Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02548/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 December 2014	**On 17 December 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR ABDIL BASIT ALISABI
(No Anonymity Direction Made)

Respondent

Representation:
For the Appellant: Mr P Nath a Senior Home Office Presenting Officer
For the Respondent: Ms S Praisoody of counsel instructed by Calices Solicitors

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Sierra Leone born on 24 August 1971 ("the claimant"). The Secretary of State has been given permission to appeal the determination of a panel consisting of First-Tier Tribunal Judge Fitzgibbon QC and non-legal Member Mr G Getlevog ("the FTT") who allowed the claimant's appeal against the Secretary of

State's decision of 3 December 2013 to deport him pursuant to the automatic deportation provisions in section 32 of the UK Borders Act 2007.

2. The claimant claimed to have arrived in the UK on 17 August 1998. It was not until May 2001 that his then representatives made an application on his behalf for asylum. 10 September 2001 the Secretary of State refused the application, on the basis of non-compliance. The claimant lodged notice of appeal but failed to attend the appeal hearing. An Adjudicator dismissed his appeal 5 April 2002. His appeal rights became exhausted on 24 April 2002.

3. In October 1998 the claimant married his wife ("his wife") by a proxy ceremony in Ghana. They have four children together. His wife has a daughter from a previous relationship.

4. On 28 July 2005 the claimant was arrested in possession of a forged Dutch passport. On 30 October 2005 he was convicted at Inner London Crown Court of the offence of using a false instrument and was sentenced to 4 months imprisonment. He was released on 25 November 2005.

5. On 30 October 2006 his wife made an application under the family ILR exercise. On 23 May 2007 the Secretary of State refused the application on the basis that the claimant had an unspent conviction. His wife contacted a MP who got in touch with the Home Office and the decision was reviewed. His wife and children were granted ILR on 22 October 2008 and naturalised as British citizens on 20 November 2009.

6. On 13 October 2013 the claimant pleaded guilty at Inner London Crown Court to conspiracy to import a Class B drug (cannabis) and was sentenced to 12 months imprisonment. This was the index offence which triggered the deportation decision.

7. The claimant appealed and the FTT heard his appeal 4 July 2014. Both parties were represented. The claimant gave evidence as did his wife. The FTT heard oral submissions and considered a skeleton from the claimant's representatives submitted after the hearing. The FTT assessed the index offence. It related to an agreement to import by post just over 2 kg of cannabis from Ghana. The package was intercepted and replaced by dummy consignment. The claimant's role was to act as the addressee and recipient of the package. The judge described his role as akin to that of a "courier" who helped by providing a safe address for receipt of the drugs which would then have been passed on to others. Sentence was passed on an agreed basis that the claimant was not involved in the organisation or importation but only in the first stage of receiving and passing on the drugs. His role was "very much at the lower end of significant".

8. The claimant was given a 10% discount for his late guilty plea and other mitigating factors. The normal starting point for sentence would have been 18 months but was reduced to 12 months. There was a 2013 pre-sentence report which made reference to the claimant's visible remorse and assessed an 8% risk of reoffending within two years. It was considered that he presented a low risk of harm to the public. The claimant said that he had agreed to commit the offence for a payment of £500. He agreed to do this for the money because he was unable to work, felt useless and wanted to help his wife financially and especially with the forthcoming birthday of one of his children.

9. The claimant said that he obtained the forged Dutch passport in 2005 because he needed documentation in order to get a job. He pleaded guilty.

10. The claimant relied on Article 8 human rights and in particular his family life with his wife and their children. The four children were a boy born in 1999 (aged 15), a girl born in 2000 (aged 13), a son born in 2003 (aged 11) and a son born in 2007 (aged 7). His stepdaughter was born in 1994 (aged 20).

11. The Secretary of State had accepted that the decision to remove the claimant to Sierra Leone would interfere with his Article 8 human rights and might not be in the best interests of the children but was satisfied that the interference was in accordance with the permissible aim of the prevention of disorder and crime.

12. During the hearing the Secretary of State's representative withdrew the contention that the claimant was not in a genuine and subsisting relationship with each of the children for the purpose of paragraph 399 (a) of the Immigration Rules. The FTT found that there was such a relationship.

13. The FTT found the claimant's wife to be an impressive witness. His second period in prison had tested her commitment to him but she had forgiven him and believed that he would not re-offend. The FTT concluded that the claimant was fully engaged with his children as a parent and that they had lived together as a family throughout their lives save for his two periods of imprisonment. The claimant and his wife were in a devoted and subsisting relationship and his remorse for his offending was sincere.

14. After setting out the Article 8 provisions under the Immigration Rules in paragraph 21 and 22 the FTT found that as the claimant was sentenced to less than four years imprisonment paragraph 399 and 399A applied. It was necessary to consider whether the claimant could bring himself within the requirements of the Rules and if not whether his deportation would result in "unjustifiably harsh consequences for be individual or their family such that the deportation would not be proportionate".

15. The FTT found that the children were British citizens and the claimant complied with the requirements of paragraph 399 (a) (i). There was a genuine and subsisting parental relationship with each of them. The Secretary of State had conceded that it would be unreasonable for them to leave the UK. In that event his wife would be able to care for them in the UK which meant that he could not comply with paragraph 399 (a) (ii) (a).

16. The claimant and his wife were in a genuine and subsisting relationship for the purposes of paragraph 399 (b) but the claimant did not meet the requirements of paragraph 399 (b) (i) because he had not "lived in the UK with valid leave continuously for at least 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment)". He had not been here long enough to comply with the alternative long residence provisions in paragraph 399B.

17. The FTT reached the conclusion that the appeal could not succeed under the Immigration Rules. However, there were arguable grounds for concluding that the deportation would result in unjustifiably harsh consequences for the claimant and his family. As a consequence the FTT went on to consider the Article 8 grounds outside the Rules.

18. In paragraph 29 and 30 the FTT took into account the pre-eminent public interest in the deportation of foreign criminals and that the importation of controlled drugs into the UK was a serious matter. Considerable weight was given to the views of the sentencing judge as to the limited involvement of the claimant. The drugs were Class B (cannabis) not the far more dangerous Class A. The 12 month sentence was the starting point for the operation of the automatic deportation process. The claimant was not a dedicated drug dealer. His previous conviction was for a wholly different type of offence. He represented a low risk of reoffending and his reintegration into the family life might help divert him from offending not least because his wife had made it clear that she would not tolerate more criminal conduct and he did not want to jeopardise his marriage or his life with the children. The offences were not so serious that deterrence was a major consideration and did not call for deportation to be used to mark society's revulsion.

19. In paragraph 31 the FTT found that the claimant enjoyed a deep and subsisting relationship with his wife and children and was taking an active part in their upbringing. She worked as a care assistant for at least three nights a week and often overtime as well. The claimant stayed at home and was responsible for the children when his wife was not there. His wife could not read or write which left the claimant with responsibilities for domestic paperwork. It was concluded that the lives of his wife and children would become much more difficult if he was not there to help. Deportation would sever the essence of the family ties

between the claimant and his family. The FTT considered the facts of this case against those of the authorities referred to.

20. The Article 8 claim was strong. The best interests and welfare of the children were a matter of prime concern. Whilst there was a high public interest in the deportation of foreign criminals the FTT was satisfies that the effect of deportation would be so severe as to outweigh the public interest and would lead to unjustifiably harsh consequences for the claimant and his family. The Secretary of State had not shown that his deportation would be proportionate interference under Article 8 (2).

21. The appeal was allowed on Article 8 human rights grounds.

22. The Secretary of State applied for permission to appeal which was refused by a judge in the First-Tier Tribunal. However, it was granted on renewal by a judge in the Upper Tribunal.

