Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01410/2014

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 12 May 2015	**On 11 June 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A M H H
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr C Jowett, instructed by Albany Solicitors

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party invited me to rescind the order and I continue it pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

3. The Appellant is a citizen of Somalia who was born on 14 December 1986. On 20 April 2010 he was convicted at the Cardiff Crown Court of the offence of possession of a controlled drug (cannabis) with intent to supply and was sentenced to a period of imprisonment of 65 weeks. As he was also in breach of a suspended sentence order imposed on 26th January 2009, also for the possession of a controlled drug (cannabis) with intent to supply, the judge partially activated that suspended sentence and imposed a consecutive term of thirteen weeks' imprisonment.

4. On 4 August 2010, the appellant was served with notice of his liability to automatic deportation as a foreign criminal under the UK Borders Act 2007. In response, the appellant raised refugee, humanitarian protection and Art 8 grounds. On 8 July 2014, the Secretary of State refused the appellant's claim for asylum and humanitarian protection and concluded that his deportation would not breach Art 8. As a consequence, the Secretary of State made a decision that s.32(5) of the UK Borders Act 2007 applied as none of the exceptions to automatic deportation had been established.

The Appeal

5. The appellant appealed that decision to the First-tier Tribunal. In a determination promulgated on 2 January 2015, Judge Knowles dismissed the appellant's appeal on asylum and humanitarian protection grounds. That decision is not challenged by the appellant and I need say no more about it. However, the judge allowed the appeal under Art 8. The judge accepted that the appellant had a genuine and subsisting relationship with a British citizen ("Ms P") which had continued for seven years; they had become engaged to be married in November 2013 and had lived together for six months. Applying para 399(b) of the Immigration Rules (Statement of Changes in Immigration Rules, HC 395 as amended), it was accepted that it would be unduly harsh for Ms P to live in Somalia and the judge found that it would be "unduly harsh" for Ms P to remain in the UK without the appellant. The judge went on to consider the issue of "proportionality" under Art 8 and concluded that the public interest reflected in the appellant's offending was outweighed by his particular circumstances including the effect upon his family life and the delay of four years between his being notified of his liability to be deported in 2010 and the decision to do so in 2014.

6. The Secretary of State sought permission to appeal on two grounds. First, the judge had failed properly to apply the "unduly harsh" criterion in para 399(b) including giving adequate reasons why the impact upon Ms P was such as to outweigh the public interest in deporting foreign criminals. Secondly, the judge's finding under para 399 had infected his finding under Art 8 and so his assessment that the public interest was outweighed was flawed.

7. On 27 January 2015, the First-tier Tribunal (Judge J M Holmes) granted the Secretary of State permission to appeal.

8. Thus, the appeal came before me.

Discussion

9. So far as relevant, para 398 of the Immigration Rules provides as follows:

> "Where a person claims that their deportation will be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) ...
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interests because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least twelve months;
>
> (c) ...
>
> The Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

10. Paragraph 399, so far as relevant provides as follows:

> "This paragraph applies where paragraph 398(b) ... applies if –
>
> (a) ...; or
>
> (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK, and
>
> (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
>
> (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and
>
> (iii) it would be unduly harsh for that partner to remain in the UK without the person to be deported."

11. Paragraph EX.2 of Appendix FM finds "insuperable obstacle" to mean:

> "The very significant difficulties which would be faced by the applicant and their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

12. The Immigration Rules provide a "complete code" (see MF (Nigeria) v SSHD [2014] EWCA Civ 1192). Having determined that an individual is a "foreign criminal", the proper approach is to first decide whether the

individual can succeed under para 399 or para 399A; secondly if he cannot then to determine whether there are "very compelling circumstances over and above" those falling within para 399 and 399A having regard to the statutory factors that must be taken into account under s.117B and s.117C of the Nationality, Immigration and Asylum Act 2002 (see Chege (section 117D – Article 8 – approach) [2015] UKUT 165 (IAC)).

