



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01450/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 2nd September 2015**

**Decision & Reasons Promulgated
On 8th September 2015**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A W Y

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A Brocklesby-Weller, Home Office Presenting Officer

For the Respondent: Ms A Seehra, Counsel instructed by Divine Legal Practice

DECISION AND REASONS

1. This is an appeal by the Secretary of State. I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Afghanistan born in 1982. His appeal against a deportation order under Section 32(5) of the UK Borders Act 2007 dated 27th June 2013 was allowed by First-tier Tribunal Judge Talbot and a non-legal member [the panel] on 16th June 2014.
2. The Respondent appealed on the ground that if exceptional circumstances were properly considered in context the Appellant had to demonstrate

circumstances over and above those set out in paragraph 399(a) or (b) of the Immigration Rules to succeed under exceptional circumstances. The panel had failed to identify why the Appellant's circumstances were exceptional in this case. The assistance the Appellant provided to his partner, although in her best interests, did not amount to exceptional circumstances and in this particular case the Appellant's circumstances were not strong enough to outweigh the public interest in line with SS (Nigeria) [2013] EWCA Civ 550. It was submitted that there was a strong public interest in deportation and the panel had failed to properly balance the public interest in the proportionality assessment and had therefore erred in law. Had the Tribunal properly considered the public interest they would have found that deportation was proportionate.

3. The application for permission was refused by First-tier Tribunal Judge Cox on 4th July 2013 on the ground that the panel clearly had in mind the considerations set out in the grounds of appeal and the case law of SS (Nigeria), AM v Secretary of State for the Home Department [2012] EWCA Civ 1634 and DS (India) [2009] EWCA Civ 544 in making its assessment of proportionality and this was evident from the last two sentences of paragraph 31 of the decision. Accordingly, the panel did not misdirect itself and whilst it was possible to conceive of a different outcome it could not be said that the panel arguably materially erred in law.
4. The application was renewed to the Upper Tribunal and additional grounds were submitted. Permission to appeal was granted by Upper Tribunal Judge Kekic on 2nd September 2014 on the basis that four grounds were arguable:
 - (i) There was no substantive consideration of the seriousness of the Appellant's offence in the decision;
 - (ii) The Tribunal failed to consider the adverse credibility findings made by a previous Tribunal, which should have been the starting point;
 - (iii) There was no medical evidence to support the Tribunal's finding that the Appellant's deportation would put in fresh jeopardy the mental health of a vulnerable young woman;
 - (iv) The Tribunal failed to identify what was exceptional in this case.
5. In submissions, Ms Brocklesby-Weller for the Respondent relied on the case of SS (Nigeria), AJ (Angola) [2014] EWCA Civ 1636, Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT 00046 (IAC) and McLarty (Deportation - proportionality balance) [2014] UKUT 00315 (IAC). She submitted that the panel had failed to provide adequate reasons for concluding that this was a compelling case. The additional grounds all challenge the inadequacy of reasons.
6. The first set of grounds were directed towards exceptional circumstances. In effect the panel had allowed the appeal on the basis of the Appellant's family life with Ms S. Her circumstances in the UK and previous history

amounted to a disproportionate interference with his family life. Those findings are found at paragraph 28 onwards.

7. At paragraph 32, the panel concluded that Ms S was a vulnerable young lady. It was unclear how they had reached such a conclusion given that there was no medical evidence before them and the oral evidence of Ms S was that she had a part-time job and her health had improved to the extent that she hoped to work full-time in the future. It was not clear from the determination how the panel had reached the definitive conclusion at paragraph 32 that she was a vulnerable young lady without medical evidence as to the up-to-date situation.
8. In assessing exceptional circumstances Ms Brocklesby-Weller relied on the case of McLarty in which the Tribunal held “where the facts surrounding an individual who has committed a crime are said to be exceptional or compelling these factors are to be placed in the weighing scale in order to be weighed against the public interest”. She submitted that significant weight had to be attached to the will of Parliament in accordance with paragraphs 53 and 54 of SS (Nigeria). The Appellant could not satisfy paragraph 399 or 399A and therefore the scales tipped heavily in favour of the public interest and the Appellant had to show very compelling circumstances in order to outweigh the public interest.
9. Ms Brocklesby-Weller relied on AJ (Angola) and stated that significant weight must be attached to the public interest, and proportionality and exceptional circumstances should be assessed through the lens of the Immigration Rules. The panel had not dealt adequately with the Immigration Rules and were misguided in their approach in finding that the circumstances of this case were compelling. Ms S’s health condition was not sufficient to amount to compelling circumstances. The proportionality balance was not a neutral balancing exercise. Had the panel properly engaged with the significant weight to be attached to the public interest they would have come to the conclusion that the Appellant’s circumstances and that of his partner were not exceptional.
10. For the applicant Ms Seehra relied on the Rule 24 response dated 29th September 2014, which in summary deals with the four grounds of appeal raised in the additional grounds dated 10th July 2014. She submitted that the decision was sufficiently detailed and the submissions made by the Respondent did not amount to an error of law. The panel found that the Appellant’s partner, Ms S could not relocate and they were entitled to reach that finding on the evidence before them. That finding was not challenged in the grounds of appeal.
11. At paragraph 28 the panel appreciated that the case was fact-sensitive and found that there would be a permanent separation of a longstanding relationship. They acknowledged the weight to be attached to the public interest at paragraphs 26 and 31 and put that into the proportionality balance at paragraph 31. They had recognised the seriousness of the offence and the fact that the low risk of reoffending was insufficient to

