Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00290/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9th October 2013	**On 26th November 2013**

Before
UPPER TRIBUNAL JUDGE A JORDAN
UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR A R G
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Mr A Vaughan

DETERMINATION AND REASONS

1. The Secretary of State appeals against the determination of the First-tier Tribunal (First-tier Tribunal Judge Colvin and Mr C P O'Brian) promulgated on 23rd July 2013 allowing the appeal of ARG the decision of the Secretary of State to a deportation order against him. The appeal was allowed on Article 8 grounds.

2. Mr ARG who was born on 9th March 1983 is a citizen of Jamaica. Although he is the Respondent in the appeal before the Upper Tribunal, for ease of reference we shall refer to him as "the Appellant" and to the Secretary of State as "the Respondent". The facts with which we are concerned in this appeal are well-known to the parties and as it appeared to us, there was no great dispute about them, we consider it sufficient for this judgment, to set out the following summary.

3. The Appellant arrived in the United Kingdom on 6th December 1999 aged 16 years, to join his mother who was living here with the Appellant's step-father. He was granted indefinite leave to remain in July 2000. He lived with his mother and step-father and regarded his step-father as his "real" father. His natural father had died when he was a baby.

4. The Appellant attended college and started full-time work in 2000. He had several jobs including being promoted as a manager in Cineworld, assistant manager at Footlockers and manager of Sports Direct in Greenford. In 2000 he met his wife Mrs CG and they moved in together in 2001. They married in January 2003 and in July 2004 their son was born. By this time the Appellant had secured employment as manager of Sports Direct in Greenford which was a good position with good salary and career prospects. However he resigned from that position because the commuting time and long hours meant he could not spend time with his son and also he wanted to support his mother in caring for his step-father who had been diagnosed with cancer.

5. On 13th June 2002 the Appellant received a conviction at South West Magistrates Court for possessing a knife in a pubic place. His explanation for that offence is that he was moving from his mother's house to set up home with Mrs CG and had taken a kitchen knife to his new house, when he was arrested in Tooting. The police were arresting people randomly as they were looking for drugs. He told the police that he had a kitchen knife in his pocket. He was subsequently charged and received a conditional discharge of twelve months and a fine of £150.

6. The next significant event in the Appellant's life occurred in 2009. His brother Mr LG had come to the United Kingdom from Jamaica and failed to regularise his immigration status here so he was removed back to Jamaica in 2007. The Appellant supported Mr LG by sending money but in May 2009 he was told on the phone by a friend that his brother's body had been found. He was shot in the head. Mr LG had been due to return to the UK to marry the mother of his two children who are present here.

7. In 2011 the Appellant was working for Millets as a manager in their branch in Orpington Kent when his step-father died. The Appellant became depressed, resigned from his job and lived off his savings.

8. On 5th October 2011 at Kingston-Upon-Thames Crown Court, the Appellant was convicted of three counts of robbery and sentenced to a term of imprisonment of

three years four months. Whilst the Appellant was in prison his wife gave birth to their second child Miss CG. At this time he and his wife separated.

9. On 20th March 2012 the Respondent wrote to the Appellant asking him to give reasons why he should not be deported. The Appellant claimed that the decision to deport him would be a breach of rights under Article 8 ECHR. Having considered those representations the Respondent made a deportation order on 24th January 2013. The deportation order was made by virtue of Section 32(5) of the UK Borders Act 2007 (Automatic deport) and the Appellant's Article 8 claim was refused under paragraphs 399/399A of the Immigration Rules. The Appellant appealed that decision to the First-tier Tribunal Panel.

The Decision of the First-tier Tribunal and Submissions Before Us

10. The First-tier Tribunal heard oral evidence from the Appellant and his family members - his mother and two sisters. They took account of a written statement from his wife Mrs CG who by this time had separated from him. In addition they had before them medical evidence outlining the Appellant's history of depression together with a report from an Independent Social Worker concerning the interaction between the Appellant and his children, in particular his eldest child Master AG.

11. This was a large body of evidence before the Tribunal which included not only the evidence outlined above but also the Respondent's notice of deportation letter which set out the following reasons for making the deportation order.

    (a) The sentencing court's view of the seriousness of the offence as reflected in the sentence imposed of three years four months imprisonment and the effect of the type of crime of robbery on the wider community.

    (b) The requirements of paragraphs 399 and 399A of the Immigration Rules do not apply in this case.