13. Having set out paras 398, 399 and 399A of the Rules and self-directed in accordance with MF (Nigeria), the judge dealt with the Appellant's claim under Article 8 at paras 81-87 as follows:

> "81. Dealing first with the appellant's family life, it is clear that he has no parental relationship with a child in the UK. There is no dispute, however, that he does have a genuine and subsisting relationship with Ms [P], a British Citizen. On the evidence, their relationship has continued for 7 years and the appellant and Mrs [P] were engaged to be married on 17th November 2013, the 6th anniversary of the start of their relationship. I note that the appellant was granted indefinite leave to remain in the UK on 19th April 2007. It follows that his relationship with Ms [P] was formed at a time when he was in the UK lawfully and his immigration status was not precarious: Paragraph 399(b)(i) of the Immigration Rules refers. It appears to be accepted, on behalf of the respondent, that it would be unduly harsh for Ms [P] to live in Somalia with the appellant. Paragraph 399(b)(ii) of the Immigration Rules requires compelling circumstances over and above those described in Paragraph EX.2 of Appendix FM. That Paragraph refers to "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner". Ms [P] is a British citizen. She has lived all he life in the UK and knows no other culture. She has never been to Somalia and cannot speak Somali. She has a supportive family network in the UK. Her career is in this country. Her entire life is here. In my view, relocation to Mogadishu would entail, for her, very significant difficulties which would result in very serious hardship. Paragraph 399(b)(iii) of the Immigration Rules also provides that it must be unduly harsh for Ms [P] to remain in the UK without the appellant. As I have indicated, there is no dispute that their relationship has lasted for 7 years. On the evidence, the relationship is a strong one, bearing in mind that it has survived the appellant's incarceration following his conviction on 20th April 2010. The couple are engaged to be married. Their relationship has the blessing of Ms [P]'s mother and sisters, albeit, for cultural reasons, his father and the wider Somali community do not approve. I accept that the appellant and Ms [P] moved in together some 6 months ago. I acknowledge the force in the point, made by the appellant himself, that, if the couple had done this merely to strengthen his case for remaining in the UK, they would, by now, have married. Given the strength and duration of the couple's relationship, I am satisfied that it would be unduly harsh for Ms [P] to remain in the UK without the appellant. I find

that the family life considerations in Paragraph 399 of the Immigration Rules apply in this case.

82. I am, however, not persuaded that the private life considerations in Paragraph 399A apply. It does not appear to be in dispute that the appellant has been lawfully resident in the UK for most of his life. On the evidence, he is clearly socially and culturally integrated into the UK to the extent that he spends little time with the Somali community. For the reasons to which I have already referred in dealing with the international protection issues, however, I am not satisfied that there would be "very significant" obstacles to his integration into Somalia, at least not in Mogadishu.

83. My finding that Paragraph 399 of the Immigration Rules applies and that the impact of the appellant's deportation on Ms [P] would be unduly harsh does not, however, mean that there is no public interest in the appellant's deportation. In my judgment, there is a balancing exercise to be conducted. As the Court of Appeal made clear in ***LC***, less weight is to be attached to the public interest but, in my view, it is not to be disregarded entirely, particularly bearing in mind the clear provision in Section 117C(1) of the 2002 Act that the deportation of foreign criminals is in the public interest. In my view, important factors in the balancing exercise are the seriousness of the appellant's offence and the risk of his re-offending. Indeed, Section 117C(2) of the 2002 Act makes it clear that the more serious the offence, the greater the public interest in deportation.

84. I acknowledge the force in the submission that the appellant's offence does not stand our as a particularly serious offence of its kind. In his sentencing remarks His Honour Judge Bidder made it clear that he was sentencing the appellant on the basis of clear evidence of small retail supply of drugs, stating that there was no evidence of a lavish lifestyle or very substantial profits. Although the appellant has since expressed remorse for his offence, I am not persuaded that there was much evidence of remorse at the time of sentencing. It appears that the appellant failed to learn his lesson from a suspended sentence imposed for a similar offence and also that he committed the later offence while on bail. He was described by the Learned Judge as "utterly obstructive" when arrested and left his plea of guilty until the day of his trial. That said, the Judge sentenced the appellant to 65 weeks' imprisonment, which was sufficient to trigger the automatic deportation provisions of the 2007 Act.

85. As regards the risk of the appellant's re-offending, there is no OASys Report before me. Given the delay that has elapsed between the service of notice of the appellant's liability to automatic deportation on 4th August 2010 and the respondent's decision on 4th July 2014, it seems doubtful that such a report would be of much value now. What there is, however, is clear evidence that, apart from an incident of criminal damage to a taxi window, for which a caution was administered on 14th October 2012, the appellant has kept out of trouble with the police, held down a job and is working voluntarily with young people in the

community as a football coach. Ms [P] has clearly had a positive influence on the appellant's life. I found her an honest and credible witness who answered the questions put to her in an open and straightforward manner. I have no reason to doubt her evidence that the appellant has stopped using cannabis, which I acknowledge seems to have been the root cause of his offending behaviour. Ms [P] clearly has a supportive family. Her mother and sister appear to have no concerns about her continuing relationship with the appellant, something I believe would be less likely had the appellant continued abusing drugs. In the light of all the evidence I am persuaded that the risk of the appellant reoffending is low and that he has now learned his lesson as a result of being sent to prison.

