Upper Tribunal
(Immigration and Asylum Chamber)

OLO and Others (para 398 - “foreign criminal”) [2016] UKUT 00056 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 November 2015	

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Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLO – FIRST APPELLANT

DBO – SECOND APPELLANT

BEO – THIRD APPELLANT

AOO – FOURTH APPELLANT

(ANONYMITY ORDER MADE)

Respondents

Representation :

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

For the Respondents: Not represented – the first appellant in person

A person sentenced to a term of 12 months imprisonment made up of consecutive terms is not a ‘foreign criminal’ within the meaning of the deportation provisions of the Immigration Rules and is not therefore subject to paragraph 398 of those Rules.

DECISION AND REASONS

1.
The appellant in these proceedings is the Secretary of State . However, for clarity I refer to the parties as they were before the First-tier Tribunal .

2.

T he appellants are citizens of Nigeria . The first appellant is the mother of the remaining appellants. She was born on 14 January 1966. The second appellant was born on 16 Janu ary 2005, the third appellant on 1 February 2001 and t he fourth appellant on 22 October 1998.

3.
The appellants come before the Tribunal because of the first appellant's convictions for two offences in connection with possession of false documents with intent. She was convicted on 20 January 2010. The Court of Appeal reduced her sentence from one of 20 months' imprisonment to a total of 12 months' imprisonment, consisting of two consecutive sentences of six months' imprisonment.

4.
A decision was made to deport the first appellant, and the remaining appellants as her family members, on 17 June 2014. The decision was made under Section 3(5) (a) of the Immigration Act 1971 on the basis that the first appellant's deportation is conducive to the public good because of her offending.

5.
Her appeal came before First-tier Tribunal Judge A . W . Khan and Mrs S Singer, a non-legal member, on 2 December 2014. The Tribunal concluded that because the respondent's decision did not consider paragraphs 398 and 399 of the Immigration Rules, the decision was not in accordance with the law. The matter was 'remitted' to the Secretary of State for fresh decisions to be made.

6.
An associated asylum claim by the first appellant was not p u rsu e d.

7.
The short point advanced on appeal to the Upper Tribunal on behalf of the Secretary of State is that the First-tier Tribunal erred in law in concluding that paragraphs 398 and 399 applied. It is asserted that the first a ppellant falls outside the scope of those paragraphs because they are concerned with a single period of imprisonment and the appellant's sentence consisted of two consecutive periods of six months' imprisonment.

8.
The First-tier Tribunal noted that the respondent's decision makes no reference to paragraphs 398 or 399 of the Rules. Wit h reference to p aragraph 398, the Tribunal observed that paragraph 398(b) applies where a person has 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 mo nths. It then referred to paragraph 399(a) which concerns genuine and subsisting relationships with a child under the age of 18 years who is in the UK . No part of the respondent's decision mentioned those paragraphs of the Immigration Rules.

9.
From [7] of the determination it is evident that the Presenting Officer at the hearing before the First-tier Tribunal rai sed the question of the absence of mention of paragraphs 3 98 and 399 from any of the decisions in respect of any of the appellants . It was apparently said on behalf of the respondent that the decisions were therefore "unsustainable as a matter of law". The determination records that the Tribunal was invited to find that the decisions were therefore not in accordance with the law and to remit the matter to the Secretary of State for fresh decisions to be made. That proposition was assented to on behalf of the appellants.

10.
In the circumstances, this is what the Tribunal decided to do, conc luding that the decision was not in accordance with the law for having failed to consider paragraphs 398 and 399 of the Immigration Rules. The appeal was allowed to that limited extent only.

11.
Before me Mr Avery submitted that there was no requirement for the respondent to consider those paragraphs of the Immigration Rules because they were not applicable, given that the first appellant received consecutive sentences of six months' imprisonment, which did not bring her within par agraph 398. I was referred to s ection 117D(4)(b) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") to the effect that a person sentenced to consecutive sentences did not come within the definition of a foreign criminal.

12.
Mr Avery informed me that as far as he was aware there was no definition of "foreign criminal" within the Rules. It was accepted that the First-tier Tribunal may have been misled by what was said on behalf of the respondent at the hearing but he contended that there was nevertheless an error of law in its decision . It was accepted that in terms of 398(c) it was not suggested that the appellant's offending had caused serious harm or that she is a persistent offender who shows a particular disregard for the law. Therefore, that would not have been a basis for her coming within the terms of paragraph 398.

13.
Because the appellants were not legally represented before me, I did not have the bene fit of any legal submissions on their behalf. The first appellant, who appeared in person, understandably did not advance any argument before me.

14.
It is apparent that none of the decisions in relation to any of these appellants contains a consideration of paragraphs 398 and 399. The Immigration Rules do not contain any definition of what is a "foreign criminal" for the purposes of those Rules.

