Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00239/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 October 2014	**On 17 October 2014**
Extempore judgment	

Before

THE HONOURABLE MR JUSTICE KING
UPPER TRIBUNAL JUDGE J E COKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DAMION ANTHONY WILSON

Respondent

Representation:

For the Appellant: Mr P Deller, Home Office Presenting Officer
For the Respondent: Mr R Christopher, Kings Legal Services

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State, brought with permission, against the decision of the First-tier Tribunal (Judge Elliman) promulgated on 18 August 2014 following a hearing on 31 July 2014. That decision allowed the appeal of the present Respondent against the decision of the Secretary of State that he was somebody to whom section 32(5) of the UK

Borders Act 2007 applied and that he accordingly fell to be automatically deported. There was and is no issue that the Respondent is a foreign criminal as defined in Section 32 of the 2007 Act, he having been convicted on 9 July 2012 of possession of class A drugs with intent to supply, possession of criminal property and dangerous driving and sentenced to three years and nine months' imprisonment. The appeal before the First-tier Judge succeeded on the Judge's finding that one of the exceptions allowed for in the Borders Act applied, and that therefore Section 32(5) did not apply, that exception being that his removal would breach his Convention rights under Article 8.

2. On the face of his Determination it is clear that the First-tier Judge applied the material statutory provisions and the material provisions of the Immigration Rules applicable at the date of the hearing. The Rules, amongst other things, require that the Secretary of State in assessing the claim will consider whether paragraph 399 or 399A applies and if it does not, the Rules (see paragraph 398) further provide that the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A. In this case however the First-tier Tribunal found that paragraph 399, in particular 399(a), did apply and that it would be unduly harsh for the child to remain in the UK without the person who is to be deported. This was in reference to a number of children from a number of different relationships which the Respondent has formed while in the United Kingdom.

3. This appeal now comes before us seeking to establish a material error of law on grounds which in our judgment cannot succeed as a matter of principle.

4. The principal ground is that the First-tier Tribunal erred in law in finding that the requirements of paragraph 399(a) of the applicable Rules were made out. The sole material error of law identified in the Grounds in support of this ground is that there was another family member who was able to care for the children in the United Kingdom and as such therefore the requirements of 399(a) could not be met. This however is a complete misreading of the material provisions of the Rules applicable at the date of the hearing. It is correct that prior to 28 July 2014 the then version of paragraph 399(a) did have a requirement that there was no other family member who was able to care for the child in the United Kingdom. That requirement however, by Rule Amendment, has been deleted and had been deleted as at the time of the hearing and the decision against which the Secretary of State seeks to appeal. These amendments reflected the statutory changes to the Nationality, Immigration and Asylum Act 2002 introduced by section 19 to the Immigration Act 2014 which inserted into the 2002 Act a new Part 5A headed 'Article 8 of the ECHR: Public Interest Considerations' and in particular a new section 117C headed 'Article 8: additional considerations in cases involving foreign criminals'.

5. There can in these circumstances be no basis upon which we can find any material error of law as identified by the Secretary of State in her grounds and in respect of which leave to appeal was given. It would appear that leave to appeal was given on the same mistaken understanding as to the requirements of paragraph 399(a). This is clear from paragraph 3 of the Decision to grant permission which reads as follows:

> "Given that the judge's finding in paragraph 30 of her determination that paragraph 399(a) of the Immigration Rules applied was inconsistent with her earlier finding that the appellant's partner assisted by her elder child cared for the appellant's children then the judge's finding that paragraph 399(a) applied arguably amounted to a material error of law which also rendered her finding that it would be unduly harsh (which is also arguably the wrong test) to deport the appellant unsafe."

6. Mr Deller has attempted to persuade us to give him the opportunity to argue that the First-tier Tribunal did not correctly apply the test of 'unduly harsh' now appearing in 399(a), but such argument does not appear anywhere in the grounds of appeal before us and we consider it to be far too late now on the morning of the hearing of the appeal for the Secretary of State to seek to change course in this way. We can deal only with the grounds of appeal in respect of which leave has been given. There has never been any application on behalf of the Secretary of State to seek permission to appeal on amended grounds.

7. There is an additional ground in support of a material error of law identified in paragraph 7 of the Grounds, namely that the Tribunal failed to identify good reasons as to why the appellant's circumstances were exceptional and outweighed the public interest in deporting him. However this again is an alleged error of law which cannot fit in with the current version of the Rules. We summarise the current effect in paragraph 2 above. The requirement of 'exceptionality' has disappeared. There is, it is true, in its place the requirement of 'very compelling circumstances' where it is found paragraph 399 or 399A does not apply, but in this case the First-tier Tribunal found that 399(a) did apply and we have already found that there is before us no ground of appeal which can succeed in challenging that finding. It must follow that any ground of appeal based by reference to a non-existent test of exceptionality, or even by reference to the current version of paragraph 398, cannot succeed.

8. It follows in our judgment that in the circumstances in which this appeal has come before us, this appeal must be and is dismissed.

Signed Date 17th October 2014

Mr Justice King