Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00318/2013

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice	**Determination Promulgated**
On 16 September 2013	**On 2 October 2013**
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Before

UPPER TRIBUNAL JUDGE LATTER
UPPER TRIBUNAL JUDGE MCGEACHY

Between

RJ
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Bond, instructed by MKM Solicitors
For the Respondent: Mr C Avery, the Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal (Judge Williams and Mrs R M Bray JP) issued on 4 July 2013 dismissing his appeal against the respondent's decision of 4 February

2013 to make a deportation order under s.32(5) of the UK Borders Act 2007.

Background

2. The appellant is a citizen of Barbados born on 8 July 1986. He first entered the UK on 5 April 2002 as a visitor and then applied for leave to remain as a member of his mother's family. On 31 March 2003 he was granted indefinite leave to remain.

3. On 31 March 2008 he was stopped at Gatwick Airport and found to be in possession of just over 1 Kg of cocaine of 100% purity. On 19 August 2008 at Croydon Crown Court he pleaded guilty to being knowingly concerned in the fraudulent evasion of prohibition or restriction in importation of a Class A controlled drug and was sentenced to nine years' imprisonment. After considering representations made on behalf of the appellant, the respondent made a deportation order under the UK Borders Act 2007.

The Hearing before the First-tier Tribunal

4. The appeal was heard by the First-tier Tribunal on 28 June 2013. The Tribunal heard evidence from the appellant, his mother, the mother of his son J, a former partner and his current partner who he had made contact with on Facebook in 2011. The Tribunal also took in to account the OASys Report which referred to the appellant having had a number of proven adjudications and warnings whilst in prison for fighting, unlawful item possession, and disobeying a lawful order. The report said that he presented a medium risk of harm to the public but the risk to children, known adults and staff was low. The Tribunal noted that his only convictions prior to his nine year sentence were various driving matters recorded against him on 3 January 2006 together with a caution for theft on 16 May 2005.

5. The Tribunal accepted that the appellant had been in the UK since 2001, that he had arrived on a visit visa when he was 15 and that he was the father of J born on 6 January 2008, a British citizen. It commented that it was highly relevant to its decision that the appellant went into custody on 31 March 2008 when J was not yet three months old. The evidence pointed to the fact that at the time of his birth the appellant was living with another partner. It accepted that J's mother had visited the appellant about once a month when he was in prison. His former partner had visited on one occasion and his current partner had been visiting about twice a month for two years and on most occasions had taken her son from a previous relationship.

6. The Tribunal accepted that there was private and family life within article 8(1). It found that the appellant was unable to bring himself within the requirements of the Immigration Rules as amended in July 2012. As he had

been sentenced to a period of imprisonment of at least four years, the various exceptions set out in para 399 did not apply and that within the rules his appeal against deportation could only be allowed if exceptional circumstances were shown.

7. The Tribunal summarised its findings as follows:

> "62. We return to the case of Maslov (above). We have already commented on the nature and seriousness of the offence committed and the length of the Appellant's stay in the country and to the time elapsed since the offence was committed. We take into account that this Appellant was 21 years old when he committed the offence, not a juvenile, albeit a young man. He still, on the evidence, has some links with Barbados through his wider family. As the case of Masih (above) states for a settled migrant who has lawfully spent a large part of his life in the United Kingdom very serious reasons are required to justify expulsion. We are also required to take into account developments since sentence was passed and the result of any disciplinary adjudications in prison or detention. This Appellant has committed serious disciplinary offences whilst in prison and, on his own evidence, has had around six months added to his sentence.
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> 63. We take all of those matters into consideration as well as this Appellant's desire to remain in the United Kingdom. However, on the evidence before us, having given this matter all anxious scrutiny, we come to a very certain conclusion in this case. It is quite clear that it could never be said to be disproportionate for this Appellant to return and be deported to his home country of Barbados. The sentence of nine years and the evil of Class A drugs make it impossible for us to say that we come anywhere near allowing this appeal. There are no exceptional reasons as to why this appeal should be allowed (the new Immigration Rules). Having looked at matters under Article 8, we find that in the proportionality balancing exercise, it is not disproportionate for deportation and thus any appeal under Article 8 of the European Convention on Human Rights must equally be dismissed."

