Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00145/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 27 September 2013	**On 25 November 2013**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FV

Respondent

Representation:

For the Appellant: Mr A Mullen, Home Office Presenting Officer
For the Respondent: Mr S Winter, Advocate, instructed by Gray & Co, Solicitors

DETERMINATION AND REASONS

1) This is an appeal with permission by the Secretary of State against a decision of the First-tier Tribunal comprising Judge Price OBE and Ms S E Singer. The First-tier Tribunal allowed an appeal by FV (hereinafter referred to as "the claimant") under Article 8 against a decision to deport him.

2) The claimant is a national of Colombia. He came to the UK in July 1978 and later that year met JG, with whom he entered into a relationship. The appellant remained in the UK until 1985 when he and JG, together with their daughter and the claimant's stepson, went to Colombia. They returned to the UK early in 1986. The claimant shortly afterwards went back to

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Colombia. JG and the two children went to visit him there and they all travelled back to the UK together in October 1986. The claimant entered the UK on a visitor visa. Subsequently in 1988 the claimant was deported from the UK. JG and the two children followed him two days later but JG was depressed in Colombia and missed her mother. Accordingly JG and the children returned to the UK in December 1988. In 1989 the claimant attempted to enter the UK but was removed. He went to Spain, where JG and the couple's daughter joined him. As they had no work or income in Spain JG and the daughter returned to Scotland. In 2000 the claimant entered the UK illegally and was reunited with JG. The couple married in January 2003. An application was made for leave to remain as a spouse. This application appears to have been treated by the Secretary of State as an application to revoke the deportation order on human rights grounds. An application of this nature was refused with a right of appeal, which was duly exercised. The appeal was successful to the extent only of revoking the deportation order. The claimant therefore returned to Colombia to apply for entry clearance. He came back to the UK in March 2007 with a valid entry clearance. In 2009 the claimant was sentenced to imprisonment for 15 months for drug offences. This led to an automatic liability to deportation under the 2007 Act. It is the appeal against this decision which was allowed by the First-tier Tribunal.

3) The First-tier Tribunal heard evidence from the appellant, from his wife, JG, from the couple's daughter, BG, and from the claimant's stepson, SG. On the basis of this evidence the Tribunal made findings about the claimant's family and private life in the UK. The Tribunal found that the appellant has been married since 2003 and has a daughter from that relationship as well as a stepson. It was not disputed that the claimant had established private and family life in the UK. The Tribunal found that at the time of the decision appealed against the Secretary of State was not aware that a supervision order had been made by the Children's Panel in relation to the claimant's grandson, TB, the son of BG. In terms of this supervision order TB was required to live with the claimant and his wife, as his grandparents, and his mother lives at this address also. Both the claimant's daughter and stepson are single parents. Between them they have three young children, who attend a primary school close to the claimant's house. The claimant provides care for the grandchildren and has a close relationship with all three of them. He also cares for his wife, who suffers from epilepsy and osteoporosis. The Tribunal accepted that the claimant's wife is dependent on him for many aspects of her care. This includes the possibility of seizures which would put her and the grandchildren at risk. The Tribunal accepted that the family are particularly close, comprising the claimant and his wife, two grown-up children, three grandchildren, and the claimant's mother-in-law, who also requires care.

4) The Tribunal acknowledged that the claimant had committed a serious offence. His sentence was reduced by 5 months to 15 months because of his early guilty plea. The Tribunal accepted that the motivation for the crime was to obtain money to repay debts.

5) The application for permission to appeal on behalf of the Secretary of State criticises both the fact finding and the reasoning of the First-tier Tribunal. It was contended that the Tribunal did not record accurate evidence in relation to the supervision order by failing to take account of its temporary and reviewable nature. It was further contended that the claimant's care for his grandchildren was a matter of convenience rather than necessity as the grandchildren all had a responsible parent. Furthermore the care provided by the claimant for his wife was also said to be a matter of convenience. There was no evidence that the family was closer than any other.

6) With regard to the legal issues, the grounds contend that the Tribunal did not have regard to the case of Sanade & Other (British children – Zambrano – Dereci) [2011] UKUT 48 in relation to the deportation of a foreign criminal convicted of the importation and supply of significant quantities of Class A Drugs.

