Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00266/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 December 2013	**On 11 February 2014**
Approved Ex Tempore Judgment	

Before

THE HON. MR JUSTICE MCCLOSLEY, PRESIDENT
UPPER TRIBUNAL JUDGE K ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAVED RUSSELL

Respondent

Representation:

For the Appellant: Mr S Bhanji (of Counsel) instructed by Mordi & Co Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the second level of appeal arising out of a decision made by the Secretary of State to the effect that the Appellant should be deported from the United Kingdom. That decision was made on 19 December 2012. The Appellant exercised his right of appeal. There ensued the decision of the First-tier Tribunal which allowed the appeal on Article 8 ECHR grounds.

2. The Secretary of State has been granted permission to appeal. The first ground on which permission which has been granted relates to the panel's conclusion that the

Appellant met the requirements of paragraph 399A of the Immigration Rules because he no longer had ties with Jamaica. This was considered arguably perverse since, in paragraph 13, the panel had acknowledged that the Appellant had a grandmother living in Jamaica and had taken family holidays there.

3. The regime, which is constituted by paragraphs 397 to 399A and B of the Immigration Rules is as follows:

> "***398.*** *Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and*
> *(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years;*
> *(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of less than 4 years but at least 12 months; or*
> *(c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.*
>
> ***399.*** *This paragraph applies where paragraph 398(b) or (c) applies if –*
> *(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and*
> *(i) the child is a British Citizen; or*
> *(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case*
> *(a) it would not be reasonable to expect the child to leave the UK; and*
> *(b) there is no other family member who is able to care for the child in the UK;*
> *or*
>
> *(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and*
> *(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and*
> *(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.*
>
> ***399A.*** *This paragraph applies where paragraph 398(b) or (c) applies if –*
> *(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or*

(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has not ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

***399B.** Where paragraph 399 or 2399A applies limited leave may be granted for a period not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate.*

4. It has been determined that the deportation of this person from the UK is conducive to the public good on account of a relevant qualifying conviction, which applies in this case. The Secretary of State, in assessing the claim, will consider whether paragraph 399 or 399A applies. If it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors. It follows from this, of course, that if paragraph 399 or 399A does apply then the elevated threshold constituted by having to demonstrate exceptional circumstances whereby the public interest in deportation is outweighed does not apply.

5. In the present case, the focus is on paragraph 399A, sub-paragraph (b) of the Rules. This provides that the person is aged under 25 years, has spent at least half of his life living continuously in the UK, immediately preceding the date of the immigration decision, discounting any period of imprisonment and has no ties, including social, cultural or family with the country to which he would go if required to leave the UK.

6. The question which the First-tier Tribunal had to decide was whether the Appellant has no ties with the country of Jamaica (the proposed country of destination). In its determination, the Tribunal rehearsed some evidence and facts bearing on this issue in paragraphs [12] and [13]. Upon the hearing of the appeal today, it is confirmed that the following facts which bear on this discrete issue are not in dispute.

7. The following facts are undisputed.The Appellant is now aged 20 and he has lived in the UK from the age of three years as a fully settled person in a fully settled family. Secondly, he has little or no memory of life in Jamaica. Thirdly, in his lifetime, he has returned to Jamaica on four occasions for holidays which have been of some two weeks duration and have involved staying in hotel accommodation. Of these four visits, the last was made at least four years ago when the Appellant would have been aged 16 or younger. All of the Appellant's family members, with the exception of his grandmother, live in the United Kingdom. He has no particular ties (social, cultural or other) with Jamaica.

8. Some little guidance on the correct approach to this provision in paragraph 399A of the Immigration Rules is provided by the decision of the Upper Tribunal in the case of **Ogundimu v SSHD** [2013] UKUT 00060 (IAC). In this decision the Upper

Tribunal held that the natural and ordinary meaning of the word 'ties' in paragraph 399A of the Rules imports a concept involving something more than merely remote or abstract links to the country of proposed deportation or removals. It involves there being a connection to life in that country. Consideration of whether a person has no ties to such a country must involve a rounded assessment of all the relevant circumstances and is not to be limited to social, cultural and family circumstances. What is clear from this passage is that every case in which the issue of ties arises will be unavoidably fact-sensitive. Secondly, what also emerges from this decision is that a connection of some substance with the proposed country of destination is required. Thirdly, a rounded assessment of all relevant circumstances is required of the Tribunal. There is no suggestion that the Tribunal erred in law in its approach to this issue or in how it conducted the assessment. Rather, this ground of appeal is confined exclusively to the outcome of the exercise. The grant of permission to appeal allows the argument to be canvassed that the finding the panel made that the Appellant has no ties with Jamaica is perverse. Perversity is an elevated threshold in the world of appeals on points of law. It is established only where no reasonable Tribunal properly directing itself in law and having regard to all the evidence could have come to the conclusion under scrutiny. This has been the law since the decision of the House of Lords in **Edwards v Bairstow** [1956] AC 14.