displace the public interest. The panel considered in detail the Appellant's offending history. This was a single offence and there were recent detailed reports in the Appellant's favour.

12. At paragraph 29 of the decision the panel considered the Appellant's relationship with Ms S and took into account the oral evidence and her detailed statement. There was ample evidence before the Tribunal in the form of statements, letters and medical evidence to enable them to reach the conclusion that they did at paragraph 34. The panel had attached significant weight to the public evidence and was entitled to find that there were exceptional circumstances, in light of the written and oral evidence, which outweighed that public interest. There was no error of law in the decision.

Discussion and Conclusions

13. I have to decide whether the First-tier Tribunal made an error of law in allowing the appeal under the Immigration Rules and on Article 8 grounds. Grounds 1, 2 and 3 of the additional grounds are misconceived. The panel took into account the sentencing remarks of the judge at paragraphs 16 and 31. They took into account the Appellant's immigration history at paragraphs 3 and 6 and they were entitled to rely on the oral evidence and documentary evidence before them. The lack of up-to-date medical evidence did not preclude the panel's finding at paragraph 33.
14. Ground 4 of the additional grounds challenges the panel's finding that the circumstances of the Appellant's case were exceptional. The panel failed to specify exactly what they found to be exceptional and this amounted to an error of law. Contrary to this ground the panel set out in some detail the exceptional circumstances at paragraphs 32 and 33 of the decision.
15. It was clear from reading the determination as a whole that the panel properly considered the provisions of the Immigration Rules and attached significant weight to the public interest. They acknowledged the seriousness of the offence and the fact that a low risk of re-offending was not sufficient to displace the public interest. They also acknowledged, at paragraph 31 of the decision, that there was a strong public interest in terms of general deterrence against foreign criminals entering the country and committing serious criminal offences even where the Appellant in question may be at low risk of committing further offences. I find that the panel clearly attached significant weight to the public interest in assessing proportionality.
16. The panel then went on to find that the Appellant's relationship with his partner, her vulnerability and her previous history amounted to exceptional circumstances sufficient to satisfy paragraph 398 of the Immigration Rules, which states:

"The Secretary of State in assessing the 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 will be outweighed by other factors.”

17. The panel set out the other factors at paragraphs 32 and 33. Therefore, I am of the view that ground 1 in the original set of grounds, that the panel had made a material misdirection of law in failing to identify exceptional circumstances and failing to properly apply the Immigration Rules was not made out. I also find that there was no error of law in the panel’s assessment of proportionality. They clearly attached significant weight to the public interest and then balanced the Appellant’s and his partner’s circumstances against that.
18. I find that the only arguable ground is that set out in paragraph 3 of the original grounds, namely, the Tribunal’s finding that it was in the Appellant’s partner’s best interests that the Appellant remained in the UK did not amount to exceptional circumstances in order to outweigh the public interest. That challenge is one of irrationality.
19. Given that the First-tier Tribunal considered the oral evidence of the Appellant and Ms S, the detailed witness statements contained in the Appellant’s bundle and the medical evidence therein, I find that the decision to find, on the particular facts of this case, that the Appellant’s circumstances were exceptional was a finding which was open to the Tribunal on that evidence. I agree with First-tier Tribunal Judge Cox in that it was possible to conceive of a different outcome, but the decision was not such that no reasonable Tribunal could have come to that conclusion on the evidence before it.
20. Accordingly, there was no error of law in the decision of the First-tier Tribunal and the Respondent’s appeal is dismissed. The decision dated 16th June 2014 shall stand.

Notice of Decision

The appeal is dismissed.

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 his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 7th September 2015

Upper Tribunal Judge Frances