**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Barry (conduct of hearing) [2015] UKUT 00541 (IAC)

**THE IMMIGRATION ACTS**

| **Heard at Field House, London** | **Determination Promulgated** |
|---|---|
| **On 15 September 2015** | |
| | ………………………………… |

**Before**

**The President, The Hon. Mr Justice McCloskey**
**Upper Tribunal Judge Reeds**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**THIERNO BARRY**

Respondent

**Representation:**

Appellant: Mr S Walker, Senior Office Home Presenting Officer
Respondent: Ms F Shaw, of Counsel, instructed by Charles Allotey & Co Solicitors

*In appropriate cases, for example appeals in which the grounds and arguments involve an unmeritorious challenge to the rationality of the decision of the FtT, Upper Tribunal Judges, bearing in mind the overriding objective, should not hesitate to determine the appeal without hearing from the Respondent's representative.*

**DECISION AND REASONS**

**Framework of this appeal**

1. The Respondent is a national of Guinea, now aged 31 years. On 18 February 2011, following his conviction in respect of the offence of wounding with intent to do

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grievous bodily harm, which attracted a sentence of three years imprisonment, he received the customary "minded to deport" notice from the Secretary of State for the Home Department (the "*Secretary of State*") inviting him to make his case setting out why he fell within any of the exceptions to automatic deportation under section 32(5) of the UK Borders Act 2007. The Respondent replied accordingly. This appeal has its origins in the ensuing decision on behalf of the Secretary of State, dated 06 June 2013, determining that the Respondent must be deported from the United Kingdom.

2. On appeal to the First-tier Tribunal (the "*FtT*"), the Respondent succeeded. The appeal was allowed under Article 8 ECHR. This decision and its underlying reasoning appear in the following passages (wherein the present nomenclature is reversed):

> "*Having weighed up all the relevant factors before us, we conclude that there exist exceptional circumstances that out weigh the strong public interest in deportation. In short terms … the harsh consequences of deportation are not justified in this particular case. A close family unit comprising of* [sic] *the Appellant, his wife and their two sons would be split up, very much to the latter's* [sic] *best interests. They will loose* [sic] *their father for at least ten years in practice and of course through no fault of their own. Their mother will lose her husband and she will be forced into single-*[sic] *parenthood. The Appellant committed a 'one-off' offence, the seriousness of which is mitigated by the facts of his case. There is a low risk of him ever doing anything similar again.*"

Followed by:

> "*The combination of these factors goes to outweigh what are obviously the very weighty matters resting in the Respondent's side of the scales.*"

Having recognised that displacement of the public interest in cases of this *genre* "*will inevitably be rare*", the Tribunal continues:

> "*We are clear that this case is an example of* ***a very strong case,*** *in all of the circumstances and relative to many of the appeals seen by the Tribunal and the higher courts. It does not succeed by a great distance; but that is perhaps never going to be the case in light of the current statutory and jurisprudential landscape.*"

[Emphasis added]

Giving rise to the omnibus conclusion:

> "*The appeal is allowed on the basis that there are exceptional circumstances under paragraph 398 of the Immigration Rules and that the Appellant's deportation would be a disproportionate interference with his family life.*"

3. We construe the grant of permission to appeal to the Upper Tribunal as identifying the following arguable errors of law in the decision of the FtT:

(a) Whereas the FtT concluded that there were factors other than those in paragraphs 399 and 399A sufficient to outweigh the public interest in

deportation, it arguably erred in law "*…. in that the circumstances were not, properly understood, exceptional at all, those being characteristic of what would be experienced by most families facing being broken up as a consequence of one parent becoming a foreign criminal*".

(b) The next permitted ground is self-explanatory:

> "*Also, the emphasis of* [on?] *the low risk of reoffending arguably indicates that the Judge had lost sight of the fact that the public interest in deportation arises because the appellant is a foreign criminal, which he is because of a single act of offending and that public interest is not diminished because he may not reoffend in the future.*"

(c) The permission Judge then highlighted the following passage in the FtT's determination:

> "*Taking everything set out above into account, we find that whilst the offence was indeed serious, and while there can be no excuse for the violent and intentional assault, there are in this case significant mitigating factors in the Appellant's favour (in particular his mental health at the time) that render the incident less serious than it otherwise might have been.*"

This prompted the permission Judge to state:

> "*A similarly flawed approach is arguably apparent in* [this] *reasoning which sits uncomfortably with the legislative objective of characterising the offences as serious such as to justify deportation.*"

Permission to appeal was granted accordingly.

