Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01304/2013

THE IMMIGRATION ACTS

Heard at Birmingham Magistrates Court	**Determination Promulgated**
On 25 March 2014	**On 16th April 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE
DEPUTY UPPER TRIBUNAL JUDGE M. A. HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ENOCH SAMUEL SUTHERLAND

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr M Olubisose, M. Olubi, Solicitors

DETERMINATION AND REASONS

1. We shall refer to Enoch Samuel Sutherland, the respondent in this appeal before the Upper Tribunal, as the appellant (as he was before the First-tier Tribunal) and to the Secretary of State as the respondent. The background to the appeal is set out in in detail in the determination of Upper Tribunal Judge Southern and Deputy Upper Tribunal Judge Coates, sitting as a panel of the Upper Tribunal at Sheldon Court, Birmingham, on 30 January 2014, the full text of which we set out below:

    1. The Secretary of State has been granted permission to appeal against the decision of the First-tier Tribunal who, by a determination promulgated on 22 October 2013, allowed Mr Sutherland's appeal against a decision that he should be deported, pursuant to section 32 of the UK Borders Act 2007, as an automatic consequence of his conviction and imprisonment for an offence of rape. The appeal was allowed on the basis that the deportation would impermissibly infringe Mr Sutherland's rights, protected by article 8 of the ECHR, to respect for his private and family life or, as the First-tier Tribunal put it at paragraph 29 of the determination:

        > "… we find that interference in the appellant's family and private life is not necessary for any reason set out in article 8(2) of the ECHR."

    2. In those circumstances, Mr Sutherland is, of course, the respondent before the Upper Tribunal but, for ease of reference, we shall continue to refer to the parties as they were before the First-tier Tribunal. It was the respondent's case before the First-tier Tribunal that the deportation of the appellant *was* necessary in light of the legitimate aim being pursued in making the deportation decision.

    3. The background to the decision under challenge is summarised at paragraph 2 of the determination which we reproduce below:

        > "The appellant entered the United Kingdom on 8th December 1998 with valid entry clearance in order to visit his parents who were in the United Kingdom. Subsequently, the appellant was granted indefinite leave to remain in line with his parents on 9th January 2003. On 10th October 2011 the appellant was convicted of rape of a young woman over the age of 17. On 7th November 2011 the appellant was sentenced to five years and four months detention in a young offenders' institution and placed on the Sex Offenders Register for life. On 3rd February 2012 the appellant was served with notice of liability to automatic deportation action. Following that, the respondent made a deportation order, a decision the appellant appealed and hence the matter before us."

    4. At the hearing, the panel of the First-tier Tribunal heard oral evidence from no less than eleven witnesses, including friends and relatives of the appellant and members of a church with which the family was associated. The panel took into account that the appellant had lived here since a very young age and he now had little in the way of any ties remaining with Ghana, his country of nationality. The panel recognised that the appellant had committed a serious offence but the witnesses now spoke of the appellant's "honesty integrity and intelligence" and the panel concluded that the appellant was remorseful for

his past actions, had engaged well in arrangements for his rehabilitation and now represented a low risk of reoffending. Drawing all that together, the panel concluded that:

> "… there are sufficiently compelling reasons (exceptional circumstances) which outweigh the public interest in favour of deportation."

5. In granting permission to appeal, First-tier Tribunal Judge Mailer said:

> "The grounds assert that the panel failed to consider the cases of AM [2012] and Masih [2012] regarding the deterrent effect of deportation and public confidence. There is a strong presumption in favour of deportation of those who exceed the sentencing guidelines outlined in para 398(a). Further, "exceptional" mean circumstances in which deportation would result in an unjustifiably harsh outcome. His family life is one of normal emotional ties.
>
> It is arguable that the panel did not properly taken into account and consider the strong presumption in favour of deportation in a case such as this. The appellant's circumstances were arguably not shown to be sufficiently compelling to outweigh the strong public interest in his deportation….."

