Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01307/2012

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Determination Sent**
on 9th September 2013	**on 16th September 2013**

Before

UPPER TRIBUNAL JUDGE SPENCER
UPPER TRIBUNAL JUDGE PITT

Between

JKO
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr E Fripp, counsel, instructed by Danielle Cohen Immigration Law Solicitors
For the respondent: Ms H Horsley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria, born on 24th March 1973. His appeal against the decision of the respondent, made on 26th November 2012 that section 32(5) of the UK Borders Act 2007 applied so that he was subject to automatic deportation, in the light

of his conviction of conspiracy to fraudulently evade a prohibition on the importation of a Class B drug, namely 193.30 kilograms of cannabis, for which he received a sentence of four years and six months' imprisonment, was dismissed after a hearing before the First-tier Tribunal, comprising First-tier Tribunal Judge Scott-Baker and Miss V Street, in a determination promulgated on 20th June 2013.

2. The First-tier Tribunal made an anonymity order under rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and we likewise make an order with reference to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant, his wife or children.

3. The appellant sought permission to appeal on two grounds. The first was that the term "exceptional circumstances" in paragraph 398 of HC 395, as amended (required to be shown as outweighing the public interest in deportation) had to be given its natural and ordinary meaning. The Oxford Outline Dictionary defined "exceptional" as "unusual; not typical" and the First-tier Tribunal judge failed to identify any basis upon which the facts relating to the appellant's family, including his strongly formed family life with a range of four children at different ages of relative maturity, could be said to be usual or typical and so not exceptional. The First-tier Tribunal had found that there was nothing within the children's circumstances to lead to a finding of exceptionality. It was said that that conclusion was insufficient to justify discounting exceptionality without further examination, particularly since the opinion of Dr Claridge was that if the appellant were deported his children would become increasingly distressed and, especially in the cases of the boys, less directed in their lives, potentially becoming despondent and anti-social as a direct result of the continued absence of their father.

4. The second ground was that in relation to article 8, separately considered from the rules, the First-tier Tribunal failed to undertake a structured assessment of the question of proportionality, considering the facts against the relevant criteria.

5. On 10th July 2013 First-tier Tribunal Judge Carruthers granted permission to appeal. He said that in summary the cruxes of the grounds on which the appellant sought permission to appeal were complaints that (1) the First-tier Tribunal had not sufficiently explained its conclusion that the circumstances of the case were not exceptional; (2) the First-tier Tribunal's article 8 assessment was not sufficiently structured and (3) the First-tier Tribunal had not sufficiently factored in the appellant's lack of previous convictions and/or what was said in the report of the chartered psychologist, Dr Claridge, as to the prospective harm to the appellant's four children by the putative destruction of "the pre-existing pattern of the children having very substantial time with their father in the family home in the United Kingdom". He said he suspected that there was little substance in at least some of the complaints made in the grounds but it might be that the First-tier Tribunal did materially err in some of the ways alleged. Overall there was sufficient in the grounds to make a grant of permission appropriate. He said the appellant should not take the grant of permission as an indication that his appeal would ultimately be successful. Decided cases such as Lee [2011] EWCA Civ 348 and Richards [2013] EWCA Civ 244 tended to go against the appellant. In the last analysis it might be

concluded that the grounds amounted to little more than a disagreement with conclusions that the First-tier Tribunal was entitled to reach.

6. Thus the appeal came before us. By the time of the hearing Mr Fripp had adopted an alternative argument, not mentioned in the grounds of appeal, which was set out in his skeleton argument. This was that in Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720, Sales J had considered the interpretation put upon the phrase "exceptional circumstances" by the Secretary of State in her instructions regarding the approach to be applied by officials in deciding whether to grant leave to remain outside the rules in the exercise of the residual discretion she had to grant such leave. In paragraph 13 of his judgment he said the Secretary of State required such leave to be granted in exceptional cases but in paragraph 3.2.7d of the instructions she had amplified the guidance for the approach to be adopted in the terms that he set out. In that guidance it was said:

> "Exceptional" does not mean "unusual" or "unique"… Instead "exceptional" means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely."

