Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01808/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 27th February, 2014	**On 14th March 2014**

Before

Upper Tribunal Judge Chalkley

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BOTULI SOMBO

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr B Halligan, Counsel instructed by Fadiga & Co

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department who in this determination I shall refer to as the claimant.

2. The respondent is a citizen of the Democratic Republic of the Congo, who was born on 3rd June, 1960. He has been in the United Kingdom since November, 1990. He applied for asylum on 21st November, 1990, and for some reason that application was not refused until 17th April, 1998, but he was granted exceptional leave to remain until 3rd April, 1999. The respondent was then granted leave to remain until 3rd April, 2002, following which he was granted indefinite leave to remain.

3. In April 2002, he made an application for naturalisation as a British citizen which was refused on character grounds. On 16th July, 2004, he was convicted of two counts of conspiracy to defraud and on 22nd September, 2004, he was sentenced to a term of imprisonment of two years.

4. The respondent had a prior conviction for obtaining property by deception when he was ordered to do 200 hours of community service. That was in 1997, and he has also some motoring convictions.

5. On 2nd February, 2005, the respondent was given notice by the claimant of her intention to make a deportation order. He appealed that decision and his appeal was dismissed on 26th May, 2005.

6. In April 2008, he made a further application for naturalisation which was again refused on the grounds of his criminal convictions on 11th October, 2008. Further representations were made to the Secretary of State in June 2009, and in October 2009, he lodged a fresh appeal against the deportation order which was also dismissed by the First-tier Tribunal on 11th March, 2010. The First-tier Tribunal on that occasion comprised First-tier Tribunal Judge Sharpe and Mr Innes, a Non-Legal Member.

7. On 18th May, 2010, the respondent's appeal rights were exhausted and so on 2nd June, 2010 the claimant made a deportation order against him under Section 51 of the Immigration Act 1971.

8. The respondent made further submissions seeking revocation of the order and that application was refused. He then made further representations in respect of an application for asylum and that was treated by the claimant as an application to revoke the deportation order and the refusal of that application was certified under Section 94 of the 2002 Nationality, Immigration and Asylum Act. The effect of that of course was to give him an out of country right of appeal only.

9. He sought judicial review of those proceedings. On 27th July, 2010 further representations made on his behalf were refused by the claimant with no right of appeal and further representations were made on that day resulting in that being treated as a further application to revoke the deportation order. The claimant refused to revoke the order on 6th September, 2010 and again certified that application under Section 94 of the 2002 Nationality, Immigration and Asylum Act.

10. On 13th September, 2010, the respondent again submitted representations which were refused the following day with no right of appeal and his removal was scheduled for 14th September, 2010. His removal failed because it is said he became disruptive on the flight.

11. On 7th March, 2011 further representations were considered and treated as an application to revoke the deportation order. This application was refused which resulted in an in-country right of appeal. On 8th March, 2011 he lodged his appeal against this decision to the First-tier Tribunal.

12. On 16th March, 2011 a consent order was signed withdrawing the claimant's decision of 27th July, 2010. On 13th April, 2011 the respondent's appeal was withdrawn and the claimant agreed to consider the matter further.

13. On 26th February, 2013 the appellant was issued with a deportation questionnaire and representatives acting on his behalf wrote a letter to the claimant. They had made further submissions in July 2012 and on 16th August, 2013 the claimant treated these as an application to revoke the deportation order which was refused in a decision of the claimant on 16th August, 2013.

14. In a Reasons for Refusal Letter dated 16th August, 2013, the claimant noted that the respondent had been convicted in July 2004, on two counts of conspiracy and noticed his sentence to two years' imprisonment. The respondent's application for asylum was refused and the claimant certified the presumption under Section 72(2) of the Nationality, Immigration and Asylum Act 2002 in respect of his asylum claim.