**<u>Consideration and Conclusions</u>**

4. We have set out the terms of the grant of permission quite fully, mainly for the purpose of highlighting that it exceeds by some margin the Secretary of State's grounds of appeal, but also because of its questionable exclusive concentration on one side of the balancing scales only. We contrast the grant of permission with the following key passages in the grounds:

> "*The Secretary of State submits that the public interest has not been properly balanced against the Appellant's circumstances …..*
>
> *The Judge has placed a great deal of weight on his finding that there is a low risk of re-offending in relation to the Appellant. However, risk of re-offending is not the only factor to be considered ….*
>
> *It is submitted that while the Judge has made reference to the other facets of the public interest, they have not been properly considered and weighed in the balance against the Appellant's circumstances …. The Appellant's circumstances are not exceptional so as to render the Appellant's deportation disproportionate.*"

It is appropriate to highlight the adjective "*properly*" in the above excerpts. We further draw attention to the fact that while the grounds of appeal contain the sweeping contention that the FtT's assessment of the public interest is "*fundamentally flawed*", this bare statement is followed by no particulars or elaboration, giving rise to a manifest deficiency in content.

5. To summarise, the essential thrust of the grounds of appeal is to complain about the <u>weight</u> which the FtT attributed to various factors. This analysis was confirmed by the presentation of the appeal. Mr Walker, on behalf of the Secretary of State, intimated that the main focus of the challenge is [115] of the determination of the FtT. We reproduce this in its entirety:

> "*Taking everything set out above into account, we find that whilst the offence was indeed serious, and whilst there can be no excuse for the violent and intentional assault, there are in this case significant mitigating factors in the Appellant's favour (in particular his mental health at the time) that render the incident less serious than it might otherwise have been.*"

Within the immediately preceding paragraphs the FtT noted the psychiatric evidence to which the panel proposed to attach "*significant weight*", the objective fact that the Respondent was the subject of a mental health assessment immediately following his arrest and the Respondent's genuine remorse. The panel also noted the substantial credit which the sentencing judge accorded to the Respondent's guilty plea, his previous good character and the selection of a sentence belonging to the lower levels of the relevant guidelines. Furthermore, the panel, having described the index offence in a little detail, commented that it was "*clearly a serious violent act*". In short, [115] of the determination must be considered in its full context.

6. In his submissions, Mr Walker was disposed to recognise the panel's evaluation of the Respondent's offending as plainly serious. Reflecting and confirming our analysis of the grounds of appeal, Mr Walker submitted that the Judge should have given greater weight to the seriousness of the Respondent's offending and less weight to the mitigating factors. There is no suggestion that the panel misdirected itself in law. Equally important, Mr Walker concurred with the suggestion that the panel had left nothing material out of account. Accordingly, this is an unvarnished irrationality challenge, giving rise to the elevated threshold associated therewith.

7. At the conclusion of Mr Walker's submissions, given the analysis above, we did not consider it necessary to hear from the Respondent's representative. We pronounced ourselves satisfied, for the reasons elaborated above, that no error of law had been demonstrated. In circumstances where all material facts and considerations were identified (indisputably so), the duty imposed on the FtT was to attribute to these such weight as, within the extensive bounds of rationality, it considered appropriate and in harmony with the statutory regime. We are satisfied that this duty was duly performed. The decision of the FtT neither lapsed into the prohibited territory of irrationality nor defied the statutory imperatives.

8. By way of guidance we would add the following. In appropriate cases, for example appeals in which the grounds and arguments involve an unmeritorious challenge to

the rationality of the decision of the FtT, Upper Tribunal Judges, bearing in mind the overriding objective, should not hesitate to determine the appeal without hearing from the Respondent's representative.

**Decision**

9. Accordingly, we dismiss the appeal and affirm the decision of the FtT.

Bernard McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 22 September 2015