86. As regards the delay that has arisen in this case, as I have indicated a period of not far short of 4 years has elapsed between service of notice of the appellant's liability to automatic deportation and the respondent's decision, which is the subject of this appeal. The cause of this delay is not clear, although there is a reference in the appellant's solicitor's letter dated 17th June 2014 to there having been an administrative error. In my view, a delay of this kind does not sit well with the importance Parliament has decided should be attached to the public interest in the deportation of foreign criminals. While I am not persuaded that, on its own, a delay, even of this magnitude, would render a decision to deport disproportionate, it is, in my view, a factor to be weighed in the balance, having regard to what was said in ***EB,*** particularly bearing in mind that there is no evidence that the appellant has contributed to the delay and the lack of any explanation whatever for it on the part of the respondent.

87. Having regard to the seriousness of the appellant's offence, the risk of his re-offending, the long delay and my finding that the family life considerations in Paragraph 399 of the Immigration Rules apply, thereby reducing the weight to be accorded to the public interest in deportation, I am satisfied that the appellant qualifies for an exception to the provisions of the 2007 Act relating to automatic deportation in that his removal from the UK in pursuance of a deportation order would be disproportionate and would, therefore, breach his right to respect for his family life protected by Article 8 of the Human Rights Convention."

14. On behalf of the Secretary of State, Mr Richards submitted that the judge had failed to give adequate reasons for his finding that the appellant's deportation would have an "unduly harsh" effect on their relationship. He relied upon what was said by the Court of Appeal in Lee v SSHD [2011] EWCA Civ 348 at [27] that:

> "The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does ..."

15. He submitted that even if the appellant's deportation would be "harsh" it had not been established that it would be "unduly harsh". The judge's

finding was inadequately reasoned and that infected his decision under Art 8.

16. Mr Jowett, on behalf of the appellant submitted that the judge had applied the correct legal framework. He submitted that in relation to the issue of whether the impact upon the couple's relationship would be "unduly harsh" the judge had correctly applied the approach set out in the respondent's own guidance, IDI, Chapter 13: "criminality guidance in Art 8 ECHR cases" (28 July 2014). In particular, he drew my attention to the section at para 2.5 headed "unduly harsh". At para 2.5.2 it is stated that:

> "When considering the public interest statements, words must be given their ordinary meanings. The Oxford English Dictionary defines "unduly" as "excessively" and "harsh" as "severe, cruel"."

17. Mr Jowett pointed out that at paras 2.5.3-2.5.5 the guidance requires a balancing of the impact upon the appellant's partner with the public interest based upon the appellant's criminality in determining whether the effect was "unduly" harsh. Paragraphs 2.5.3-2.5.5 are in the following terms:

> "2.5.3 The effect of deportation on a qualifying partner or a qualifying child must be considered in the context of the foreign criminal's immigration and criminal history. The greater the public interest in deportation, the stronger the countervailing factors need to be to succeed. The impact of deportation on a partner or child can be harsh, even very harsh, without being unduly harsh, depending on the extent of the public interest in deportation and of the family life affected.
>
> 2.5.4 For example, it will usually be more difficult for a foreign criminal who has been sentenced more than once to a period of imprisonment of at least 12 months but less than four years to demonstrate that the effect of deportation would be unduly harsh than for a foreign criminal who has been convicted of a single offence, because repeat offending increases the public interest in deportation and so requires a stronger claim to respect for family life in order to outweigh it.
>
> 2.5.5 It will usually be more difficult for a foreign criminal to show that the effect of deportation on a partner will be unduly harsh if the relationship was formed while the foreign criminal was in the UK unlawfully or with precarious immigration status because his family life will be less capable of outweighing the public interest that if he was in the UK with lawful, settled immigration status."