7. Mr Fripp relied upon paragraph 14 of the judgment in which Sales J said that the definition of "exceptional circumstances" which was given in the guidance equated such circumstances with there being unjustifiable hardship involved in removal such that it would be disproportionate – i.e. would involve a breach of article 8.

8. Mr Fripp argued, in reliance upon Nagre, that exceptional circumstances meant no more than that circumstances had to be shown which demonstrated that removal or deportation would involve a disproportionate breach of the article 8 rights of the person concerned. Therefore it was unnecessary to adopt the two stage approach said to be necessary by the Tribunal in MF (Article 8 - new rules) Nigeria [2012] UKUT 393 (IAC).

9. It is interesting to note that this was not how Mr Fripp argued the appeal before the First-tier Tribunal. There, as shown by paragraph 76 of the determination, he stated that under the rules the appellant would need to show exceptionality and if exceptional circumstances were found by the First-tier Tribunal the appeal would succeed. If not it would be necessary to look at the freestanding article 8 situation.

10. Before us Mr Fripp pointed out that in paragraph 29 of his judgment Sales J said that the new rules did provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under article 8 than was formerly the position, so that in many cases the main points for consideration in relation to article 8 would be addressed by decision-makers applying the new rules. He said it was only if, after doing that, there remained an arguable case that there may be good grounds for granting leave to remain outside the rules by reference to article 8 that it would be necessary for article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave.

11. Mr Fripp did not accept that compelling circumstances required anything more than showing that a decision to deport would be disproportionate.

12. Ms Horsley did not seek to persuade us that the Secretary of State's interpretation of "exceptional circumstances" in her guidance was other than that suggested by Sales J. She agreed that the circumstances which had to be shown were such as to demonstrate that deportation or removal would be disproportionate.

13. In the determination of the Tribunal in Green (Article 8 – new rules) Jamaica [2013] UKUT 254 (IAC), the Upper Tribunal, presided over by its President, Blake J, found that Nagre endorsed the two stage approach recommended by the Upper Tribunal in MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC) and pointed out that Sales J added the proviso that it would not always be necessary to move onto the second stage and consider article 8 proportionality apart from the provisions of the immigration rules where the rules and the learning on article 8 were in harmony unless there were exceptional circumstances. The Tribunal pointed out that the difference between the rules and the Strasbourg principles was marginal in that case. The Tribunal went on to say that further detailed consideration of the decision was not necessary or appropriate.

14. We are extremely surprised at the view taken by the respondent of the meaning of "exceptional circumstances". In Huang v Secretary of State for the Home Department [2007] UKHL 11 the House of Lords decided that there was no test of exceptionality involved in the assessment of proportionality. If respondent is right is would have been more appropriate to have just used the term disproportionate.

15. The explanatory memorandum to HC 194, which introduced paragraphs 396 to 400 into the immigration rules reads as follows:

> "***Approach to ECHR Article 8***
>
> 7.2 The new Immigration Rules will reform the approach taken as a matter of public policy towards ECHR Article 8 – the right to respect for family and private life – in immigration cases. The Immigration Rules will fully reflect the factors which can weigh for or against an Article 8 claim. The rules will set proportionate requirements that reflect the Government's and Parliament's view of how individuals' Article 8 rights should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public from foreign criminals. This will mean that failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim to enter or remain in the UK, and no grant of leave on that basis. Outside exceptional cases, it will be proportionate under Article 8 for an applicant who fails to meet the requirements of the rules to be removed from the UK."

It is difficult to see how it was intended that the meaning of "exceptional circumstances" should be no more than disproportionate, in circumstances where the rules themselves were intended to indicate the factors which would make deportation proportionate.

