Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00894/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 22nd October 2013	**On : 30th October 2013**

Before

Upper Tribunal Judge McKee

Between

R G
(anonymity direction continued)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Claire Physsas, instructed by Blavo & Co. Solicitors
For the Respondent: Miss Alison Everett of the Specialist Appeals Team

DETERMINATION AND REASONS

1. The appellant, who is now 41 years old, has been living in the United Kingdom since he arrived from Jamaica in 1999, and was given six months' leave to enter as a visitor. Just before those six months were up, he married a British citizen, MT, and thereafter applied successfully for leave to remain as a spouse. After completing his one-year 'probationary period', the appellant was granted indefinite leave to remain in May 2001.

2. Just one month before that grant, however, the appellant received the first of a series of sentences for criminal offences, when he was fined by Ealing Magistrates for possession of crack cocaine. The following year, the appellant was one of ten men arrested as a result of 'Operation Pugsy', aimed at drug-dealing in the Cloak Lane market, off Ealing Broadway. He was sentenced in March 2003 to a total of 3 years and 10 months for a variety of offences: supplying Class A drugs, assault, obstructing a police officer, having an offensive weapon and destroying property. In 2005 the Criminal Casework Team at the Home Office wrote to him, to say that he was being considered for deportation. But by that time the appellant had moved from the address in Acton Vale where he had been living with his wife, their relationship having broken down, and it is said that he never received the letter.

3. In 2007 the appellant received a suspended prison sentence of 8 months for assault occasioning actual bodily harm, while in November 2010 he was arrested for the more serious offences of possessing a Smith & Wesson .44 magnum revolver and ammunition, as well as a stun gun. In February 2011 he was sentenced to 5 years' imprisonment, and is still in custody at the present time.

4. Mrs MT had a daughter from a previous relationship, MB (born in November 1996), when she married the appellant, and a daughter, IG, was born of the marriage in December 2000. A son, KG, was born to the couple in December 2005, by which time the couple had separated. The separation was apparently caused by a relationship which the appellant had formed with SW, who bore him a daughter, ZW, in June 2005 and a son, JW, in October 2006. All five children, like their mothers, are British citizens.

5. On 15th March 2013 the Home Office sent pro forma letters to both Mrs MT and Miss SW, requesting information about their relationship with the appellant, who was being considered for deportation. Mrs MT provided the information through Blavo & Co., including letters from herself and her two daughters. She wrote that, before his incarceration, the appellant would see the children every week, and would look after them on two weekends each month. Similarly, he would look after the children during the school holidays, when their mother was working. Now that he was in prison, he would call them once or twice a week, and they would visit him whenever possible. The girls, she said, missed him terribly, while her son, being surrounded by females, looked up to him as a man. In their letters, MB and IG both emphasize how important their father is in their lives and how much their little brother needs him as a role model. The stress is making their mother ill.

6. Miss SW's reply to the letter of 15th March 2013 was very different. She said that she had never lived with the appellant, and was glad to have got out of their relationship four years previously. He had never helped her financially, and had been aggressive and abusive towards her in front of the children. She had let the appellant take the children every other weekend, but he had not looked after them properly, and they would hurt themselves. She did not regard the appellant as a good role model for the children, who were better off without him in their lives.

7. Nevertheless, as pointed out in the Decision Letter of 29th April 2013, ZW had been to visit her father in prison eleven times between November 2010 and March 2013, while JW had been nine times. As for Mrs MT, she had been 24 times, while IG had

been 21 times and MB 18 times during the same period. Consideration of their interests did not, as the letter stated, preclude the making of a deportation order under section 32(5) of the UK Borders Act 2007, and one was duly made. On 17th June 2013 an appeal to the First-tier Tribunal came before a panel comprising Judge Rowlands and Mr Yates. They heard oral evidence from the appellant, Mrs MT and a friend, EH, all of whom had also provided witness statements.

8. In his statement, the appellant emphasizes his attachment to all the children, and how he shared child-care duties with each of their mothers before his arrest in November 2010. Both sets of children know each other, and he has taken them all to Jamaica on a visit. He accepts responsibility, and expresses remorse, for his past misdeeds and, building on the courses which he has successfully undertaken while in prison, he promises to carry out faithfully his duties as a father in future. The drug habit which he had acquired before ever coming to the United Kingdom has been broken. He denies the accusations levelled against him by Miss SW, surmising that her letter was written "out of anger".