15. The Tribunal hearing the appeal comprised First-tier Tribunal Judge Mailer sitting with Mrs R M Bray. The panel made clear findings and although some concern was expressed in respect of comments made at the top of page 14 of the determination, the Tribunal allowed the respondent's claim and no challenge was made by the claimant in respect of those comments. The claimant did however challenge the decision suggesting that in allowing the appeal against deportation on the basis that the respondent's Article 8 family and private life rights would be infringed, had failed to give adequate consideration to the public interest in removing the respondent when undertaking the proportionality assessment and thereby misdirect itself in law. Reliance was placed on *SS (Nigeria)* [2013] EWCA Civ 550. In granting permission to appeal Designated First-tier Tribunal Judge McCarthy said this:

> "There is some merit in the respondent's argument. At para 165 the panel identified that the deportation decision would result in the separation of the appellant from his partner and children and at paragraphs 173 and 174 it identified the impact such separation would have on the appellant's partner and children. The panel appears to have reached its decision on the basis that such separation trumps other considerations. That is not the proper legal approach and it is arguable that the panel should have considered in more detail how the appellant's partner and children would be affected by the enforced separation and whether it was proportionate."

He went on to say this:

> "In addition, although not raised in the grounds of application, I have concern that the determination contains at the top of page 14 an exchange between the panel members, which suggests that they had yet to reach agreement as to the factual matrix. Such comments suggest that the panel had not yet completed its deliberations and concern that this might be the situation undermines the remainder of the determination."

16. In respect of that last point, it was not something that should have troubled the Designated Immigration Judge, because of course it was not something that had been raised by the claimant. The respondent was not concerned because his appeal had been allowed and, given the resources of the claimant, it really was not for the Designated Immigration Judge to take points that had not been taken by the claimant.

17. At the hearing before me Mr Tarlow relied on the grounds and relied on the decision of the Court of Appeal in *SS*. He particularly drew my attention to the fact that the respondent and his partner were living some distance apart with one in Cheltenham and one in London. He relied particularly on paragraph 58 of *SS*.

18. I noted in particular what the Tribunal said at paragraphs 132 and 133. At paragraph 132 they said:

> "We have also had regard to the summary conviction relating to the appellant. He has been convicted of obtaining property by deception, going equipped to cheat, for which he received a community sentence order in 1997. There are also several motoring offences committed in 1999, 2000, 2002 and 2004. He was also cautioned for assault occasioning actual bodily harm in January 2009. The details of that caution, however, have not been made available."

19. Arguably those are matters which the panel of the Tribunal should not have taken into consideration. The 1997 conviction was not a conviction which prompted the claimant to make a deportation order. Nor were the motoring offences in relation to the caution for occasioning actual bodily harm. That is something which occurred after the deportation order, but again is not relied on by the claimant and so the Tribunal could be said to have erred by taking account of those matters. Nonetheless they did take account of those matters and they went on at paragraph 133 to say this:

> "We have particularly taken into account the fact that the appellant has been convicted of a serious offence which has resulted in imprisonment for two years. He was however released from imprisonment on 20th December, 2004. We have also had regard to the significant role that the appellant played in the commission of the well organised conspiracy to defraud. We have had full regard to the sentencing remarks."

In respect of the sentencing remarks the Tribunal referred to them at paragraphs 7 and 8 of its determination and demonstrates that it was mindful of the remarks made by His Honour, Judge Pitman.

20. At paragraph 164 the Tribunal said this:

> "We have had regard to the sense to be given to the adjective 'primary' as discussed by Laws L.J. in the consideration of the children's best interests. Their interests are not only 'the' but also 'a' primary consideration – paragraph 44 of *SS (Nigeria)* [2013] EWCA Civ 550. It was accepted that the phrase should be taken to mean a consideration of substantial importance."

The Tribunal demonstrate that it has given consideration to *SS* and at paragraph 155 they say that the public policy considerations operating in such cases are substantial. They say at paragraph 156:

> "We bear in mind that the authorities do stress the significance of basic principles relating to the strong public interest in removing those convicted of serious offences. That interest lies not only in the prevention of further offences on the part of the individual concerned, but on deterring others from committing them in the first place."

In my view the Tribunal had demonstrated that it has fully taken into consideration the public interest into account.

21. They say again at paragraph 176 that they have had regard to the child's best interests and at 177 they reach the conclusion that affording, as they put it, "substantial weight to the public interest policy relating to deportation in a case such as the appellant's, we nevertheless find that those interests are outweighed by the interests of the appellant, Mrs Ewange and, in particular, their children in the enjoyment of their family life in the United Kingdom".

22. I have concluded therefore that the challenge by the claimant does not identify any error on a point of law in the Tribunal's determination. I uphold the determination. This appeal by the respondent is allowed.

Upper Tribunal Judge Chalkley