7) Prior to the hearing Mr Mullen sought by correspondence to expand and enlarge upon the grounds of appeal. In relation to the legal issues considered by the First-tier Tribunal he pointed out in a letter of 26 September 2013 that the Tribunal wrongly applied paragraph 364 of the Immigration Rules, which applied to discretionary decisions to deport and not to a mandatory decision under section 32(5) of the UK Borders Act 2007. Had the panel considered the matter within the correct statutory framework there was a very real possibility that it would not have reached the conclusion it did in relation to the weight to be attached to the claimant's sentence. The Tribunal further erred by having regard to paragraph 395C of the Immigration Rules, which had been deleted. The Tribunal did not satisfactorily explain why the appeal was decided in the claimant's favour and did not consider the full extent of the claimant's immigration history. The proper weight to be attached to the public interest in deporting those to whom section 32(7) applied was clarified in SS (Nigeria) [2013] EWCA Civ 550, although this post-dated the decision of the First-tier Tribunal.

8) At the commencement of the hearing I indicated to Mr Mullen that I did not consider it necessary to formally amend the grounds of the application for permission to appeal. The matters raised by Mr Mullen were in part extensions of the original grounds, or were already referred to in the grant of permission to appeal, or were obvious points arising from the face of the Tribunal's determination.

9) In his submission at the hearing Mr Mullen said he would concentrate upon the grounds in the application relating to the supervision order and the misdirections in law. He would not pursue the grounds relating to the care of the grandchildren or the claimant's wife or the issue of the closeness of the family relationships. He submitted that had the panel properly directed itself with regard to the correct legal provisions then on the facts, which were largely agreed, there was a strong likelihood that an entirely different outcome would have been reached. The panel's treatment of the

supervision order was wholly inaccurate and on the basis of this the panel inferred that the claimant has established a private life. There was no mention by the panel that the supervision order came into effect once the claimant was already under the threat of deportation and his immigration status was precarious. There was no mention by the claimant of whether he had disclosed to social workers that he had completed a two year sentence for the supply of Class A drugs and was under threat of deportation. Mr Mullen acknowledged, however, that the question of disclosure of the claimant's prison sentence did not appear to have been raised in cross-examination before the First-tier Tribunal. Nevertheless it should have been clear to the panel that the claimant was under the threat of deportation when the supervision order was made.

10) Mr Mullen continued that at paragraph 30 of the determination the Tribunal accepted that the claimant had committed a serious offence but noted that his sentence was reduced by 5 months. Mr Mullen questioned whether this should be weighed in the claimant's favour. According to primary legislation a foreign criminal sentenced to 12 months or more should be deported subject to certain exceptions. As was pointed out at paragraph 54 of SS (Nigeria), it required a strong claim to overcome the public interest in deportation. The panel did not take into account the claimant's immigration status and previous deportation order. In relation to the previous deportation order, however, Mr Mullen acknowledged that the claimant entered the UK in 2007 with a valid entry clearance. Nevertheless, the claimant could not claim to be ignorant of immigration procedures and he knew he needed to abide by the laws of the land. The claimant was 51 when he committed the offence in question and could not rely on youth or naivety as an excuse.

11) It was pointed out that the Tribunal had before it no pre-sentence report or probation report. Mr Mullen acknowledged that none had been produced. Nevertheless there was a lack of appreciation of the evidence and the relevant factors had not been properly weighed up. The tribunal had failed to properly carry out its task. Its decision could not stand and should be re-made. The sentencing remarks had been produced (at M1-M4 of the respondent's bundle). Mr Mullen acknowledged that a sentence of 20 months was not the most serious for the type of offence but there was still a statutory presumption in favour of deportation. He referred to paragraph 48 of SS (Nigeria) on the weight to be attached to the policy and legislation. There was a statutory presumption set out by Parliament.

12) On behalf of the claimant, Mr Winter submitted there was no material error of law. The issue was whether given the findings of fact the error was material and would justify setting aside the decision. There were sufficient findings made by the Tribunal to say the error was not material. The Tribunal set out the correct question at paragraph 7 of the Determination, which was whether the deportation would breach Article 8. The Tribunal's reasons should be looked at a whole. The Tribunal had regard to the public interest at paragraph 33 of the determination and accepted that the

claimant had committed a serious offence. The Tribunal regarded the length of sentence as significant. In response Mr Mullen submitted that the claimant's immigration history and the nature of the offence were not taken into account. The supervision order was not properly considered.