The Grounds and Submissions

8. Permission to appeal was granted by the First-tier Tribunal in a decision dated 22 July 2013. When granting permission, the judge said:

> "2. The complaints in the preceding seven pages of the grounds on which the appellant seeks permission to appeal are in effect summarised in paragraph 19 on pages 7 and 8 of those grounds: "This determination is confusing, uncertain and contradictory. It is difficult to follow, conflates legal tests which should be applied separately and fails to follow a very simple form as required by authority. It fails significantly to treat the best interests of the appellant's son [J] as its primary [sic] consideration and also to make adequate findings regarding the appellant's ties in his country of origin. Furthermore, it appears to set a general rule that deportation appeals bought by a certain class of criminals are bound to fail, regardless of the circumstances. It is

submitted that the determination is so riddled with errors of law that it is unsafe in its entirety."

3. I suspect that there is little substance in most of the complaints made in the grounds. In general terms, the grounds can be characterised as an attempt to obscure the substance of the case with complaints relating to the structure of the determination, and the wording used by the Tribunal. But it may be that the Tribunal did err in some of the ways alleged. The point that most concerns me is that it may be arguable, as per ground 11, that the Tribunal did not really examine where the best interests of [J] lie. Overall, there is sufficient in the grounds to make a grant of permission appropriate.

4. The appellant should not take this grant of permission as any indication that his appeal will ultimately be successful. Apart from anything else, even if it were determined that it is in the best interests of [J] for the appellant not to be deported, his best interests are only a primary considerations in the context of the case overall (not the primary consideration, as one might think from grounds 9 and 19). Clearly the appellant stands convicted of a very grave and harmful offence - case law such as Lee [2011] EWCA Civ 328, 29 March 2011 and Richards [2013] EWCA Civ 244, 30 January 2013 tends to go against the case of the appellant. "

9. Ms Bond relied on the grounds of appeal but focussed her submissions on the following issues. She argued that it was not clear that the Tribunal had adopted the proper two stage analysis as set out in MF (Article 8) Nigeria [2012] UKUT 00393 but appeared to have looked at everything globally. She submitted that in reality the Tribunal had applied an exceptional circumstances test and had conflated the application of the rules and article 8 generally. She argued that the Tribunal had not approached the issues logically and this had led to a danger that essential elements would become confused and muddled. The best interests of the appellant's child had not been properly considered and therefore not factored correctly into the balancing exercise when considering proportionality. She submitted that the Tribunal had also treated the public interest as fixed and had therefore failed to carry out the balancing exercise in this respect. Had the Tribunal not made these errors, she argued that it was plainly possible that it could have reached a different decision.

10. Mr Avery submitted that the Tribunal had adopted the correct approach to assessing the appeal under the rules and separately under article 8. It had considered the best interests of the appellant's child and had considered the impact of removal, not only on him but also on his partners. It had been entitled to note that contact with his son had been very limited. There is no reason to believe that the Tribunal had proceeded on the basis that there could only be one outcome in the light of the seriousness of the offence. It had balanced all the relevant issues and reached a decision properly open to it particularly in the light of the

seriousness of the appellant's offence and the length of the sentence he received.

Consideration of the Issues

11. The issue for us is whether the Tribunal erred in law such that the decision should be set aside. The grounds of appeal set out five grounds which we will take in turn. Firstly, it is argued that the Tribunal failed to take the correct approach to this appeal both under the rules and Article 8, particularised as a failure to adopt a two stage approach, to interpret and apply the Immigration Rules and in consequence that it took a wrong approach resulting in a flawed assessment of article 8. It is further argued that the proportionality assessment was significantly predicated upon a wrong and unlawful use of the "exceptional circumstances test". We are not satisfied that there is any substance in this ground. It is clear from [39], [44] and [63] that the Tribunal adopted the proper approach both to the rules and article 8. In [39] the Tribunal referred to the fact that MF required a two-stage process and in [63] it drew a distinction between the rules and article 8.

12. In [44] the Tribunal said that it must bear in mind that, although it was making an article 8 assessment outside the Immigration Rules, the rules themselves in force since June 2012 were specific in their terms and in particular specific in stating that exceptional reasons were needed to prevent deportation to those sentenced to four years or more. Read out of context this might be taken as indicating that the Tribunal were imposing an exceptionality test in relation to article 8 but in the context of the determination as a whole and indeed the context of [44] itself, the point being made was that the view of Parliament as to where the public interest lay, set out not only in the 2007 Act but also in the amended Immigration Rules was properly to be taken into account when assessing proportionality. We also note that in [53] the Tribunal cited from SS (Nigeria) v Secretary of State [2013] EWCA Civ 550 where Laws LJ said:

> "While the absence of an exceptionality rule, and the meaning of the primary consideration are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision maker's margin of discretion: the policy's source and the policy's nature, and in particular to the great weight to which the 2007 Act attributes the deportation of foreign criminals."