16. Moreover in paragraph45 of its judgement in Konstatinov v. The Netherlands - 16351/03 [2007] ECHR 336 the Court said:

> "The Court further reiterates that, moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would be precarious from the outset. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Rodrigues da Silva and Hoogkamer v. the Netherlands, no. 50435/99, § 39, ECHR 2006 ..., with further references)."

In Izuazu (Article 8 – new rules) Nigeria [2013] UKUT 45 (IAC) the Tribunal quoted a similar passage from Rodrigues da Silva and Hoogkamer v Netherlands (2006) 4th Section [2006] ECHR 86 and Nunez v. Norway - 55597/09 [2011] ECHR 1047 and after quoting the passage from Nunez then went on to say that this was not to adopt a general test of exceptional circumstances, but to identify the need for weighty factors in favour of the claimant in this class of case., Notwithstanding this, however, we consider that it might be thought that in paragraph 398 the respondent intended to introduce a test of exceptionality permitted by the Strasbourg jurisprudence but not permitted by the House of Lords in relation to consideration of article 8 outside the immigration rules.

17. We remind ourselves that in paragraph 10 of his determination in Molla (established presence - date of application) Bangladesh [2011] UKUT 161 (IAC) Upper Tribunal judge Storey said:

> "Even though the Policy Guidance cannot be used to establish the requirements of the Immigration Rules, Sedley LJ made clear in Pankina that it can nevertheless give rise to a legitimate expectation that appellants should be able to benefit from Policy Guidance provisions that are more generous than the Rules: see HM and others (PBS - legitimate expectation - paragraph 245ZX(I)) Malawi [2010] UKUT 446 (IAC)."

18. Nevertheless we also take the view that it is not necessary to reach a decision upon whether exceptional circumstances means no more than circumstances showing that deportation would be disproportionate because the First-tier Tribunal clearly went on to consider whether the appellant's deportation would amount to a disproportionate interference with his article 8 rights outside of the immigration rules and so answered the question which Mr Fripp said it was obliged to determine.

19. It follows therefore that our consideration of the second ground of appeal will be determinative of the outcome of the appeal. When invited to say what factors would make the appellant's deportation disproportionate Mr Fripp identified the solid

family life which the appellant had with his wife and children which the First-tier Tribunal accepted and the fact that the appellant had not been unlawfully present in the United Kingdom, having been granted indefinite leave to remain. He pointed out that there was a good family background, in that the appellant had spent time in South Africa in order to supply the family's needs, in circumstances where his stay there had been prolonged because of his previous removal. There was the factor that notwithstanding that the offence committed by the appellant was a serious one, that event had to be seen in context, which was that the appellant was 40 years old, of previous good character, had no previous convictions in any of three countries and the fact that the appellant's claim was that he did not know what was in the container. Mr Fripp however had to concede that he could not go beyond the appellant's conviction, which implicitly involved him knowing that he was conspiring to fraudulently evade the prohibition on the importation of a Class B drug.

20. Mr Fripp also suggested that although the First-tier Tribunal had set out in a structured way the background cases, so far as the facts of the appeal were concerned although they were present in the determination they were set out disparitively. He repeated that the First-tier Tribunal had failed to deal with the offence in its context, which was that the appellant was nearing 40 years of age, was a family man of good character and no other criminal offences were recorded against him in any country. Mr Fripp referred to paragraph 10 of his grounds of appeal which suggested that the First-tier Tribunal focused on the seriousness of the offence to the exclusion of any wider examination of its context, including his good and sometimes potentially impressive behaviour.

21. Mr Fripp also submitted that the First-tier Tribunal accepted the evidence of family life and the evidence of Dr Claridge concerning prospective harm to the children, but submitted, however, that the First-tier Tribunal's reliance upon the fact that the appellant did not live permanently with his children was an error of law because the First-tier Tribunal justified that consideration in giving less weight to the effect that the appellant's deportation would have upon the children.