13) Having heard the parties' submissions I considered the issue of whether there was an error of law in the decision of the First-tier Tribunal by reason of which it should be set aside. There was no question at all but that the Tribunal misdirected itself as to the law at paragraph 31 of the determination where it referred to paragraph 364 and paragraph 395C of the Immigration Rules. As has been pointed out on behalf of the Secretary of State, paragraph 364 was of no relevance to a decision under section 32 of the UK Borders Act 2007, and paragraph 395C had been deleted from the Immigration Rules. It was submitted on behalf of the claimant that this misdirection would not have affected the outcome of the appeal as the Tribunal had properly directed itself as to the issue in relation to Article 8 at paragraph 7 of the determination. I do not accept this submission. As Mr Mullen argued, in order to take the public interest properly into account the Tribunal would need to apply the provisions of sections 32 and 33 of the 2007 Act. As was pointed out in SS (Nigeria), although this judgment post-dated the decision of the First-tier Tribunal, Parliament has set out in legislation a view of where the public interest in deportation lies in relation to foreign nationals sentenced to 12 months or more in prison.

14) I was satisfied that there was an error of law in the decision of the First-tier Tribunal and it was so fundamental to the question the Tribunal was asked to decide that the decision had to be set aside. I further stated that in my view the decision could be re-made without a further hearing. As Mr Mullen acknowledged, the facts were largely agreed, as they had been found by the First-tier Tribunal. There was some concern over the temporary and reviewable nature of the supervision order but this did not affect significantly the finding made by the Tribunal that the child who was subject to the order lives with the claimant and his wife as his grandparents. The only significant issue in dispute was whether the Tribunal had had proper regard to the public interest when carrying out the balancing exercise under Article 8. I asked Mr Mullen to address me on the issue of the weight to be given to the public interest.

15) In response to this invitation, Mr Mullen indicated that the claimant was now serving a prison sentence of four months imposed for a different offence. I pointed out that the claimant's conviction upon which the current deportation order was based was the conviction and sentence imposed in 2009 and the question for the Tribunal was whether this would justify deportation having regard to the claimant's right to private or family life.

16) Mr Mullen acknowledged that so far as the 2009 offence was concerned, it was not at the most serious end of the scale. It was less than a sentence of four years set out in the Immigration Rules as the threshold for more serious offending. It was still nevertheless a very serious offence and covered by

the legislation. It was sufficient to justify deportation. Mr Mullen further submitted that it was significant that the claimant's wife, child and grandchildren were not present at the hearing today to support the claimant. There was no-one present to express continuing support for him.

17) At this juncture I asked Mr Mullen if he was seeking to introduce new evidence under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. This, however, was not Mr Mullen's intention. I pointed out that I had already stated that I would re-make the decision relying on the facts found by the First-tier Tribunal. In those findings the claimant's relationship with his grandchildren was a significant factor. At the same time I did not understand it to be disputed that the supervision order in respect of the grandchild TB was not made until after the appellant had been sentenced, and indeed had served his sentence and was under threat of deportation.

18) The hearing before the First-tier Tribunal took place on 23 April 2012. If there has been a material change of circumstances since that date it is open to the Secretary of State to make a further decision in relation to the claimant based on the change of circumstances. The decision made in this appeal is restricted to consideration of the Secretary of State's decision of 7 March 2012 to the effect that the claimant was subject to section 32(5) of the UK Borders Act 2007 and that none of the exceptions in section 33, in particular section 33(2) in relation to the Human Rights Convention, applied to him. Even though the appellant succeeds in this appeal, the claimant's leave to enter expired in March 2009 and further leave to remain was refused in June 2009. The question of whether the claimant is entitled to leave to remain is not before the Tribunal in this appeal. The future status of the claimant is a matter for the Secretary of State, taking into account any material change of circumstances which may have taken place since the hearing before the First-tier Tribunal in March 2012.

19) The First-tier Tribunal following its hearing set out the claimant's family circumstances, which are compelling. At the hearing before me Mr Mullen acknowledged that the Tribunal's findings in relation to the claimant's family life would not be challenged save in relation to the nature of the supervision order and the time at which it was made. As I have already indicated, I do not consider that the supervision order significantly affects the fact that both the child concerned and his mother, who is the claimant's daughter, live with the claimant and his wife and are dependant upon them for care and support. It is further accepted that the claimant's wife has serious health problems. Mention has already been made of her epilepsy and osteoporosis but the evidence before the First-tier Tribunal was that she also suffers from depression. The evidence before the Tribunal was that it would not be safe for the claimant's wife to care for the grandchildren on her own because she is subject to seizures.

