Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00665/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
13 November 2013	**25 November 2013**

Before

Lord Matthews
Sitting as a Judge of the Upper Tribunal
Upper Tribunal Judge Freeman

Between

EDDIE KARWHOO

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr Kam Mak, Solicitor, MKM Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a French national born on 20 March 1976 in Liberia. On 15 January 2009 at Croydon Crown Court on his own plea he was convicted of being knowingly concerned in the fraudulent evasion of a prohibition or restriction on the importation of a Class A controlled drug and was sentenced to a term of nine years' imprisonment. He had one previous conviction following his arrest on 29 March 2008 for driving a motor vehicle with excess alcohol. That resulted in a fine and a disqualification of 20 months.

2. On 15 April 2009 he was served with a notice of decision to make a deportation order and a questionnaire for him to complete and to indicate why it would not be appropriate to make such an order. He responded by providing several reasons why he should not be deported to France. These reasons were rejected by the Secretary of State and a notice of deportation was served on 19 March 2013. This was appealed by notice of appeal dated 28 March 2013, it being asserted that the decision to make the deportation order under Section 3(5)(a) of the Immigration Act 1971 and to remove the appellant under Regulation 19(3)(b) and 24(3) of the Immigration (European Economic Area) Regulations 2006 was not in accordance with the law and with the Regulations. It was also contended that his removal would be unlawful under reference to Article 8 of the European Convention on Human Rights.

3. For reasons which we shall explain shortly that appeal was successful but the Secretary of State has in turn appealed against that decision. It will be convenient to maintain the designation of Mr Karwhoo as the appellant and of the Secretary of State as the respondent.

4. The First-tier Tribunal found that the deportation of the appellant would be proportionate in terms of Regulation 21 but disproportionate in terms of Article 8.

5. The thrust of the current appeal is that the First-tier Tribunal failed to provide adequate reasons for the finding that it would be disproportionate to deport the appellant due to his family life. He had spent a considerable proportion of his residence in this country in prison and the family life he had with his partner and children had been extremely limited. There were no reasons provided as to why the family could not relocate to France to continue their family life together, which they stated they would do. There were no insurmountable obstacles to their being able to do so. Even if his partner did not wish to relocate, contact could be maintained. There was no evidence that the appellant and his family were dependent upon each other and had been unable to cope without each other while he was in prison or in separate countries. He had been found to represent a genuine present and serious threat to one of the fundamental interests of society and there were no adequate reasons as to why his and his children's best interests outweighed the public interest in deportation.

The Findings of the First-tier Tribunal

6. The Tribunal found that the appellant was a French national who was born on 20 March 1976 in Liberia. He spent at least 12 years prior to his arrival in the United Kingdom living and working in France. The appellant had given evidence about arriving in the United Kingdom in 2006 but he was not found credible in that regard. He was also found to be unreliable in the light of his conviction and certain lies in interviews with the Probation Service. It was found that he was not exercising treaty rights at that stage and certain assertions that he was doing casual work were not supported by any evidence. He had not paid any tax during the period.

7. The Tribunal found, however, that his partner and his two eldest children, aged 11, entered the UK in the summer of 2007 and had remained here since. The partner

gave evidence that she was exercising her treaty rights and she was believed in that regard, her evidence being supported by a number of documents. A child was born to the couple in the UK in 2008. The judge found herself satisfied that the appellant and his partner had been living together in a relationship akin to marriage and indeed that they had been married in a religious ceremony which had not been registered for various reasons. It was found that they were in a durable relationship and that as at the date of the respondent's decision on 19 March 2013 both the partner and the appellant had acquired rights of permanent residence in the United Kingdom, with the appellant acquiring such rights as a result of being a family member of an EEA national and despite the fact that for a period of his time in the UK he was a serving prisoner.

8. In those circumstances, in terms of Regulation 21(3) of the 2006 Regulations the appellant could only be removed on serious grounds of public policy or public security. The principles which had to be applied are set out in Regulations 21(5)(a) to (e) as follows:

> "(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles –
> (a) the decision must comply with the principle of proportionality;
> (b) the decision must be based exclusively on the personal conduct of the person concerned;
> (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
> (e) a person's previous criminal convictions do not in themselves justify the decision."