6. As Mr Olubisose commenced his submissions we invited him to take us to anything said in the determination from which it could be deduced that the panel had had any regard at all to the public interest in deterring others, or indeed to anything said in the determination from which it could be drawn that the panel had carried out a proper assessment of the level of criminality involved in the appellant's offending. He was unable to do so, other than to suggest that this might be inferred from a reading of the determination as a whole, although he accepted, as he was bound to, that there is no specific mention or discussion of the issue of deterrence arising from the deportation of foreign criminals. This reinforces our conclusion that these were matters that were simply left out of account altogether by the panel.

7. That is of considerable importance because the effect of leaving out of account a material consideration meant that we cannot be sure that the outcome would have been the same had the panel adopted a proper approach.

8. There can be no doubt that this was a material consideration that the panel were bound to factor into their assessment as they struck a balance between the competing interests in play. That has been made clear, consistently, in guidance given by the superior courts. In *N (Kenya) v SSHD [2004] EWCA Civ* Judge LJ (as he then was) said at para 83:

> "83. The "public good" and the "public interest" are wide ranging but undefined concepts. In my judgment (whether expressly referred to in any decision letter or not), broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence, to non-British citizens who are already here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that whatever the circumstances, one of the consequences of serious crime may well be deportation …"

At paragraph 64 May LJ said:

> "Where a person who is not a British citizen commits a number of very serious crimes, the public interest side of the balance will include importantly, although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality."

So that, in the case under consideration:

> "…I consider that a proper reading of the determination as a whole does not support the submission that the adjudicator took properly into account the public interest considerations. If he had, it is, in my view, plain that he would not have reversed the Secretary of State's decision as to deportation.".

9. More recently, in *AM v SSHD [2012] EWCA Civ 1634*, as is specifically relied upon in the grounds for seeking permission to appeal, Pitchford LJ, having referred to this *dicta* said at paragraph 24:

> "Deportation in pursuit of the legitimate aim of preventing crime and disorder is not, therefore, to be seen as one-dimensional in its effect. It has the effect not only of removing the risk of re-offending by the deportee himself, but also of deterring other foreign nationals in a similar position. Furthermore, deportation of foreign criminals preserves public confidence in a system of control whose loss would itself tend towards crime and disorder."

10. The importance of these considerations was emphasised also in *JO (Uganda) v SSHD [2010] EWCA Civ 10*, *per* Richards LJ at paragraph 29:

> "…the factors in favour of expulsion are, in my view, capable of carrying greater weight in a deportation case than in a case of ordinary removal. The maintenance of effective immigration control is an important matter, but the protection of society against serious crime is even more important and can properly be given corresponding greater weight in the balancing exercise…"

11. The same approach was taken by a Presidential panel of the Upper Tribunal in the reported decision of *Masih (deportation-public interest-basic principles) Pakistan [2012] UKUT 46 (IAC)*. The guidance is summarised in the head note as follows:

> *"The following basic principles can be derived from the present case law concerning the issue of the public interest in relation to the deportation of foreign criminals:*
>
> *(a) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place.*
>
> *(b) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.*

> *(c) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge. ..*"

12. If anything more were required to establish the significance if this issue, it may perhaps be found in the judgment of the House of Lords in *Huang [2007] UKHL 11* . Having made the point, at paragraph 16, that:

> "… There will, in almost any case, be certain general considerations to bear in mind…"

The Committee set out some key considerations which included:

> "…the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain;

13. As we have observed, there is nothing in the determination to indicate that any regard was had to this issue and so the balancing exercise carried out was legally flawed. That is sufficient to establish that the panel of the First-tier Tribunal made an error of law such as to require their decision to be set aside. However, the determination discloses other legal errors which we can summarise briefly as follows.

14. Although the panel had before them the judge's sentencing remarks, from which it is unambiguously clear that he regarded the offence committed by the appellant to be particular grave, there is nothing to indicate that any regard was had to those remarks, the focus being mainly upon the case advanced by the appellant in support of his claim to have established a significant private and family life. Thus, there was no real or sufficient analysis of the criminality involved, which was an essential ingredient in any proper balancing exercise.

