Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00417/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 October 2013	**On 31 October 2013**

Before

THE PRESIDENT, THE HON MR JUSTICE MCCLOSKEY
UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KENO ST GEORGE FORBES

Respondent

Representation:

For the Appellant: Mr A Khan, Cleveland and Co Solicitors
For the Respondent: Ms E Martin, Home Office Presenting Officer

DETERMINATION AND REASONS

The Framework of this Appeal

[1] This judgement determines the Secretary of State's appeal against the decision of the First-tier Tribunal, which allowed the appeal of Mr Forbes, the Respondent herein, against the Secretary of State's decision that he be deported from the United Kingdom.

[2] In the forum of the First-tier Tribunal, the resolution of the appeal ultimately centred on a contest between the public interest and certain private interests. The public interest espoused and asserted by the Secretary of State was that in deporting the Respondent from the United Kingdom in light of his convictions for certain serious drugs offences. The competing private interest was that of the family life rights as asserted on behalf of the Respondent and his mother under Article 8 ECHR. As this judgement shall presently highlight, it is essential for tribunals to properly appreciate the true character and weight of the public interest in play in cases of this kind.

[3] We draw attention at the outset to the offences of which the Respondent was convicted. These consisted of eleven counts of supplying or being concerned in the supply of Class A drugs. It is apparent from the sentencing transcript that these offences spanned a period of several weeks. The sentencing judge's rehearsal of the evidence suggested that the Respondent was a professional drug dealer and had conducted these activities in a particular housing estate during a lengthy period. The judge described the Respondent as regular drug dealer. The sentence imposed was three years imprisonment, concurrent in respect of each of the eleven counts. In passing sentence, on 13 October 2011, the judge described this as the minimum sentence which he could impose, adding that many would regard it as merciful. In determining this appeal we are alert to other aspects of the Respondent's criminal record, in particular his conviction of two separate offences of possessing a controlled class A drug, on 6 April 2009, giving rise to community orders. We note, and take into account, the form of disposal selected by the sentencing court.

[4] In cases involving the deportation of convicted foreign criminals, the legal equation - to which we shall return later in this judgement – has four main elements. The first is the significant parliamentary intervention, by primary legislation. The second element consists of certain provisions of the Immigration Rules. Thirdly, there is the Human Rights Act 1998, in particular Article 8 ECHR. Fourthly, and finally, there now exists extensive and authoritative judicial guidance. Within these several sources, all of which combined to form a whole, there are several inter-related public interests: society's condemnation of serious criminal activity to; the deterrence of further offending of this kind; the promotion of public interest in the criminal justice and immigration systems; the protection of the public; and the maintenance of firm immigration control.

[5] Against this background, we remind ourselves that the question for this Tribunal in every case is whether the First-tier Tribunal committed any material error of law within the compass of the authorised grounds of the appeal. At this juncture, we draft attention to the two permitted grounds of appeal. These are, respectively:

(a) The First-Tier Tribunal:

> *"… erred in law by failing to give adequate reasons for finding that the Appellant was in a subsisting relationship with his wife ……"*

(b) The First-Tier Tribunal:

> "*…. failed to give adequate reasons for finding this is a case where the Appellant's and the children's' best interests are so strong as to outweigh the Secretary of State's public interest policies.*"

The Decision in MF (Nigeria)

[6] These grounds must be considered in the context of the relevant provisions of the Immigration Rules, namely paragraphs 398, 399 and 399A. The legal status and effect of these provisions have been determined by the Court of Appeal in **MF (Nigeria) – v – Secretary of State for the Home Department** [2013] EWCA Civ 1192, which post-dated the first instance Determination. The Court of Appeal held, firstly, that in cases where it is necessary to decide whether the deportation of a foreign criminal would breach rights under Article 8 ECHR, great weight should be given to the public interest where the offender is unable to satisfy any of the provisions of paragraphs 398, 399 and 399A. The Master of the Rolls continued:

> "*[**40**] …… It is only exceptionally that such foreign criminals will succeed in showing that their rights under Article 8(1) trump the public interest in their deportation ….*
>
> *[**42**] ….. In approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal …..*
>
> *[**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 paragraphs 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.*"

The Court held, secondly, that the new Rules constitute "*a complete code*". In the balancing exercise to be performed, the Tribunal applies a proportionality test as required by the Strasbourg jurisprudence. The words "*other factors*" refer to "*all other factors which are relevant to proportionality*": paragraph [**39**]. To summarise:

(a) If a claimant's case falls within paragraph 399 or 399A, the exercise for the Tribunal involves a single stage only.