9. No issue has been taken with the findings we have narrated thus far.

10. The judge went on to indicate that the appellant asserted that he had learned a serious lesson as a result of his decision to become involved in criminal activity and claimed that he was not a career criminal. Nonetheless it was found that he had committed a very serious offence on the facts of his conviction in 2009. There were substantial quantities of a Class A drug and he had a significant role in a well-planned enterprise which represented a high level of harm to society at large. It was found that he was less than frank during interviews with the Probation Service in 2010 which reflected his attempts, having pleaded guilty and served a year of his nine year term of imprisonment, to minimise his role and blame others. However the judge noted that when he gave evidence he backed down somewhat from that stance and presented a slightly more credible account of being recruited in an African restaurant to undertake an overseeing role; but the judge was still not entirely satisfied about his explanation. It was found that he must have been a close confidant of the main organisers of the importation. The appellant had still not disclosed the identity of the organisers, claiming that he was under duress and in fear of retribution for his family.

11. It was found that the appellant had demonstrated that he had the capacity to lead a responsible, law-abiding life; but his offending was on such a serious scale that on balance the judge decided that he still represented a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", namely public policy in controlling serious crime involving harmful drugs.

12. The judge purported to take into consideration the fact that he had lived in the UK for some six years and had a family life here. There was no evidence of re-offending and the reports suggested a low risk of that. Even so, it was found that the decision to remove was proportionate under the Regulations.

13. The judge, however, went on to consider the appellant's human rights claim under Article 8 and it would be as well to quote in full his treatment of that at paragraph 38 of the determination. It runs as follows:

> "38. I must however also consider the Appellant's human rights claim under Article 8 ECHR and the impact his removal will have on those rights and the welfare of his children in particular. The Appellant has a substantial family life and private life in the UK. I accept the evidence before me as to the extent and nature of such ties. There is a close bond between him, his partner and their children. The youngest child was born in the UK and the entire family lived together prior to the offence being committed and subsequent to his release. The life in the UK of his partner and the children is well-documented. They are settled in employment and in the education system. I find on this evidence that looking at the family unit as a whole there is a significant and strong family life established in the UK which I find is protected".

14. The judge found that the interference caused by the appellant's removal would have consequences of such gravity as to engage Article 8. At paragraph 40 he went on:

> "40. Looking at all matters in the round I find, despite the considerable weight attached to the public interest, that the nature and extent of this family unit, the close ties and dependency as evidenced and the children's welfare overwhelmingly in favour of remaining in the UK to continue with their education, that the Appellant's removal from the UK is not proportionate to the legitimate aim sought to be achieved. The Appellant's removal in such circumstances would, I find, be incompatible with his and the family's Article 8 rights and thus unlawful under section 6 of the Human Rights Act 1998."

The Appeal

15. Mr Avery for the respondent submitted that the judge, having found that the appellant was still a risk to the United Kingdom and that the decision was in accordance with the Regulations, acted oddly in allowing the appeal on Article 8 grounds. The reasoning in relation to Article 8 was brief. It seemed to relate primarily to the family life and in particular to the fact that the children were in education in this country. His assessment of proportionality was deficient. The only positive factor he mentioned was the interests of the children; but he failed to balance that against the serious nature of the offence and the facts that the appellant lied to

his Probation Officer and failed to disclose information about the conspiracy to import drugs. In particular he failed to name anyone else involved. None of this was mentioned in the balance. Both parents were French and the children were of French ethnicity. It would not be a fundamental shift in culture if they left the country. There would be some disruption but it was not a strong factor. The judge did not seem to consider that the appellant could leave the country and the children could stay here. The children's rights in order to prevail over the public interest in deportation would have to be of substantial importance. The case of SS (Nigeria) v SSHD [2013] EWCA Civ 550 dealt with automatic deportation cases but paragraph 46 of that was clearly relevant. It was to the effect that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it was to prevail. The main difficulty however was the fundamental lack of reasoning. There was also an apparent contradiction because the judge found deportation to be proportionate in terms of Article 8 but disproportionate in terms of the Regulations.