9. We are satisfied that the threshold of perversity, or irrationality, is not overcome in the present case. Having regard to the evidence available to the Tribunal on this issue and the findings which it made, both explicit and implicit, we consider that the Tribunal's conclusion on this issue was plainly open to it. In the absence of any suggestion of a misdirection in law, we conclude that the first ground of appeal has not merit.

10. The second ground on which permission to appeal was granted recites that the panel's approach to Article 8 issues should now follow the decision of the Court of Appeal in **MF (Nigeria) v SSHD** [2013] EWCA (Civ) 1192, which suggested that the two-stage approach followed by the Upper Tribunal in **MF is not correct.** That indeed is what the Court of Appeal decided in **MF (Nigeria)**. It held that these provisions of the Rules constitute a composite code, or regime. Importantly, however, and not unexpectedly, the Court of Appeal also held that it is incumbent in any appeal of this kind to examine the substance of what the lower Court or Tribunals decided in order to ascertain whether any error of law has been committed: that is the approach which we adopt in the present case.

11. Elaborating on this ground on behalf of the Secretary of State it is contended that the following frailties contaminate the First-tier Tribunal's assessment and determination of the Article 8 issue. Firstly, it is argued that the Tribunal failed to give sufficient weight to the judge's sentencing remarks. Secondly it is said that more weight should have been given to the offence of theft committed whilst an inmate in the young offenders' institution. Thirdly, it is claimed that more weight should have been given to the Appellant's adult status. Finally, it is suggested that insufficient weight was given to the public interest.

12. The formulation of each of these arguments is noteworthy. They challenge the merits of the Tribunal's evaluative assessments, findings and conclusions They suggest that greater weight should have been given to certain factors and they complain that insufficient weight was given to others. This formulation is important because it points this appellate Tribunal in the direction of what the relevant criterion to be applied is. Where there is a challenge of this genre the legal standard to be applied is, as in the first ground of appeal, that of irrationality. In other words, could a reasonable Tribunal, properly directing itself in law and having regard to the evidence considered and findings made, have reasonably reached this conclusion?

13. The consideration of this matter in the First-tier Tribunal's determination is extensive. At the outset, in paragraph [16], they reminded themselves that they must strike a balance between the public interest that would be served by the removal of a foreign criminal and the Appellant's right to respect for his private and family life. In the twelve paragraphs which follow, the Tribunal identified a series of factors and evaluated each of them. Importantly, there is no suggestion that in conducting this exercise the Tribunal left out of account any material factor, nor is it suggested that in performing this exercise the Tribunal impermissibly allowed the intrusion of some alien consideration. Furthermore, there is no suggestion of any misdirection in law in this part of the determination. The Tribunal, having set itself the task mentioned above, made the following conclusion in paragraph [28]:

> *"We turn to the final **Razgar** question that related to proportionality considering this in the context of both the appellant's family and his private life. We have concluded that the public interest to be served by the appellant's removal is significantly reduced because there is little risk that he will re-offend and he therefore represents little risk to the public. In our view, the appellant has family and private life rights here, of considerable moment. We therefore find the appellant's right to respect for both his private and family life in the United Kingdom outweighs the public interest in his removal".*

14. In considering whether the applicable threshold, namely that of irrationality, is overcome in this aspect of the appeal, we can find no fault in the findings or evaluative judgements which are littered throughout these paragraphs. We consider that the conclusion which the Tribunal made, having conducted this exercise, fell within the band of reasonable conclusions open to a reasonable Tribunal properly directing itself in law. We conclude, accordingly, that the second ground of appeal, which encompasses the complaints articulated *inter alia* in paragraphs [6] and [7] of the application for permission to appeal, must be rejected.

DECISION

15. It follows that we dismiss the appeal and we affirm the decision of the First-tier Tribunal.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 10 February 2014