9. In her letter, Mrs MT confirms that her children interact with those of Miss SW, and that they have visited the appellant together in prison. The children will lose out, she insists, if the appellant is sent back to Jamaica. In his statement, Mr EH, who is a Student Services Manager, avers that the appellant adores his children, who would be profoundly affected if he were deported. Both his son and his daughter by Mrs MT would benefit from his continued support, especially as the former has a medical condition.

10. The appellant, Mrs MT and Mr EH adopted their statements when they appeared before the First-tier Tribunal, and in their oral evidence they enlarged on the twin themes that the appellant had learned his lesson and that the children needed him as a father. Nevertheless the appeal was dismissed, and an application was lodged for permission to appeal to the Upper Tribunal, with grounds settled by Miss Physsas, who had appeared below. The application was initially unsuccessful, but was granted on renewal by Judge Peter Lane, who focused on the failure by the panel to say why they preferred the letter from Miss SW to the written and oral evidence of the appellant as to how he had behaved in front of their two children.

11. When the matter came before me today I heard very cogent and persuasive submissions from both representatives, with whose assistance in highlighting the relevant issues I was able to come to a decision on 'error of law' fairly easily. The First-tier determination is not, with respect, well structured. It starts well enough, with the appellant's immigration history and catalogue of offences, and then sets out in full each of the three witness statements, with extracts from the oral evidence of each witness tacked on at the end of each statement. The oddity really starts with the panel's findings. They find that the appellant's children and step-daughter exist, a somewhat redundant finding given that their existence was not disputed by the respondent. But as far as the relationship between the appellant and the children is concerned, the panel say at this stage only that the visits to the prison by ZW and JW do not constitute "*much more than Miss [SW] being compassionate towards her children and the Appellant*." That says something about the relationship between the appellant and Miss SW, but it does not address the relationship between the

appellants and the children, and how that impinges upon the best interests of the latter.

12. The panel also at this point disbelieve the appellant's expressions of remorse for, and insight into, his offending behaviour, their reason for that being the discrepancy between his guilty plea at the trial, which meant he must have accepted that a handgun was on his premises with his knowledge, and what he told the author of the OASys Report, namely that the gun was put into the pocket of a jacket of his, without his knowledge, by a guest at his house-warming party.

13. The panel now announce that they will take the two-step approach adumbrated by the Upper Tribunal in *MF (Nigeria)*, looking first at Article 8 as confined within paragraph 398 and 399 of the Rules, and then at Article 8 in the wider ambit of the Strasbourg jurisprudence. But they actually go straight to the second step, setting out the factors listed in *Üner* and *Maslov.* This eventually brings them to the best interests of the children. They draw a distinction between Miss SW's two children and the other three, it being doubtful whether the former will have any more meaningful relationship with the appellant than visiting him in prison, given the hostile attitude of Miss SW towards him. They do not believe the appellant's denial of the accusation in Miss SW's letter that the appellant "*has been violent to her in the past in front of the children*." That goes some way to fortifying the panel in their view that "*the well being of the children does not include contact with the Appellant*." Indeed, if he is meant to be their role model, "*they would be better off with no role model than a father who has dealt in Class A drugs and been found to be in possession of firearms*."

14. The above passage was what caused Judge Lane to grant leave to appeal, the panel not having explained why they believed what Miss SW said in her letter, and disbelieved what the appellant said in his oral evidence. Miss SW does not actually say that the appellant has been "*violent*" towards her. She uses the term "*abusive*", which may well not imply physical violence. At any rate, the panel cite this accusation and the appellant's criminal offending as entailing the conclusion that the best interests of the children do not include contact with "*the children*." There are two problems with this. First, it is not clear whether all five children are covered by this, or just Miss SW's two children. Secondly, as this is the only consideration given to the best interests of the children, save for adding that it would not be impossible for the children to visit the appellant in Jamaica, the panel make no mention at all of the pleas of MB and IG that they really do want and need contact with their father, and the insistence of Mrs MT that it is in the best interests of all three of her children that the appellant continues to play a part in their upbringing.

15. The panel now go through the five questions posed in *Razgar*, and soon reach the fifth question, *viz* proportionality. At this point they revert briefly to the 'first stage' in terms of *MF (Nigeria)* and mention that, under the Immigration Rules, the appellant's sentence of five years means that his deportation will be proportionate save in exceptional circumstances. They then say that "*taking into account all that we have said concerning this matter*", deportation <u>is</u> proportionate to the legitimate aim. This is presumably the proportionality assessment <u>outside</u> the Immigration Rules, although the way it is structured led Miss Physsas to suppose that the panel might have been searching for 'exceptional circumstances', as under the Rules.