16. Mr Mak for the appellant submitted that there was no error of law. Paragraph 38 of the determination had considered the close bond between the parties and the effect of the family life. Their life in the United Kingdom was well documented. The evidence of the appellant's partner had been set out at paragraphs 22 and 23 of the determination and she had been assessed as a credible witness. She had arrived in the United Kingdom in 2007 to join her partner in the exercise of her rights to free movement within the European Union. She was the mother of the three children, the youngest of whom was born in the United Kingdom on 30 June 2008. She had previously worked as a teacher's assistant and then received a one year bursary from the Training and Development Agency for a one-year course in teacher training which she had now completed. She was looking for a full-time post as a teacher. She had been totally unaware of her partner's criminal involvement and only became aware of it after his arrest. Although she was angry and disappointed she remained supportive of the appellant because of the three children. She was very close to the children and the fact that he was serving a term of imprisonment had been kept from them. He had spent a considerable period of his prison term on day and weekend releases at the home and since his release from prison on 24 April 2013 he had been the children's carer, taking them to school, collecting and looking after them at home by doing cooking and household chores while she was on her training course. She was confident he would never re-offend again. She accepted that if he was returned to France she would probably follow him there in order to maintain the family unit. That would present difficulties for her personally and for the family. She had an English teacher qualification and hoped to secure a full-time post in September with offers of work as a supply teacher in the alternative. Her English qualification was not recognised as such in France and she would have to seek exemptions and then apply for a post through a competitive public examination. All three children were already immersed in the English educational system which is quite different from that in France. In fact the elder children would have been in secondary school had they been educated in France and removal of the family as a whole would result in a huge disruption in their educational paths particularly as their main language was now English. She had had previous experience herself of the educational system in France holding various jobs as a play-worker, teacher's assistant and a project manager in education but she had no family or relatives in France. She knew that the

appellant had relatives in Africa but did not know of any relatives of his in France, although he had some friends with whom he maintained contact primarily through Facebook.

17. Mr Mak drew our attention to paragraph 40, which I have already quoted. The important part of it was that the judge indicated that he had looked at all matters in the round. He had considered all of the evidence and must have carried out the balancing exercise desiderated by the respondent. The case of SS related to a foreign criminal within the meaning of Section 32 but the appellant's case was being decided under the EEA Regulations.

18. We asked Mr Mak about the contradiction between the findings that the decision was proportionate in terms of the Regulations but not in terms of Article 8. It seemed to us that Mr Mak was in some difficulty in answering this question, although he sought to derive some support by way of analogy from the case of MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192. He suggested that Article 8 was perhaps wider than the Regulations but had no authority to assist him. One of the difficulties with that submission is Regulation 21(6), which is in the following terms:

> "(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

19. It seemed to us, with due deference to Mr Mak's careful submissions, that the considerations set out in Regulation 21(6) mostly, if not completely, reflected the sorts of considerations which would have to be taken into account in an Article 8 assessment. Although we cannot think of any for ourselves, it may be that there is some nuance which would entitle a decision maker to reach different conclusions on proportionality vis-à-vis the Regulations and Article 8 but nothing in the determination helps us in that regard. In our opinion the ex facie ambiguity is such that it discloses an error or law.

20. We indicated that that was our decision and that it fell to be re-made. We invited comment from parties as to how matters might proceed and after some discussion it was agreed that a further evidential hearing was unnecessary. Nonetheless we were invited to take account of a further statement from the appellant.

21. That statement indicated that since the hearing before the First-tier Tribunal on 19 August 2013 he had continued his rehabilitation to lead a law-abiding life. Through his voluntary work with probation he was offered full-time employment as an engagement worker by the London Probation Trust on 30 September 2013. His work was to engage with prisoners, providing support and helping them to re-integrate back into society. The prisoners are on licence and attend the Probation Service where he provides induction, assists them with their community work and guides

them towards their release. He continued to live with his wife and three children at the family home. His voluntary work with the Probation Service had provided sufficient evidence for the Service to employ him as an engagement worker to assist them. That statement was supported by a letter from the London Probation Trust confirming that he commenced employment with them on 30 September 2013. He was based at their office in Bethnal Green and although he had only been in post for five weeks he had made good progress and positive feedback had been received from his line manager. A copy of his terms and conditions of employment was also provided.