(b) If a claimant's case does not fall within either of these provisions, it is necessary to consider, and determine, whether there are exceptional circumstances outweighing the public interest in deportation: this introduces a second stage in the exercise.

The decision in SS (Nigeria)

[7] In order to properly appreciate the potency of the public interest in play, it is necessary for Tribunals to be alert in every case to another recent decision of the Court of Appeal, **SS (Nigeria) – v – Secretary of State for the Home Department** [2013] EWCA Civ 550. The central theme of this decision is the powerful weight to be attributed to the Parliamentary intervention in this field.

[8] By section 32 of the UK Borders Act 2007, a "*foreign criminal*" is any person who has received a sentence of at least 12 months imprisonment after 1st August 2008 or was in custody pursuant to such a sentence on that date and had not been served with a Notice of Deportation. It is appropriate to interpose here section 3(5) of the Immigration Act 1971:

> "(5) *A person who is not a British citizen is liable to deportation from the United Kingdom if –*
>
> *(a) the Secretary of State deems his deportation to be conducive to the public good; or*
>
> (b) *another person to whose family he belongs is or has been ordered to be deported.*"

Section 32 of the 2007 Act continues:

> "*(4) For the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good.*
>
> (c) *The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).*"

Section 33 provides:

> "*(1) Section 32(4) and (5) –*
>
> *(a) Do not apply where an exception in this section applies (subject to subsection (7) below) …..*
>
> *(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach -*
>
> *(a) A person's Convention Rights, or*
>
> (b) *The United Kingdom's obligations under the Refugee Convention.*"

The remainder of Section 33 is not central the present exercise**.** Section 55 of the Borders, Citizenship and Immigration Act 2009 is another important element in the primary legislation framework:

> "*(1) The Secretary of State must make arrangements for ensuring that –*
>
> *(a) The functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom …*
>
> *(2) The functions referred to in subsection (1) are –*
>
> *(a) Any function of the Secretary of State in relation to immigration, asylum or nationality;*
>
> *(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer …..*
>
> *(3) A person exercising any of those functions must, in considering the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).*"

[9] Delivering the main judgment of the Court in **SS,** Laws LJ, referring to the deportation of foreign criminals under the 2007 Act, stated:

> "*[48] ... Where such potential deportees have raised claims under Article 8, seeking to resist deportation by relying on the interests of a child or children having British citizenship, I think with respect that insufficient attention has been paid to the weight to be attached, in virtue of its origin in primary legislation, to the policy of deporting foreign criminals ……*
>
> *[49] The policy's source, however, is as we have seen one of the drivers of the breadth of the decision maker's margin of discretion when the proportionality of its application in the particular case is being considered.*"

Summarising, Laws LJ stated:

> "*[55] …. Proportionality, the absence of an 'exceptionality' rule and the meaning of 'a primary consideration' are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision maker's margin of discretion: the policy's source and the policy's nature and in particular to* ***the great weight which the 2007 Act attributes to the deportation of foreign criminals***."
>
> [Emphasis added.]

And in a later passage, Laws LJ refers to "*the extremely pressing public interest in the Appellant's deportation*": paragraph [58].

[**10**] It is appropriate at this junction to highlight the distinctive functions of the First-Tier Tribunal and the Upper Tribunal. Where an appeal against an order deporting a foreign criminal is pursued, it is incumbent on the First-Tier Tribunal to consider all relevant evidence, to make appropriate findings of fact and, finally, to make its decision in accordance with **MF (Nigeria)** and **SS (Nigeria)**. The Upper Tribunal, however, has a different function. Where a further appeal is brought in this forum, permission having been granted, such appeal is, pursued, per section 11(1) of the Tribunals, Courts and Enforcement Act 2007 –

> "*…. on any point of law arising from a decision made by the First-Tier Tribunal* …."