15. This being a case where paragraphs 399 and 399A did not apply, the focus was on the concluding sentence of paragraph 398:

> "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 would be outweighed by other factors."

As was made clear by the Court of Appeal in *MF v SSHD [2013] EWCA Civ 1192,* those circumstances have to be (with emphasis added):

> ".. sufficiently compelling (and therefore exceptional) <u>to outweigh the public interest in deportation</u>…"

Thus, the assessment of the circumstances is to be carried out in the context of the countervailing public interests arguments and not in isolation considered by themselves. One plank of the public interest argument, though, had been left out of account.

16. Thus the Panel made errors of law such as to require that their determination be set aside. The decision must be re-made by the Upper Tribunal. Having heard from the parties we accepted that, since the appellant had himself not been produced from detention, given that he had been successful before the First-tier Tribunal, it was inappropriate to remake

the decision in his absence. Therefore, the appeal is adjourned to a resumed hearing for that purpose. We do not reserve the appeal to ourselves and so it may be listed before any constitution of the Upper Tribunal.

Directions

Not later than 21 days from the date upon which these directions are sent out:

a. Mr Sutherland's representatives are to file with the Tribunal and serve upon the respondent an indexed and paginated bundle containing all documentary evidence relied upon. If reliance is placed upon documentary evidence already served, there is to be a single composite index including reference to that material as well as any additional documentary material.

b. In respect of any witness who is to be called to give oral evidence there must be a witness statement drawn in sufficient detail to stand as evidence in chief filed with the Tribunal and served upon the respondent. The respondent will be asked to indicate, at the commencement of the hearing, whether any assertion of fact contained in any such statement is challenged.

c. Mr Sutherland's representatives are to file with the Tribunal and serve upon the other party a skeleton argument setting out all lines of argument to be pursued at the hearing.

2. The resumed hearing took place at Birmingham Magistrates Court on 25 March 2014. As the previous panel of the Upper Tribunal had recorded at [15], this is an appeal which cannot succeed under paragraph 399 or 399A of HC 395. The appeal proceeded by reference to the existence of "exceptional circumstances" (that is, pursuant to paragraph 398 of HC 395) and also Article 8 ECHR.

3. The burden of proof is on the appellant and the standard of proof (as regards the appeal on Article 8 ECHR and Immigration Rules grounds) is the balance of probabilities. We heard evidence from the appellant; his father, Edward Sutherland, his mother, Cynthia Sutherland; his sister Edrina Sutherland; his brother Edwin Sutherland; the Reverend Joseph Acquaye. Each of these witnesses adopted their respective written statements as their evidence-in-chief. Each witness expressed his or her surprise that the appellant had committed the offence of rape and gave their views as to how the appellant's deportation to Ghana might affect his close family. We accept that the appellant's family is a close-knit one and that each of its members would wish the appellant to continue being a daily part of the family. It was, however, unfortunate that the appellant's parents, Edward Sutherland and Cynthia Sutherland, gave unreliable evidence regarding the existence and circumstances of Cynthia Sutherland's mother, who lives in Ghana. We say that this was unfortunate because we have little doubt that the motive in each case for failing to tell the truth to

the Tribunal lay in the genuine wish of each witness to do everything possible to ensure that the appellant remains living in the United Kingdom.

4. The appellant told us that his only close relative who remains living in Ghana is his maternal grandmother. He said that she lives in a rented room and is not in good health (she is in her seventies) and requires someone to look after her.

5. Edward Sutherland needed to be prompted in cross-examination to acknowledge that his mother-in-law is alive and in Ghana. First, Mr Sutherland said that the appellant could not live with his grandmother because he was "a man". He then explained that the grandmother lives in an apartment which would be too small for both the appellant and his grandmother. He also said that his United Kingdom family's expenses are "very high" and that he and his wife would be unable to support the appellant or his grandmother.