22. Mr Mak submitted that the appellant did not present a genuine threat. The deportation decision had to be based on his personal conduct and there was no question of dealing with general deterrence. His convictions did not themselves justify the decision in terms of Regulation 21(5)(e). He had been punished for his crimes but had been assessed as a low risk. He now helped other prisoners. Having been released from prison he had found employment in a supermarket and had then been found worthy of employment with an arm of government. He did not present any kind of threat at all.

23. Mr Avery referred to the refusal letter. So far as any assessment of risk was concerned he had not been forthcoming about who was involved in the criminal enterprise with him. Failing to provide information about that was a serious matter and led to a continuing threat against society which weighed in the balance. He was prepared to lie when it suited him as could be seen from his dealings with the Probation Service.

24. In reply Mr Mak pointed out that any lies he told were three years ago before he undertook the work with probation when he realised the significance of the crime. The Probation Service knew of his conviction and his dealings with them. He fulfilled the criteria for the job and would help serving prisoners to lead a law-abiding life. His failure to disclose the names of his associates was through fear. He re-iterated that he did not present any form of danger.

Findings

25. We do not interfere with the basic facts found established by the First-tier Tribunal except as otherwise indicated. We are however concerned with the application of Regulation 21(5)(c). As we understand it, the respondent relies not only on the serious conviction but on the appellant's lack of frankness during interviews with the Probation Service in 2010 in an effort to minimise his role and blame others, as well as his failure to reveal details of his associates. In considering this issue we take account of the fact that the Probation Service itself has offered him employment. It is one thing for an OASys assessment to find that an offender is a low risk of re-offending, as happened in this case. It is quite another for the Probation Service to go further and, in the knowledge of the appellant's previous lack of candour, to offer him employment with them, which implies that they pose a great deal of trust in him. We cannot envisage that they did this without anxious consideration of all the circumstances. It seems to us that any lies told by the appellant to the Probation

Service at an early stage of his incarceration and indeed his failure to name his associates have to be seen in context. It is in our experience not uncommon for offenders to attempt to minimise their involvement in offences but this has to be seen against the background of a plea of guilty. One has also to take into account the developments since then not least the offer of employment to which we have already referred.

26. It is equally not uncommon to find that offenders fail to name associates. There seems no reason to dispute the appellant's assertion that this is out of fear. That of course is no excuse but the suggestion that because of that failure the appellant represents a risk to society is, it seems to us, somewhat contentious. The thinking seems to be that since he has failed to name these people they are still at large and therefore they represent a danger to society so the danger represented by the appellant is somewhat derivative, if it exists at all. All this assumes that any information which he could give would still be useful now, nearly five years after the appellant's conviction. We are not persuaded that the two factors relied on by the respondent over and above the convictions really entitle her to take the view that the appellant represents a genuine present and serious threat as is required in terms of the Regulations.

27. Accordingly we depart from the findings of the First-tier Tribunal set out in paragraphs 35 and 36 of the determination which are to the opposite effect.

28. Lest we are wrong in that we think that we should say something about proportionality. We think there is some force is Mr Mak's contention that, although all of the various features which figure in the balance are not mentioned in paragraph 38 of the determination, when it is read as a whole the First-tier Tribunal took their role into account. SS (Nigeria) is of less relevance than it would be in a Section 32 case but we think that the findings of the First-tier Tribunal in relation to Article 8 when taken as a whole and when combined with the appellant's new-found employment are sufficient to tip the balance in favour of the appellant, whether proportionality is assessed in terms of the Regulations or under Article 8. We do not consider it necessary to say any more about this in view of the decision we have reached as to the applicability of the Regulations.

Decision

29. We find that the decision to deport is unlawful.

LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)
Date: 20 November 2013