22. It seems to us that Mr Fripp's complaints about the First-tier Tribunal's assessment of the proportionality of the appellant's removal amounts to a criticism of the weight which the First-tier Tribunal gave to various competing factors, rather than identifying an error of law on the part of the First-tier Tribunal.

23. The offence which the appellant committed was undoubtedly a serious one. He pleaded guilty to conspiracy to import and to evade a prohibition on the importation of a Class B drug, namely 193.30 kilograms of cannabis, for which he received a four and a half year term of imprisonment imposed at the Crown Court at Wood Green on 2nd March 2012. The sentencing judge observed that it was said by the Crown that he had undertaken a leading role, while his counsel acknowledged that his role was at least significant. The judge said that a leading role meant of course the supposition that he was leading others and the case was presented to the court, and the court accepted, that it was a sole trader enterprise, so it seemed to him that he fell between a leading role and a significant role.

24. As to the context in which the offence was committed, in paragraph 79 of its determination the First-tier Tribunal noted the submission by Mr Fripp that the appellant had not accepted his guilt but it was plain that he accepted that the situation was not proper and he should not have acted in the way that he had acted. He pleaded guilty. It was asked to note that the appellant was 38 at the time of the commission of the offence and was at the date of the hearing over 40. This was a first offence by a person close to the age of 40 which was unusual.

25. In paragraph 8 of the First-tier Tribunal said that Mr Fripp submitted that the appellant had shown a strong disinclination to avoid return to custody. This demonstrates, in our view, that the First-tier Tribunal had these factors in mind.

26. In paragraph 84 of its determination the First-tier Tribunal accepted that there was a genuine, committed relationship between the appellant and his wife. They had met at university and they started to live together shortly thereafter. Even when the appellant had to move to South Africa for business opportunities, the relationship continued with their meeting each few months. It noted the celebration of marriage in 2003 and the appellant's wife's commitment to her husband when she travelled to live with him in South Africa. The First-tier Tribunal also went on to carefully examine the evidence relating to the decision to settle in the United Kingdom and noted the decision made by the couple that the appellant would continue to carry out his economic activities in South Africa as he had been successful and he was able to support his developing family with the profits. The First-tier Tribunal also noted his desire for the betterment of the family, in that although his wife had been granted a council flat tenancy, he was able to raise a mortgage to buy their own home in the United Kingdom. The First-tier Tribunal found that from about 2005 it had been the family's intention that the appellant would relocate to the United Kingdom and he sought to do so by developing his business here of the importing and exporting cars to Nigeria. The First-tier Tribunal noted that during this time he was visiting the United Kingdom on the basis of visit visas which was not in breach of the immigration rules, although it noted that he did overstay in 2008, at which time he was forcibly removed from the United Kingdom to Nigeria. The First-tier Tribunal said it was indeed unfortunate that that occurred as this seems to have been the catalyst to the unravelling of his financial affairs.

27. The First-tier Tribunal went on to find that the arrangements by the couple meant that they did not live as a traditional nuclear family, but the appellant spent a considerable proportion of his time working in South Africa trading and as a result, on his evidence, he spent no more than six months in any year up to the time of his arrest in the United Kingdom. As a result of this the family had prolonged periods of separation when contact was maintained by e-mails and correspondence. The First-tier Tribunal noted the appellant accepted responsibility for the crime that he had committed but asserted he was not aware of the contents of the consignment and therefore did not knowingly import the prohibited drugs. He had, however, at the date of the hearing made no formal appeal nor did he produce any evidence that he had indeed been in communication with solicitors to this effect.

28. The First-tier Tribunal found that the appellant's four children were British citizens and that their lives were centred primarily on their mother who was their main carer

and that they were fully integrated in the United Kingdom. It accepted, however, that the appellant was involved in the lives of his children, but the family choice had been to live separate and apart for a substantial period of time for financial purposes. It noted both the appellant and his wife had parents and siblings still residing in Nigeria.