20) The claimant's family life, of course, must be weighed against the public interest, having regard to the offence he committed and its seriousness. This is where the First-tier Tribunal misdirected itself by, in particular, failing

to have regard to paragraphs 396-399 of the Immigration Rules. Under paragraph 396 there is a presumption that it is in the public interest to deport a person where the Secretary of State must make a deportation order in accordance with section 32 of 2007 Act. Under paragraph 397 a deportation order will not be made if the person's removal pursuant to the order would be contrary to the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed. Under paragraph 398, so far as relevant to this appeal, where a person claims their deportation would be contrary to Article 8 and the deportation of the person is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months, then the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if neither does, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

21) The provision in paragraph 399(a) of the Immigration Rules applies where the person to be deported has a genuine and subsisting parental relationship with a child under the age of 18 years, subject to certain further conditions. In relation to this appeal the claimant's relationship with the children in his family is as a grandparent rather than as a parent and it has not been argued before me that in consequence of the supervision order he is to be regarded as having a parental relationship with a child. The further provision in paragraph 399(b) applies to a person in a genuine and subsisting relationship with a partner who is in the UK and is a British citizen. This provision requires that the person to be deported has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and on the facts of this appeal, the claimant cannot meet this requirement. It has not been suggested that paragraph 399A has any application to the circumstances of this appeal.

22) Accordingly, the claimant's position must be considered outwith paragraph 398 of the Immigration Rules under Article 8. In this regard I am satisfied that the claimant has a strong arguable case in terms of MS (India) [2013] CSIH 52. The proper approach in such cases is set out by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192. Although this judgment was handed down shortly after the hearing before me, it confirms the proper approach to be taken in relation to the two stage test when applying Article 8. The first stage is to consider the appeal under the Immigration Rules, in terms of which it has already been found that the claimant cannot succeed. The second stage is to carry out the balancing exercise in terms of the proportionality of removal under Article 8. In carrying out this balancing exercise I am mindful of the significance of the public interest as set out in the case of SS (Nigeria).

23) There is no question as to the seriousness of the claimant's offence. He was found guilty of possession of a Class A drug with intent to supply. He was sentenced in Glasgow Sheriff Court on 29 September 2009. The sentencing remarks of the Sheriff are before me but they make little reference to the nature of the offence except to state that this type of offence, unless there are exceptional circumstances, will merit a custodial sentence. But for the guilty plea the sentence would have been one of 20 months but this was reduced to 15 months to take account of the plea.

24) The First-tier Tribunal was correct to have regard to the length of the sentence in considering the public interest. Given the nature of the offence the sentence was not a heavy one. It may be compared with the sentence in SS (Nigeria), which concerned three concurrent sentences of 3 years. The position in this appeal is that the claimant was convicted of a serious offence which would normally justify deportation but the sentence imposed was comparatively light, leaving open the possibility that the public interest in deportation might be outweighed by the claimant's family circumstances.

25) The claimant's family circumstances as found by the First-tier Tribunal, based on the evidence it heard in April 2012, are very compelling. The claimant has been caring for his wife, who is poor health and in effect holding together three generations of his family, which includes the child of his own daughter and the two children of his stepson. When I balance the claimant's family life and the support he has been providing to the other members of his family against the length of his sentence, I am satisfied that his deportation would be disproportionate in terms of Article 8.

26) One of the issues raised by Mr Mullen was whether the First-tier Tribunal took into account the claimant's immigration history, including the previous deportation order. This history is clearly poor. Nevertheless it is not disputed that the claimant's appeal in 2006 against the decision refusing to revoke the previous deportation order was successful. In consequence he was able to enter the UK in March 2007 with a valid entry clearance. I do not consider that the events which took place prior to March 2007 would be of sufficient weight to outweigh the significance of the claimant's family life as constituted in March 2012.

27) As I have already indicated, if there has been a material change in the claimant's family circumstances since that date, that is not a matter for this appeal.

Conclusions

28) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

29) I set aside the decision.

30) I re-make the decision in the appeal by allowing it.

Anonymity

31) The First-tier Tribunal did not make a direction for anonymity. Nevertheless, having regard to the nature of the claimant's family life and his involvement with his grandchildren, I consider that an order should be made under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting any report of these proceedings which will directly or indirectly identify the claimant or any member of his family.

Fee Award Note: this is not part of the determination

The First-tier Tribunal found that no fee had been paid or was payable and therefore made no fee award. I have had no application to make a fee award and accordingly I do not make one.

Signed Date
Judge of the Upper Tribunal