6. Cynthia Sutherland was asked in cross-examination whether any of the appellant's grandparents remain living in Ghana. She said clearly that all four grandparents had died; her own mother had died in 2005. When it was pointed out to her that both the appellant and Mr Sutherland had claimed that her mother was still alive, she told us that she had been referring to her stepmother and agreed that her natural mother is still alive and aged 74 years. She went on to explain that she pays her mother's rent in Ghana. She said that her husband did not know about that arrangement. Re-examined, Mrs Sutherland said that her mother lives in two rooms in a compound ("a room and a chamber"). She said that she considered it her responsibility as a daughter to continue to pay the rent.

7. We have no doubt whatsoever that Mrs Sutherland sought deliberately to mislead the Tribunal when she stated in her evidence that all of the appellant's grandparents had died. Her subsequent attempt (only made after a significant pause in her testimony) to claim that she had been referring to her stepmother was wholly unpersuasive. As we have recorded above, we have no doubt that Mrs Sutherland sought to deceive the Tribunal because she believed this would assist her son's appeal. However, her evidence and the lack of candour shown by Mr Sutherland has significantly altered the factual matrix which we find exists in this case. We consider it more likely than not that Mr and Mrs Sutherland did not wish to tell the Tribunal of the true circumstances of Mrs Sutherland's mother in Ghana because they feared that this would weaken their son's case. We find that the appellant's grandmother is a woman in her seventies who lives in Ghana in rented accommodation. We do not find it likely that the accommodation is so small that it would be impossible for the appellant to live with his grandmother. We do not consider the fact that the appellant is a male should in any way inhibit his ability to live with his own grandmother. Significantly, we find that there is in existence a financial mechanism whereby Mrs Sutherland remits money to her mother in Ghana to pay for rent and possibly other expenses. Mrs Sutherland does not, at present, receive any financial assistance from Mr Sutherland (although we doubt that he is has been, as he claims, unaware of the arrangement). We find that, if the appellant were to be deported to Ghana, not only would Mrs Sutherland continue with the present arrangement but

that it is highly likely that Mr Sutherland would assist financially by the same mechanism to support both the appellant and his grandmother. We find that there is no possibility, in the light of those arrangements, that the appellant would be destitute upon his return to Ghana. Further, the appellant told us that he had achieved several academic qualifications whilst in prison. We accept Mr Mills's submission that the appellant would be able to use those qualifications in order to obtain work in Ghana; the appellant's complaint that he has never worked before in his life seems to us to be irrelevant.

8. So far as the appellant's circumstances upon return to Ghana are concerned, the findings which we have set out in the paragraph above lead us to conclude that he would not encounter circumstances which would be unjustifiably harsh. He would be returning to the country of his nationality where the appellant's first language (English) is widely spoken and in which government and official business is conducted. We attach little weight to the appellant's complaint that he would not be able to speak the "dialect"; his anticipated problems in this regard were never properly explained to us. He would, in any event, have the assistance of his grandmother. We find that the appellant would be able to look for work and, in the shorter term, would receive financial assistance from his parents in the United Kingdom.

9. There is, in our opinion, nothing "sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation" regarding the likely circumstances of the appellant on return to Ghana which we have detailed above (see **MF (Nigeria) [2013] EWCA Civ 1192**). What then of the impact of the appellant's deportation upon his existing family and private life and the family and private lives of his close family members? We find that the appellant's mother, in particular, has been gravely upset by the emotional trauma caused by her son's criminality and conviction. We accept that she has suffered from stress and depression. We also have no doubt that his father and siblings are also very distressed by what has occurred and by the prospect of the appellant's removal to Ghana. Whilst we are well aware that continued communication by email or telephone is a poor substitute for day-to-day, face to face contact, we do find that this is a stable moderately well-off family whose members would be in a financial position to arrange to visit the appellant in Ghana, quite probably on a regular basis. Further, the impact of the appellant's deportation on the Article 8 rights of all involved must be considered in the context of the fact that the appellant is now, like all the other family members involved, an adult. He would, in natural course, have been expecting to leave his parents' home at the age of 20 years.