16. On the question of 'error of law' I heard very thorough and cogent submissions from both representatives, ranging over many aspects of the First-tier determination, but in the end it seemed to me that there were two serious flaws in the panel's consideration of the best interests of the children, as summarised at paragraph 14 above. First, it was unclear which children the panel were referring to. Secondly, the panel did not take account of material factors in considering those interests, namely the express views of MB and IG and of their mother. Miss Everett argued that those flaws were not material, as the panel would have come to the same conclusion without them, but it seemed to me that the flaws were serious enough to justify setting aside the First-tier determination.

17. In order to re-make the decision on the appeal, it was agreed on all hands that there was no need for me to hear oral evidence. I had all the evidence before me from the First-tier appeal, and it was a question of evaluation rather than fact-finding. So the appeal proceeded by way of submissions only, and again I was greatly assisted by the lucid and cogent arguments of both representatives. In our task we now had the advantage of consulting the recent judgment of the Court of Appeal in *MF (Nigeria)* [2013] EWCA Civ 1192, which is particularly relevant to the present case for what it says about "*exceptional circumstances*" at paragraph 398 of the Immigration Rules, without which the public interest in deportation will not be outweighed. The 'Criminality Guidance for Article 8 ECHR Cases' is cited for the explanation that 'exceptional' "*means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that deportation would not be proportionate*." That, said the Court, meant that Home Office caseworkers had to apply a 'second stage' test <u>within</u> the Rules, if the criteria set out at paragraphs 399 and 399A did not apply, analogous to the second stage test <u>outside</u> the Rules laid down by the Upper Tribunal.

18. The Court accepted a submission on behalf of the Secretary of State that "*the reference to exceptional circumstances serves the purpose of emphasizing that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. 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*." Their Lordships went on to say this at paragraph 43 of their judgment :

> "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'."

19. This clarification must inform the assessment of proportionality in the present appeal. The case for the appellant, put by Miss Physsas, is that he is a reformed character. He has broken free of his drug habit, he accepts responsibility for his past offending, he feels remorse, and intends to live a crime-free life in future. He is ready to fulfil the role of father to his children, and has undertaken a number of courses in prison which will help him to find remunerative work on release. The children need a father in their lives, and his son in particular, living in an otherwise all-female household, needs a male role model. The case against the appellant, put by Miss Everett, is that the appellant's optimistic prediction of a law-abiding and useful life in future must be

viewed with some caution, given his apparent reluctance, at least in the OASys Report, to accept responsibility for the gun being on his premises. His deportation will doubtless have an impact on the children, but he has never lived with ZW and JW, and has not lived with MB, IG and KG for a number of years. He has helped their mothers with child care, but has not been responsible for their day-to-day care or for taking the important decisions in their lives. Even if it is in the children's best interests for their father to stay, it cannot be said that there are "*very compelling reasons*" in the present instance for allowing the appeal.

20. In the light of the recent Court of Appeal guidance, it seems to me that Miss Everett has the better of the argument. Whether we come to proportionality via the step-by-step approach of *Razgar* or through the 'second stage' assessment required by the Immigration Rules, in a case of serious criminality, where paragraphs 399 and 399A do not apply, very compelling reasons are needed in order to outweigh the public interest in deportation. The conviction which triggered a deportation order was not a one-off, but the most serious of several serious offences. As Lady Hale remarked at paragraph 33 of *H(H) v Deputy Prosecutor of the Italian Republic* [2012] 3 WLR 90, *"sometimes the parents' past criminality may say nothing at all about their capacity to bring up their children properly*", and in the present case it may well be that the appellant would have a useful role to play in helping to bring up his children, were he allowed to stay. The two girls who have given their views will certainly miss him, and so will Mrs MT who, as the appellant mentioned at the hearing, is an only child and has derived great benefit in the past from having the appellant to help with child-care. All in all, I think it would be in the best interests of the children if their father were allowed to stay in this country.

21. But the circumstances of the children are not such as to furnish the "*very compelling reasons*" which would outweigh the public interest. In another recent judgment, *SS (Nigeria)* [2013] EWCA Civ 550, Lord Justice Laws put it even more forcefully when he said that the pressing nature of the public interest in a case like this means that deportation can only be resisted successfully "*by a very strong claim indeed*." The circumstances of the present case simply do not reach this threshold. The facts of the case, sadly, admit of only one conclusion ~ a conclusion prefigured to some extent in the grant of leave itself.

DECISION

The appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

26th October 2013