Thus the question to be determined by the Upper Tribunal is whether the First-Tier Tribunal has erred in law in making its decision. In thus deciding, the Upper Tribunal does not conduct an open ended enquiry into or review of the first instance decision. Rather, both the appeal and the ensuing appellate tribunal's decision are circumscribed by the terms in which permission to appeal has been granted. In determining such appeals, the Upper Tribunal, in common with the First-Tier Tribunal, must give full effect to the decisions in **MF (Nigeria)** and **SS (Nigeria)** in every case. Those decisions will invariably have a significant influence in deciding whether the First-Tier Tribunal has erred in law in any of the respects falling within the permitted grounds of appeal. In conducting this exercise, the Upper Tribunal will scrupulously examine the substance of the decision of the First-Tier Tribunal.

THIS APPEAL

[**11**] We turn to address the first ground of appeal. The evidence available to the First-Tier Tribunal included that relating to the offending and sentencing of the Respondent. We have outlined this in paragraphs [**3**] – [**5**] above. The Judge's consideration of the Article 8 ECHR issues began in paragraph [**25**]. Having rehearsed some of the relevant evidence, the Judge made a finding that there was family life between the Appellant and his wife and children, followed by a finding that there was a subsisting husband/wife relationship. We consider that there was sufficient evidence to warrant these findings. Moreover, the Secretary of State's decision letter expressly acknowledged the genuine and subsisting husband/wife relationship. We consider that the relevant passages in the Determination, coupled with the material supporting evidence and the clear acknowledgements in the Secretary of State's letter confound the first of the grounds of appeal. The reasons for the Judge's finding about this relationship are abundantly clear. The asserted error of law has not been demonstrated.

[**12**] Turning to the second ground of appeal, the Judge made a further finding that there was an active and subsisting father/children relationship. This was no bare

conclusion. Rather, it was substantiated by appropriate evidence based particulars. It was further fortified by discrete findings that the Respondent played an important role in the life of his children (with appropriate elaboration) and that the Respondent was motivated to turn his life around. This particular finding was underpinned by evidence, which the Judge rehearsed, of the Respondent's active rehabilitation efforts in prison. The Judge made a further discrete finding that the Respondent presents no risk of reoffending. This finding was amply justified by evidence of compliance with licence conditions since release from prison, his progressive acquisition of new skills and his positive rehabilitation in prison.

[13] Next, the Judge made a further finding that if the Appellant is returned to Jamaica his wife and children will, realistically, remain in the United Kingdom, giving rise to long term decimation of their established family life. This finding is uncontroversial. The Judge then specifically addressed section 55 of the 2009 Act. He correctly recognised that the best interests of the children were a primary consideration. He then made an assessment of those interests. He found that those interests would be best served by preservation of the family unit. The judgment is littered with the reasons for this assessment. We consider that there is no deficiency in the reasoning, both express and reasonably implied. The Judge recognised that this was a borderline case. The contest was between the strong public interest in the deportation of a foreign criminal (on the one hand) and the rights of all family members under Article 8 ECHR and the best interests of the children (on the other). The Judge, having conducted an elaborate balancing exercise, as Mr Khan urged in his submission, concluded, in terms, that the balance swung narrowly in favour of the Respondent and the other family members, in particular the children. We are satisfied that the Judge's reasoning is apparent in the relevant passages of the judgment, which must of course be read as a whole and we reject the challenge of inadequacy.

[14] Finally, we are satisfied that, in substance, the Judge's decision was based on an appreciation and correct application of the "*exceptional circumstances*" test in paragraph 399 of the Immigration Rules. We remind ourselves that this is not an appeal on the merits. Rather, this is an error of law appeal, conducted within the confines of the permitted grounds. We are satisfied that there was no misunderstanding of or misdirection on the relevant law in the Determination of the First-Tier Tribunal. For the reasons elaborated, we conclude that neither of the errors of law advanced on behalf of the Secretary of State has been established.

DECISION

[15] Accordingly, the appeal is dismissed.

Signed: Edmund McCloskey.

Mr Justice McCloskey,
President of the Upper Tribunal

Dated: **23 October 2013**