    (c) As regards Article 8 it is considered that the Appellant has not been absent from Jamaica for a period considered significant enough as to render his familiarity with the country irretrievable nor that he has no ties to that country. There is no reason why the Appellant could not utilise his skills learned through education and employment in the UK in Jamaica.

    (d) Consideration has been given to the Appellant's submission that he has strong family ties in the UK. There is no evidence that his son and daughter have suffered adversely or experienced significant hardship whilst he was in prison or that the children could not receive appropriate care and support from their mother after his deportation.

    (e) The Appellant will be able contact with his sisters and mother from Jamaica via letters telephone calls emails and the Internet. In addition there is nothing to prevent them from visiting him in Jamaica if they wished.

12. In their findings of fact the Panel at paragraph 42 said, *"The presumption therefore is that the public interest requires deportation of the Appellant and that under the Immigration Rules it will only be in exceptional circumstances that the public interest is outweighed by the obligations under the Human Rights Convention".*

13. They followed that up in paragraph 42 by saying *"it is accepted by both parties in this case that the Appellant does not come within the new Immigration Rules that reflect Article 8 ECHR considerations".*

14. We then come to what we consider the central question in this appeal. In paragraph 52 the Panel states, *"The question therefore is whether there are countervailing matters that outweigh these best interests of the children. Clearly the serious nature of the robbery offences in which the Appellant was involved and for which the statutory presumption means that he should be deported in the wider public interest are to be given significant weight. We have set out above our views on this".*

15. Mr Wilding's submissions, and one that we are bound to agree with, is that it is hard to see where the Panel has "set out above our views on this". He accepted that they had come to a firm finding that the Appellant is at "low risk of reoffending" but their error as far as that is concerned, was to disproportionately focus on that one aspect. Nowhere in the determination had they indicated that they had engaged with the other limbs of the Secretary of State's public interest policy encompassed in;

    (a) Society's revulsion against violent crime.

    (b) The need to deter others. **AM v SSHD [2012] EWCA Civ 1634**

16. Mr Wilding submitted that the Panel had further erred in their assessment of the best interests of the Appellant's children in particular Master AG. What the Panel had overemphasised, was the effect on the Appellant's children, should their father be deported. Their analysis on this point was somewhat one-sided. They had paid regard to the opinion of the Independent Social Worker but had not taken into account evidence that Master AG's primary carer is his mother and that she will remain so. In any event the Appellant does not live in the same household as Master AG, his younger sister and their mother since the relationship with Mrs CG has broken down. Further Master AG suffered no lasting harm during the time his father was absent in prison. It is accepted by all parties that the bond between the Appellant and Miss CG is not developed through force of circumstances, to the same extent.

17. Mr Vaughan on behalf of the Appellant relied on his skeleton argument and submitted on the first point the Panel clearly did take into account the issue of revulsion against violent crime and the need to deter offences of violence. He said they mention this in paragraph 52 and therefore is can be inferred they accorded significant weight to it; and to the seriousness of the offences.

18. He submitted that society's disapproval of serious offending and the prevention and deterrence of crime did not have to be expressly spelt out in a determination since it was self-evident that the purpose of Section 32 meant that foreign criminals should

ordinarily be deported. He said that the Panel's determination in any event can be construed showing that they took into account the public interest factors. One of his stronger points was that the Secretary of State in her reasons for deportation letter, did not specifically rely on prevention, deterrence and revulsion. Therefore she cannot complain now if those factors were not expressly taken into account by the Tribunal.

19. So far as the Panel placed inordinate weight on the low risk of reoffending, Mr Vaughan submitted, they applied the correct test and took into account a whole host of relevant points. The Respondent's reliance on this ground is no more than a perversity point, which is not made out, since the Panel did not place decisive importance on the risk of reoffending.

20. Concerning the Panel's findings on the best interests of the children, he drew our attention to the Respondent's stance in her reasons for deportation letter which reads;

> *"Consideration has been given to your submissions that you have very strong family ties in the United Kingdom. There is no evidence that your son and daughter have suffered adversely or experienced significant hardship whilst you were in prison or that your children could not receive appropriate care and support from their mother after your deportation".*

He submitted that given the evidence of the Independent Social Worker, the Panel's conclusions were entirely correct and Mr Wilding's submission on this point amounted to no more than a disagreement with those findings.

21. Having provided both representatives with a copy of **MF (Nigeria) [2013] EWCA Civ 192**, Mr Vaughan further submitted that whilst he accepted that paragraph 43 of the Panel's determination stated, *"It is accepted by both parties in this case that the Appellant does not come within the new Immigration Rules that reflect Article 8 ECHR considerations"*, it is clear nevertheless that the Appellant was entitled to some form of Article 8 consideration. Whether that consideration was given under the new Immigration Rules (as it ought to have been) or assessed in the way they did under the **Razgar** test, there were clear findings that to remove this Appellant would be disproportionate. Therefore it could be inferred that despite the apparent concession made in paragraph 43, deportation would be disproportionate because this Appellant's circumstances amounted to exceptional ones and the test within the Rules itself was met.

22. He expanded this by saying, to remove the Appellant would be disproportionate as the following factors outweighed removal.

    (a) It had been found there was a low risk of reoffending.

    (b) The Appellant had been resident in the UK for a long time. **Samaroo [2001] INLR**

(c) The best interests of the children have to be factored in, especially the strong bond with Master AG. Master AG is a British citizen and it would not be reasonable to expect him and his immediate family to relocate to Jamaica. There was little prospect of the children visiting in the future.

Error of Law Finding

23. Having considered the representatives' submissions we were satisfied that the First-tier Tribunal Panel had erred in its assessment of whether the Appellant's claim amounted to exceptional circumstances capable of outweighing the public interest in deportation.

24. This is an automatic deportation appeal. The UK Borders Act 2007 mandates that in certain circumstances the deportation of a foreign criminal is deemed to be conducive to the public good and a deportation order should be made in respect of a foreign criminal. The Secretary of State has a duty to make a deportation order against a foreign criminal who does not fall into one of the exceptions in Section 33.

25. As the only issue upon which findings were required related to the proportionality of the decision being appealed it was necessary for the Panel to consider all facts in favour of both the Appellant and the Secretary of State, to decide what weight they were able to attach to each element of the evidence, and thereafter to ascertain which parties evidence attracted the greater weight which would have been determinative of their decision to either allow or dismiss the appeal.

26. It is clear from reading the determination why the Appellant won, and it is also clear that all aspects of the evidence the Panel were asked to consider on his behalf were considered with a degree of care required in an appeal of this nature by them. The Panel were clearly impressed by the evidence given by the Appellant and the strength of his relationship with his children. What is not clear is whether the same degree of care and consideration was given to the public interest arguments. It is in relation to this element that we find the Panel erred.

27. In **RU (Bangladesh) [2011] EWCA Civ 651** the Court of Appeal held that the point about deterrence was not whether the deportation of a particular foreign criminal might or might not have a deterrent effect on other prospective offenders. It concerned a much more fundamental concept. The UK operated an immigration system by which control was exercised over non-British citizens who entered and remained in the UK. The operation of that system must take account of broad issues of social cohesion in the UK. Moreover, the public had to have confidence in its operation. Those requirements were for the public good or were in the public interest. For both of those requirements to be fulfilled, the operation of the system must contain an element of deterrence to non-British citizens who were either already in the UK, even if refugees, or who were thinking of coming to the UK, so as to ensure that they clearly understood that, whatever the circumstances, one of the consequences of serious crime might well be deportation. That element of public interest or public good was a part of the legislative policy, declared by Parliament in

Section 32(4) of the 2007 Act, that the deportation of foreign criminals was conducive to the public good (paras 41-43).

We see no consideration of this in the Panel's determination.

28. The need for the Panel to have considered the deterrent element has also been reinforced by the Court of Appeal in **AM v SSHD [2012] EWCA Civ 1634** in which the Court confirmed a Tribunal should expressly mention the wider public interest which is engaged in a deportation appeal namely deterrence and the prevention of crime.

29. We find there is no specific mention of this element in the determination and it is not clear whether the Panel properly considered it. It is certainly not possible to infer from reading the determination that they did. There are no specific findings upon this element despite the Panel's declaration in paragraph 52 of their determination,

> "*Clearly the serious nature of the robbery offences in which the Appellant was involved and for which the statutory presumption means that he should be deported in the wider public interest are to be given significant weight. We have set out above our view on this*".

Remaking the Decision

30. Both representatives agreed they did not wish to call further evidence. The facts are not in dispute and are therefore preserved.

31. It is common ground of course, that the Appellant comes within the provisions of Section 32(5) of the UK Border Act 2007. He is a foreign national who was sentenced to a term of imprisonment of three years four months for a serious of robbery. The Appellant has claimed that to deport him would breach his Convention rights under Article 8 ECHR. It is also common ground that the Respondent's decision to make a deportation order was made on 24th January 2013 and thus it falls to be considered under the new Rules laid before parliament in July 2012.

32. The new Rules state,

> "**Deportation and Article 8**
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> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for this they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".

33. It is not in dispute that the Appellant cannot bring himself within the exception to the Immigration Rules. Therefore the only avenue before him is to show that the facts of his case amount to exceptional circumstances.

Exceptional Circumstances

34. We are assisted by **MF (Nigeria)**, where the Court of Appeal confirms that any reference to "exceptional" in the Immigration Rules relating to private and family life rights must be interpreted as requiring the decision-maker to undertake a proportionality exercise consistent with ECHR jurisprudence. Insofar as this requirement is part of the Immigration Rules, the Rules are a complete code for Article 8 issues. The Court of Appeals use of the phrase "complete code" is apposite since to break the code there needs to be an understanding of the code words in particular "exceptional" and "insurmountable".

35. With regard to deportation appeals perhaps the most important words in **MF (Nigeria)** are those to be found at the end of paragraph 46: "but either way, it is necessary to carry out a two-stage process".

36. Paragraphs 43 to 46 of **MF (Nigeria)** are key.

> "43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".
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> 44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not "mandated or directed" to take all the relevant article 8 criteria into account (para 38).
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> 45. Even if we were wrong about that, it would be necessary to apply a proportionality test outside the new rules as was done by the UT. Either way, the result should be the same. In these circumstances, it is a sterile question whether it is required by the new rules or it is a requirement of

the general law. What matters is that it is required to be carried out if paras 399 or 399A do not apply.

46. There has been debate as to whether there is a one stage or two stage test. If the claimant succeeds on an application of the new rules at the first hurdle i.e. he shows that para 399 or 399A applies, then it can be said that he has succeeded on a one stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether para 399 or 399A applies. It is the second part of a two stage approach which, for the reasons we have given, is required by the new rules do not fully reflect Strasbourg jurisprudence. But either way, it is necessary to carry out a two stage process".

37. In our view we consider it appropriate to remind ourselves that **MF (Nigeria)** should be read in the context of developing jurisprudence on the relationship between the Immigration Rules and Article 8 ECHR.

Findings

38. In our assessment of whether the Appellant's case falls within exceptional circumstances when assessing proportionality we have had regard to the criteria summarised in **Uner [2006] ECHR 873**. The Court said that in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim perused, the following criteria had to be considered:

(a) The nature and the seriousness of the offence committed by the Appellant;

(b) The length of the Appellant's stay in the country from which he was to be expelled;

(c) The time that had elapsed since the offence was committed and the claimants conduct during that period;

(d) The nationalities of the various parties concerned;

(e) The Appellant's family's situation;

(f) Whether there are children in the marriage and if so their ages;

(g) The seriousness and the difficulties which the spouse is likely to encounter in the country of the Appellant's origin;

(h) The best interests and well-being of any children of the Appellant;

(i) And in particular the seriousness of any difficulties that they would be likely to encounter in the country to which the Appellant would be expelled;

(j) The solidity of social, cultural and family ties with the host country and with the country of destination.

We have borne these factors in mind when drawing together the strands of the Appellant's claim.

39. In accordance with these features we have considered the points raised by Mr Vaughan. In particular we have had regard to the family life which the Appellant has with his children Master AG and Miss CG.

40. We discount the claim of family life with his wife Mrs CG. He no longer lives with her and the children although we note from her statement that she refers to the Appellant as being supportive of the children. There is nothing about her relationship with the Appellant.

41. The Appellant's mother and his siblings have all provided statements of support. We note that the Appellant's mother Mrs IT states that the Appellant lives with her now and that he has a close bond with his children. She is fearful that if he returns to Jamaica she will lose him in the same way that she lost her other son Mr LG. The evidence from the Appellant's three adult sisters say much the same.

42. His mother and sisters are all adults and whilst he has *de facto* family life with them there is no evidence of dependency on him by those family members or him on them. Article 8 is not engaged so far as they are concerned.

43. What the Appellant has left to fall back on is his relationship with the children and a consideration of the best interests of the children. We accept the report of Sabrina Williams the Independent Social Worker. She reports that the family will not relocate to Jamaica with the Appellant. That stands to reason as the Appellant is no longer in a relationship with the children's mother.

44. She reports that the children's mother would be nervous and reluctant to allow her children to go to Jamaica on holiday. The reason provided was that the Appellant's brother had been shot dead on his return there.

45. She also noted that Mrs CG noticed changes in Master AG's behaviour following Mr ARG's detention, but that his academic ability remained consistent.

46. Set against those considerations Sabrina Williams reported that Master AG and the Appellant kept in touch by telephone contact during the time that he was in prison. It is also noted that Master AG uses Skype to keep in contact with relatives in Trinidad.

47. In **JO (Uganda)** and **JT (Ivory Coast) v SSHD [2010] EWCA Civ 10** the Court of Appeal stated:

> "In considering the position of family members in deportation cases the material question is not whether there is an insuperable obstacle to their following the applicant to the country of removal but whether they cannot

reasonably be expected to follow him there. This ensures that the seriousness of the difficulties which they are likely to encounter in the removal country is properly assessed as a whole and taken into account together with all other relevant matters in determining the proportionality of deportation;

Even if difficulties make it unreasonable to expect family members to join the applicant in the country that will not necessarily be a decisive feature in the overall assessment of proportionality. In the case of sufficiently serious offending that the factors in favour of deportation will be strong enough to render deportation proportionate even if it does have the effect of severing established family relationships; and

The maintenance of effective immigration control is an important matter but the protection of society against serious crime is even more important and can properly be given corresponding greater weight in the balancing exercise".

48. In **Gurung v SSHD [2012]** the Court of Appeal said:

"The Borders Act by Section 32 decides that the nature and seriousness of the offence, as measured by the sentence, do by themselves justify deportation".

49. In **RU (Bangladesh)** the Court of Appeal said:

"The point about "deterrence" is not whether the deportation of a particular "foreign criminal" may or may not have a deterrent effect on other prospective offenders. It concerns a much more fundamental concept which is explained by Judge LJ at [83] of his judgment in **N (Kenya)**. The UK operates an immigration system by which control is exercised over non-British citizens who enter and remain in the UK. The operation of that system must take account of broad issues of social cohesion in the UK. Moreover, the public has to have confidence in its operation. Those requirements are for the "public good" or are in the "public interest". For both of those to requirements to be fulfilled, the operation of the system must contain an element of deterrence to non-British citizens who are either already in the UK (even if refugees) or who are thinking of coming to the UK, "so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation". That element of "public interest" or "public good" is a part of the legislative policy, declared by Parliament in **section 32(4)** of the UKBA, that the deportation of "foreign criminals" is conducive to the public good".

50. In **Richards v SSHD [2013] EWCA Civ 244** the Court of Appeal after reviewing **Masih, OH (Serbia)** and **Gurung** said:

"What in my judgment needs emphasis is that the strong public interest in deporting foreign criminals is now not merely the policy of the Secretary of State but the judgment of Parliament. That gives it special weight, which the courts ought to recognise, as no doubt the Strasbourg Court will. This approach sits with the well-established approach to proportionality questions in

European Union laws where acts of the primary legislator enjoy a wider margin of discretion (see **R v Secretary of State for Health ex-parte East Side Cheese [1999] 3c MLR**)

51. In drawing these strands together and balancing proportionality we find that although the Appellant clearly enjoys family life with his children, what it amounts to at its highest is this. He sees his children on a daily basis. There is nothing unusual or exceptional in that. Master AG and he have a strong bond; there is nothing exceptional in that, bearing in mind Master AG's main carer is his mother.

52. Contact with his children would not cease altogether. The Independent Social Worker explained that whilst it may difficult for the children to travel to Jamaica to see the Appellant, nevertheless Master AG already uses Skype to keep in contact with other relatives in Trinidad.

53. The loss which Master AG suffered when his father went to prison in our judgment is not exceptional. His schoolwork did suffer slightly but to all intents and purposes this was of temporary duration.

54. The Appellant, we accept, did suffer from depression but not of such an order as to bring it within exceptional circumstances.

55. Summing up therefore it is our conclusion that the Appellant has not shown any exceptional circumstances which would outweigh the public interest in deporting a foreign national who has committed serious offences of robbery.

Decision

56. The First-tier Tribunal erred in allowing the Appellant's appeal against the Respondent's decision to make a deportation order. We remake the decision. The Appellant's appeal is dismissed.

Direction regarding anonymity – rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

The appellant is granted anonymity throughout these proceedings, unless and until the Tribunal directs otherwise. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.

Signature **Dated**

Judge of the Upper Tribunal