29. In paragraph 91 of its determination the First-tier Tribunal found that the appellant did enjoy family life in the United Kingdom as well as a private life and that it would be an interference with his family and private life if he were to be deported to Nigeria. It accepted that it would not be reasonable to expect his British born wife and children to relocate to Nigeria.

30. In paragraph 93 of its determination the First-tier Tribunal accepted that the issue, as Mr Fripp identified, turned on proportionality. The First-tier Tribunal reminded itself of the criteria set out in the decision in Uner v the Netherlands No. 46410/99 [2006] ECHR 873 and Maslov v Austria No. 1638/03 [2008] ECHR 546**.** In paragraph 102 the First-tier Tribunal said it was accepted on behalf of the appellant that he had committed a serious offence relating to drugs. This had been accepted by the appellant although it noted in part that he claimed that he was not aware that there were drugs within the consignment. In paragraph 103 it noted that the appellant had indefinite leave to remain at the time of the offence, he had been involved in a much longer relationship with his wife and was married with four children and that his wife and children were British citizens. In assessing the appellant's conduct it noted that he remained in custody and he attempted to use his time constructively with further studies. It noted the appellant's family situation and observed that the children were British citizens and that they would not be required to leave the United Kingdom and it would not be reasonable for them to do so.

31. In paragraph 104 the First-tier Tribunal said that in dealing specifically with section 55 of the Borders, Citizenship and Immigration Act 2009 the removal of the appellant from the United Kingdom would have an impact on the children. They would wish to live with their father and to be able to see (him) when the family wished to do so. It went on to say, however, that the circumstances of this family were such that they decided that the father would work overseas, although it accepted he did spend half of his time in the United Kingdom and his deportation would of course mean that he would not be able to do that. However, this was not a situation where the children had not had unfettered access to their father at all times and they had become used to their father being absent in part. It went on to say that it had carefully considered all of the evidence and accepted Dr Claridge's report and found that there would be an adverse effect on the children. It reminded itself, however, that the children's interests were a primary consideration and not the paramount consideration.

32. In paragraph 107 the First-tier Tribunal repeated that it had considered all of the factors relating to the appellant's and his wife's and children's lives in the United Kingdom and apart from this offence he had a clean record and had been working to maintain his family. In paragraph 108 it said it had to balance the competing views of the parties and had paid especial regard to the interests of the children. It found on the evidence before it that the balance fell in favour of the Secretary of State's requirement to protect the public interest.

33. In our view it is plain that the First-tier Tribunal took into account all of the factors relevant to the assessment of the proportionality of the appellant's deportation. We do not share Mr Fripp's view that the First-tier Tribunal in some way discounted the effect that the appellant's deportation would have upon his relationship with his children; rather the First-tier Tribunal set out the context in which the appellant's deportation would take effect. The First-tier Tribunal clearly had regard to the appellant's good character and general family background in taking account of the seriousness of the offence. We find that Mr Fripp's criticisms of the First-tier Tribunal are not warranted.

34. In view of the weight which has to be given to the public interest in the deportation of foreign criminals in the light of the decision of the Court of Appeal in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550 the First-tier Tribunal did not disclose an error of law in relation to the question of whether or not the appellant's deportation would amount to a disproportionate interference with his right to respect for his private and family life under article 8 of the ECHR.

35. In these circumstances the Tribunal was entitled to find that there were no exceptional circumstances for the purposes of paragraph 398 of HC 395 and we are of the view that there was no error of law in relation to the assessment of the appellant's article 8 rights as seen through the prism of the immigration rules. This is the case whether exceptional circumstances had to be shown in the sense argued by Mr Fripp before the First-tier Tribunal or it merely had to be shown that the appellant's deportation would not be disproportionate.

36. Accordingly the determination of the First-tier Tribunal dismissing the appeal shall stand.

Signed Dated

P A Spencer Judge of the Upper Tribunal