18. Mr Jowett submitted that the judge had fully considered the relevant factors: at para 81 he considered the nature of the relationship between the appellant and his partner; at paras 83 and 84 he had considered the seriousness of the appellant's offending including the sentencing judge's remark; at para 85 he considered the risk of the appellant re-offending; at para 86 he took into account the important factor that the respondent had delayed for almost four years between notifying the appellant of his

liability to be deported in 2010 and making the decision to deport him in July 2014. Mr Jowett sought to distinguish the case of Lee because the appellant's relationship was not a short relationship and the delay had contributed to its development. The relationship, as the judge noted, had been in existence for seven years and formed at a time when the appellant had indefinite leave to remain. Mr Jowett submitted that there was no error of law in the judge's decision; he had not failed to take into account all factors and his decision was not irrational.

19. As Mr Richards acknowledged, Judge Knowles' determination is a detailed and comprehensive one. It is not challenged that it would be unduly harsh to expect Ms P to live in Somalia with the appellant. The effect of the deportation would, therefore, be to separate probably permanently the appellant from Ms P. The judge took into account a number or relevant factors:

    (1) The relationship was a long-standing one of seven years and the appellant and Ms P were engaged to be married;

    (2) the relationship was formed whilst the appellant had indefinite leave to remain and his immigration status was not precarious;

    (3) the appellant and Ms P have cohabited for around six months.

20. All of those factors were relevant as to the "strengthened duration of their relationship". However, reading the determination as a whole, I am satisfied that Judge Knowles also considered in assessing whether the effect upon Ms P of the appellant's deportation would be "unduly harsh", the seriousness of the appellant's offending as required by the respondent's own guidance which I have set out above. Mr Richards did not suggest that the judge should not have considered the nature of the appellant's offending. As is clear from paras 83 and 84, the judge took into account the serious nature of the appellant's offending, namely the possession with intent to supply a controlled drug, namely cannabis for which he was sentenced to 65 weeks' imprisonment. It is noteworthy that the offence did not relate to the most serious category of controlled drugs, namely class A and the appellant's sentence of 65 weeks' imprisonment reflects that fact. Further, the judge found that the Appellant's risk of re-offending was at the "low end" and he was clearly impressed by the evidence he heard that the appellant had "learnt his lesson" as a result of being in prison and enjoyed the helpful support of Ms P and his family. Finally, the judge was entitled to take into account the almost four years delay between the appellant being sent a notice of liability to deportation and the actual decision to deport him made in June 2014. I did not understand Mr Richards in his submissions, nor the grounds, to doubt that that delay was relevant in assessing the legality of the appellant's deportation in accordance with EB (Kosovo) v SSHD [2008] UKHL 41. The delay was not explained and it undoubtedly contributed to the further development of the relationship between the appellant and Ms P, which the judge fully accepted as genuine, at a time when the appellant had indefinite leave to remain.

21. Whether the respondent's challenge is couched in terms of "adequacy of reasons" or illegality or irrationality, I do not accept that the respondent has established that the judge was not entitled to reach the decision that he did for the reasons that he gave. The reasons are adequate, in the sense that the reader is able to understand why the appellant succeeded in demonstrating that the effect on his relationship with Ms P if he were deported would be "unduly harsh". The Judge clearly had in mind the importance of the public interest in deportation cases: at para 80 of his determination he refers to s.117C(1) and the Court of Appeal's decision in LC (China) v SSHD [2014] EWCA Civ 1310. The appellant's offending, albeit involving controlled drugs, did not fall within the most serious category. The appellant had a genuine and long-standing relationship with his partner who could not be expected to live with him in Somalia. It would be unduly harsh to expect her to do so. Although the Court of Appeal in Lee, noted that the effect of deportation would, in many instances, result in a split in a family, that case does not establish any proposition that such a split is always justified under Art 8 whether viewed through the lens of para 399 or 399A or para 398. Each case turns necessarily upon the particular circumstances of the individual or individuals involved. Here, the judge did consider the individual circumstances and, having due regard to the public interest, considered that the impact upon the appellant and Ms P would be "unduly harsh" if he were deported such that she would have to remain in the UK and their family life would, in effect, cease.

22. In my judgment, the respondent has not established any basis upon which the judge could be said to have erred in law in allowing the appellant's appeal under Art 8 applying the relevant Immigration Rules, namely para 399(b).

Decision

23. For the above reasons, the First-tier Tribunal's decision to allow the appellant's appeal did not involve the making of an error of law. That decision stands.

24. Accordingly the appeal of the Secretary of State to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal