Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/00193/2013
AA/01510/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 19 September 2014	**On 12 January 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SCS
IFD
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Miss Johnstone, Senior Home Office Presenting Officer
For the Respondents: Miss L Mair, instructed by Greater Manchester Immigration

DECISION AND REASONS

1. The respondents SCS and IFD are respectively citizens of Jamaica and Zimbabwe. I shall hereafter refer to the respondents as the first and

second appellants and to the Secretary of State as the respondent (as they appeared respectively before the First-tier Tribunal).

2. The first appellant arrived in the United Kingdom in April 1998. In January 2010, he pleaded guilty to two counts of possession of a class A drug with intention to supply and was sentenced to three years and four months' imprisonment. The second appellant, having entered the United Kingdom initially as a visitor in 2002, was served with a notice of intention to remove in April 2007. She appeals against the decision to remove her on human rights and asylum grounds. In her determination at [55], Judge Foudy, in a determination in which he dismissed the second appellant's asylum appeal and allowed the first appellant's appeal against deportation and the second appellant's appeal on human rights grounds, wrote:

> ... [the second appellant's] human rights appeal overlaps very significantly with that of the first appellant as they are partners and have a young child together. The respondent concedes that it is unreasonable to separate that family unit therefore if the first appellant succeeds in his appeal the second appellant will succeed in her human rights appeal. I shall therefore turn now to the appeal of the first appellant.

3. The second appellant has not appealed against the decision of the judge to dismiss her asylum/Article 3 ECHR appeal. The first appellant's family circumstances are complicated. He has two children (K and S) who are British citizens. He has a further son (JJ) whose nationality is not certain. He does not appear to be a British citizen. He has a nephew (M) who has leave to remain as does another son (J). JJ is the natural child of the first and second appellants.

4. The deportation decision in respect of the first appellant is dated 14 January 2013. In a thorough and detailed determination, Judge Foudy rejected as incredible the second appellant's account of being at serious risk of harm in Zimbabwe. She found [65] that the first appellant is a good father to his children. She properly considered the severity of the first appellant's offending and the public revulsion which it might generate [60]. She found, however, [63] that the first appellant is not an habitual offender but "a weak man who saw an easy way to obtain money when he was facing financial hardship." She found that it was unlikely that the first appellant would offend again. Navigating her way through the complex family relationships between siblings, half-siblings and cousins, she considered that the interests of J and M were, if taken alone, insufficient to displace the public interest concerned with the appellant's deportation [67]. However, she considered it important in her Article 8 ECHR analysis to have regard to J and M as part of a "wider sibling group." She heard evidence from a number of witnesses, including the first appellant's former partner. She considered that it was unlikely that, if the first appellant was deported, that contact would continue between J and M and K and S; there is considerable hostility between the appellant's former wife and his former partner. The judge concluded at [70] that, if the first appellant were deported, "all meaningful contact between the older and

younger siblings would quickly cease." The judge was assisted in reaching that finding by the sight of a CAFCASS Report concerning K and S. As with the other children, when viewed in isolation, the judge was not persuaded that the interests of JJ alone would outweigh the public interest. However, she regarded JJ also as part of the wider sibling group. At [74], she concluded:

> I therefore conclude that the deportation of the appellant is certainly not in the best interests of K and S who would risk losing more than just a father in their everyday lives but also siblings. Moreover, I find that the public interest in reinforcing family life and avoiding the need for state intervention and childcare would not be met by the appellant's deportation.

5. In her helpful skeleton argument, Miss Mair analyses the grounds of appeal as follows:

   (a) The judge erred in law by failing to make findings as to whether paragraph 399 of HC 395 applied to the first respondent's Article 8 rights; the judge proceeded to conduct a balancing exercise.

   (b) the public interest was not properly balanced against the first respondent's circumstances; the factors falling against the first respondent were not properly balanced with reference to the public interest considerations in **OH Serbia**

   (c) the second respondent's Article 8 assessment was flawed because the judge did not

   > 'Consider whether there were any arguably good grounds to consider Article 8 outside of the Immigration Rules and whether there were any compelling circumstances not sufficiently recognised under the Immigration Rules as per **Nagre**'

6. Having considered the papers carefully together with the oral submissions of both representatives, I find that the Secretary of State's appeal should be dismissed. I have reached that conclusion for the following reasons. First, I agree with Miss Mair that the judge did not err in law by carrying out a balancing exercise having concluded (albeit briefly) that the first appellant could not meet the requirements of paragraph 399 of the Immigration Rules. I find that it is not helpful to speak in terms of a "hurdle" or "test." An appellant must show that there exist exceptional circumstances. In *MM [2014] EWCA Civ 985* the Court of Appeal observed at [129]

> Sales J's decision therefore follows the logic of Laws LJ's statements in [38]-[39] of ***AM(Ethiopia),*** analysed above. However, there is a difference in that in ***Nagre*** the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on ***Article 8*** grounds; whereas in ***AM(Ethiopia)*** and in the present appeals the rule challenged stipulates a particular requirement that has to be fulfilled before the applicant will be allowed to enter or remain. The argument in each case is that it is that specific requirement that offends ***Article 8. Nagre*** does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case

> that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further ***Article 8*** claim. That will have to be determined by the relevant decision-maker.

Likewise, in *MF (Nigeria) [2013] EWCA Civ 1192* at [44] the Court of Appeal indicated that a balancing exercise was likely to be necessary:

> We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not "mandated or directed" to take all the relevant article 8 criteria into account (para 38).

7. Secondly, as I have noted above, the judge was very careful to give proper weight to the severity of the first appellant's criminal offending. I find that she adequately considered the public interest concerned with his deportation. The Secretary of State appears to argue that the judge should have given even greater weight to the public interest but, with respect, that is not the point. This is certainly not a case in which the judge has ignored or played down the public interest. Indeed, she has made it very clear that the appeal has only succeeded because of the complex interaction of the relationships between the various children involved. She was right to point out that, viewed in isolation, that the rights of each child would not have been sufficient to outweigh the public interest. I find that the outcome of the appeal was clearly available to the judge and she has supported it with cogent and adequate reasoning.

8. Finally, there is no merit in the Secretary of State's assertion in the grounds of appeal that the judge improperly allowed the Article 8 appeal of the second appellant. The grounds overlook the contents of [55] of the determination which I have set out above. I can find no reason to doubt that, before the First-tier Tribunal, the respondent's representative made the concession which the judge records at [55] that it is not possible for the respondent to seek to resile from that concession at this stage.

9. In the circumstances, the appeal is dismissed.

Notice of Decision

This appeal is dismissed.

Signed Date 14 November 2014

Upper Tribunal Judge Clive Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 19 November 2014

Upper Tribunal Judge Lane