23. In her application to the Upper Tribunal the Secretary of State relied on the grounds of appeal to the First-Tier Tribunal and a supplementary ground. The grounds are formulaic and could usefully have been broken down into separate grounds rather than run together. Distilling them as best I can they submit that the FTT erred in law in a number of ways. Firstly, by "failing to give genuine and proper regard as to the government's view on what are exceptional circumstances". Secondly, by failing to have regard to the case law which should have led to the conclusion that the claimant's circumstances were not exceptional and that there were no factors which set him apart from an ordinary family life claim. Thirdly, by failing to give adequate consideration to the Secretary of State's public interest policies given the severity of the offence committed or to the fact that the claimant's circumstances were essentially the same now as they were when the offence was committed. Fourthly, by failing to have regard to not only the risk of reoffending by the claimant but also the purpose of deterring other foreign criminals. Fifthly, by minimising the serious of the offence to an impermissible extent by observing that the claimant was not involved with "the far more dangerous Class A" drugs. There was no authority or evidential basis for the observation that cannabis was less dangerous than a Class A drug.

24. Mr Nath relied on the grounds of appeal. He questioned whether the Secretary of State's representative at the hearing before the FTT had conceded that there was a genuine and subsisting parental relationship. However, he dropped the point when I asked whether it had been raised in the grounds of appeal. It has not. He agreed that the FTT's finding that the claimant could not succeed under the Rules was correct. He emphasised that the claimant's wife had said that she could cope if he was sent back to Sierra Leone. The claimant had never made any effort to

regularise his stay in this country and still had ties to Sierra Leone. He relied on the observations of the sentencing judge.

25. Mr Nath submitted a copy of the pre-sentence Probation Report. He argued that the evidence of the claimant's children was not individually set out in the determination. In reply to my question, he was unable to point me to any part of the grounds of appeal in which this was raised. I was asked to find that the FTT erred in law and to set aside the decision which could be remade in the Upper Tribunal without adjournment, further evidence or submissions.

26. The essence of Ms Praisoody's submissions was that the FTT had set out the appropriate tests and correctly applied them. She took me through the findings of fact. All the relevant evidence had been given proper consideration. She emphasised that the claimant's wife was unable to read or write. Appropriate weight to been given to the public interest and the FTT carried out the correct balancing exercise. I was asked to find that there was no error of law and uphold the decision.

27. In his reply Mr Nath directed my attention to the evidence in the Probation Report as to the propensity to reoffend. Were it not for his guilty plea and other factors the claimant would have been sentenced to 18 months imprisonment.

28. I reserved my determination.

29. I find no merit in the submission that the FTT failed to take into account the passage in the Probation Report relating to the question whether the claimant could reoffend if he considered that he needed money. Firstly, this is not in the grounds of appeal. Secondly, I find that the panel made a proper assessment of the contents and conclusions in this report.

30. I find no merit in the additional ground of appeal that in paragraph 29 the FTT went behind the index conviction and sought to minimise the seriousness of the offence by observing that the narcotics the appellant were involved in were "not the far more dangerous Class A drugs". It is also submitted that the FTT erred because there was no legal authority or evidential basis for the observation that cannabis was less dangerous than a Class A drug. This is not a complete quotation from the determination. The FTT said; "the drugs were Class B drugs (cannabis), not the far more dangerous Class A". I regard it as self-evident that a Class B drug (cannabis) is less dangerous than a Class A drug or at least that legislation and the Secretary of State treat them in this way. I wonder whether the Secretary of State would continue to publicly support the submission that cannabis is as dangerous as a Class A drug.

31. I find that the FTT did give genuine and proper regard as to the government's view as to what are exceptional circumstances not only in the reasoning leading up to the conclusion that the claimant could not succeed under the Rules but in paragraphs 28, 29, 30, 33, 34 and the final summing up in 35. Clear reasons were given for the conclusion that the claimant's circumstances were exceptional and there were factors which set him apart although I find that there is a lack of clarity as to what the Secretary of State considers to be "an ordinary family life claim". Adequate consideration was given to the Secretary of State's public interest policies given the FTT's assessment of the severity of the offence committed. There are valid reasons for the findings as to the propensity to reoffend in the light of current circumstances. Proper regard was had to society's revulsion and the deterrence other foreign criminals in paragraph 30.

32. I have not been asked to make an anonymity direction and can see no good reason to do so.

33. I find that the grounds are in essence no more than disagreement with conclusions properly reached by the FTT on all the evidence. There is no error of law. I dismiss the Secretary of State's appeal and uphold the determination.

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Signed Date 13 December 2014

Upper Tribunal Judge Moulden