10. In light of the findings and observations which we have set out above, we are unable to conclude that, notwithstanding the evident distress which would be caused, the deportation of the appellant to Ghana will have consequences upon the family and private lives of the appellant himself and his family members which are so harsh as to warrant allowing his appeal. Mr Mills submitted that this family, far from being exceptional, was entirely normal, consisting of caring and loving family members closely committed to each other's welfare. We agree with that submission; there is nothing unusual about the family itself or, as a consequence of the criminal

behaviour of one of its members, the circumstances in which it now finds itself. Whilst we have no doubt that the appellant's removal will deepen the distress of close family members (especially Mrs Sutherland) neither the interference caused to family life in the United Kingdom nor the material circumstances to which the appellant will be removed in Ghana are such as to signify the circumstances of this appeal as exceptional.

11. In addition, we do find that this is a case where, notwithstanding the fact that the appellant is not a repeat offender, there exists a very powerful public interest concerned with his deportation. Whilst the probation reports indicate that the appellant is at low risk of reoffending, any offending which he may perpetrate in the future is at risk of causing considerable harm to individuals in the community. Mr Mills cited the decision of the Court of Appeal in **RE (Turkey) [2008] EWCA Civ 249** at[[14]:

> Ms Hulse submits that this was a misdirection by the AIT because in truth the immigration judge did properly take into account the impact of the appellant's criminal convictions. She did so at paragraph 36 of her determination before setting out as bullet points the factors which, as I have already indicated, she held favoured the appellant not being removed. At paragraph 36 she stated:
>
> "The offences were indeed abhorrent, and the fact that he pleaded not guilty, and put his former wife and children through a contested hearing is to be deprecated. His former wife was likely to have been traumatised by the experience."
>
> I have to say I consider that this seriously understates the gravity of the appellant's crime. The AIT's point moreover was not that the immigration judge had forgotten or ignored the fact of the appellant's criminal convictions but that they had simply failed to accord anything like due weight to their gravity. Rape is a crime which causes much revulsion in the mind of right-thinking people. If it is committed by an alien with no right or settled right to remain here, public policy will very likely call for the criminal's removal or deportation; and only the most pressing compassionate factors will be capable of tilting the balance the other way. I regard such a proposition as no more than dictated by ordinary humanity. The immigration judge did not recognise that critical aspect of the balance to be struck. Her decision contains what is little more than a perfunctory acknowledgment of the gravity of the crime followed by a list of bullet point factors said to go in the appellant's favour, none of which is as pressing as might be required and some of which do no more than point to the absence of further vice rather than the presence of virtue. I consider that the immigration judge's approach was unreasonable, with respect to her, and the AIT were quite right to find an error of law.

12. Consideration of the public interest brings us to the application of **Maslov v Austria (Application 1638/03) ECHR**, in particular [75]:

In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile.

13. We have had regard to the comments of Laws LJ in **RE** as regards the repugnance with which the crime of rape is considered in the wider community and having considered also the sentencing remarks of Recorder Elson, we find that this is a case where, whilst we acknowledge that the appellant came to the United Kingdom when he was only 5 years old, there exist very serious reasons and a legitimate public interest to justify his deportation.

14. Having considered paragraphs 398 of HC 395 ("exceptional circumstances") and having applied to the facts of this case the relevant Strasbourg jurisprudence concerning Article 8 ECHR, we are brought to the same conclusion. The deportation of this appellant to Ghana represents a proportionate response to his criminality when it is considered in the context of his and his close family members' private and family lives and the interference that will be caused to those lives by his removal. Accordingly, this appeal is dismissed.

DECISION

15. This appeal in respect of the Immigration Rules is dismissed.

16. This appeal is dismissed human rights grounds (Article 8 ECHR).

Signed Date 8 April 2014

Upper Tribunal Judge Clive Lane