15.
The issue before me in terms of how the first appel lant's sentence of imprisonment of two consecutive terms of six months is to be treated, had in fact earlier been considered in her case b y the Upper Tribunal at a hearing on 27 September 2011. A pa nel consisting of Mr C M G Ockel ton, Vice President and Senior Immigration Judge Jordan considered the issue with reference to the automatic deportation provisions of the UK Borders Act 2007 ("the 2007 Act") . At [12] of its decision, the Tribunal stated as follows:

"Unfortunately s 38(1)(b) uses two different ways of referring to the period in question. "At least 12 months" is used as well as "more than 12 months". As we read it a person sentenced to a term of imprisonment of at least 12 months is caught by the automatic deportation provisions, even if the sentence is made up of consecutive sentences, if it amounts to exactly 12 months. The reason for that is that the removal of the reference to a sentence of that type by the words "does not include" applies only if the sentence is in aggregate more than 12 months.

...

17. The position is therefore that a person sentenced to a period of imprisonment of exactly 12 months is liable to automatic deportation under s 32(2) of the 2007 Act even if the sentence of exactly 12 months is made up of two or more consecutive sentences."

16.
After referring to the Immigration Directorates Instructions, which the y concluded made the position even more difficult, they found that the appellant did come within the terms of the automatic deportation provisions of the 2007 Act and accordingly dismiss ed the appeal.

17.
In doing so they express ed the view that it would be quite wrong for the appellant to be deported in accordance with the then deportation order until the Secretary of State had given formal consideration firstly , to amending the policy so that it properly ref lected the terms of the statute and secondly , to considering whether the statute should be amended in order to reflect what appears to be the Secretary of State 's intention.

18.
Subsequent to that decision the respondent made the decision which is the subject of the appeal with which I am concerned , notably not being a decision under the automatic deportation provisions of the 2007 Act .

19.
Although a p anel of the Upper Tribunal therefore concluded (in an unreported decision) that the appellant was subject to automatic deportation, and indeed that any new decision made by the Secretary of State would be bound to be the same , the assessment of whether the first appellant's consecu tive terms of imprisonment brought her within the auto matic deportation provisions was not concerned with the Immigration Rules relevant to the appeal before me .

20.
The amendments to the 2002 Act at s.117A-D were brought about by section 19 of the Immigration Act 2014 ("the 2014 Act") . S.117D(4) (b) of the 2002 Act provides that references to a person who has been sentenced to a period of imprisonment of a certain length of time do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time. It is clear therefore, that the appellant is not to be defined as a "foreign criminal" under s.117C of the 2002 Act because of s .117D(4)(b) . The appellant's consecutive sentences exclude her from the definition of foreign criminal.

21.
That is not to say however, that she is not subject to the considerations set out at s.117B. The terms of s.117A make it clear that she is, notwithstanding that she is not to be regarded as a "foreign criminal".

22.
There is no definition of foreign criminal in the Immigration Rules. Paragraph 6 does define what is meant by "a period of imprisonment" within the Immigration Rules, stating that it has the same meaning as set out in s .38(2) of the 2007 Act. That however , does not assist in terms of whether the appellant is a foreign criminal for the purposes of the Rules , s.38(2) referring to how suspended sentences are to be treated and describing the types of detention that are within the definition of imprisonment.

23.
The Explanatory Notes to the 2014 Act at [21] (materially) state with reference to the deportation Rules as follows:

“The Act gives the force of primary legislation to the principles reflected in those rules by requiring a court or tribunal, when determining whether a decision is in breach of Article 8 of the ECHR, to have regard to the public interest considerations as set out in the Act.”

24.
That extract from the Explanatory Notes fortifies the view that the meaning of “foreign criminal” within the Rules should be considered consistently with the definition in the 2002 Act.

25.
A398 of the Rule s states as follows:

“A398. These Rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom ’s obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.”

26.
There then follows the provisions of the relevant deportation Rules , including 398 and 399 , which apply to foreign criminals. However, g iven that the first appellant is not a foreign criminal for the purposes of the 2002 Act , and given that the meaning of the phrase ‘foreign criminal’ is to be construed consistently with the definition in the 2002 Act, paragraphs 398 and 399 have no application to her . Accordingly, the respondent was not required to consider those Rules in her decision .

27.
It follows from that that the First-tier Tribunal was wrong to conclude otherwise. Its decision finding that the respondent’s decision was not in accordance with the law is therefore in error.

28.
I set aside the decision of the First-tier Tribunal . It is appropriate for the matter to be remitted to the First-tier Tribunal for a full determination of the appellant’s appeal with reference to Article 8 of the ECHR, which is the basis upon which her appeal is advanced, the asylum ground having been abandoned. No findings of fact were made by the First-tier Tribunal, and there are therefore no preserved findings.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing before a differently constituted panel, or by a single judge.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the a ppellant s are granted anonymity in order to preserve the anonymity of the minor appellants . No report of these proceedings shall dir ectly or indirectly identify them or any member of their family. This direction applies both to the a ppellant s

and to the r espondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek 14/01/16