f) he will be deprived of his established family life in the UK and of the availability to forge a private life in Sierra Leone. Cumulatively these factors constitute very compelling circumstances under paragraph 398 of the Rules and section 117C(6) of the 2002 Act, making the decision to remove the appellant disproportionate and in breach of Article 8 ECHR."

22. In the final analysis, the First-tier Tribunal Judge again reminded herself of the strong public interest in the deportation of foreign offenders who commit serious offences but found that on the particular facts, the strong public interest is outweighed for the reasons set out in paragraph [42]. The respondent does not challenge the conclusion that there are exceptional or very compelling circumstances in the appellant's family and private life, that outweigh the public interest in deportation. If the

Tribunal judge applied the correct test, and that resulted in an arguably generous conclusion, it does not mean that it was erroneous in law.

23. In my judgement the decision of the First-tier Tribunal Judge was one that was open to her on the evidence. The findings and conclusions reached by the FtT judge were neither irrational nor unreasonable in the *Wednesbury* sense. It follows that in my judgement there is no error of law and the appeal is dismissed.

Decision:

24. The appeal is dismissed. The decision of First-tier Tribunal Judge Thomas stands.

Signed Date 28th February 2020

Upper Tribunal Judge Mandalia