Therefore, we are not satisfied that the Tribunal, having cited a passage referring to the absence of an exceptionality rule, then went on to apply such a rule.

13. The second ground argues that the Tribunal's findings on the existence of family life were uncertain and inconsistent in that it was far from clear what findings were made about who the appellant had established family life with and whether the Tribunal was saying that family life with unspecified persons did not exist or that family life with unspecified

persons was limited to such an extent that article 8 was not engaged. Ms Bond rightly did not seek to pursue this ground and we are not satisfied that it discloses any error of law. The Tribunal accepted that there was family life and private life: [41]. It went on to consider its nature and extent between the appellant and his son and between him and the three women who had been his partners: [45] – [47]. We are not satisfied that the Tribunal's findings on family life are unclear or inconsistent as asserted in the grounds or that there is any error of law in this aspect of the Tribunal's determination.

14. The third ground argues that the Tribunal failed properly to consider the best interests of the appellant's son, failed in its obligation to treat his best interests as a primary consideration and did not examine at all what his best interests were and whether they would include having continued contact with the appellant. They further argue that, having found that this was not a case where deportation would result in the displacement of a British citizen, it proceeded on the basis that there was little need for further enquiry into the best interests of the child.

15. However, we are satisfied that J's best interests were taken into account. The general background is set out in [45] and J's position was more specifically considered in [50] where the Tribunal commented that family life between the appellant and his son had to be relatively limited in the light of the fact that he had been in prison since 31 March 2008 although it accepted that there had been visits. It was entitled to note, as it did in [55], that his child would continue to be looked after by his primary carer as he had been whilst the appellant was in prison. It accepted that his removal would have a considerable affect upon his own child as well as the child of his present partner [56], that the children and the appellant's partner were not to be blamed for his offending and that removal would effectively bring to an end family life in the UK but in this context the Tribunal referred to the judgment of the Court of Appeal in Lee [2011] EWCA Civ 348 that this was the tragic consequence of deportation as a result of serious criminal offending. The Tribunal therefore faced up to the issue that removal would end family life in its present or potential form in the UK and whilst accepting that there would be an impact on the appellant's family including his son, it was, nevertheless, entitled to find that the public interest outweighed any such interference with their right to respect for private and family life.

16. The fourth ground argues that the Tribunal failed to carry out a proper assessment of the extent of the appellant's links with Barbados or to carry out a rounded assessment of the extent of those ties. We are not satisfied that there is any substance in this ground. It was accepted in evidence that the appellant had relatives in Barbados. The appellant said he had a half brother there and in her evidence the appellant's mother said she had two sisters and a mother there. Further, the appellant himself had returned to Barbados in 2008 where he obtained the drugs he brought to the UK. It had been his account that he had met up with a cousin who had

asked him if he wanted to take drugs to the UK for payment [15] although the Tribunal noted the contradiction in the evidence given at the hearing that he had given a man in Barbados no money and had merely been given the drugs as a present and that there was no one specifically to whom he had to give the drugs when he arrived here: [61]. The Tribunal did not err in law in the way it considered the appellant's links with Barbados.

17. Finally, it is argued that the Tribunal failed to carry out properly the necessary evaluative exercise when assessing proportionality. As we have already indicated, we are satisfied that the Tribunal properly considered the matter under the rules and article 8. We note that in [48] the Tribunal directed itself on the factors set out by the ECtHR in Maslov [29] 1 INLR 47, reminding itself in [62] that there was a need to show very serious reasons to justify the expulsion of a settled migrant who had lawfully spent a large part of his life in the UK. The Tribunal considered the public interest as set out in Masih (Deportation – public interest – basic principles) Pakistan [2012] UKUT 00046 (IAC) and OH (Serbia) v Secretary of State [2008] EWCA Civ 694. It took into account the guidance in SS at [53] and Lee at [56]. There is no substance in the argument that the Tribunal regarded the nature and seriousness of the offence as in itself determinative. When referring to the public interest elements in [58] it commented that they included an element of deterrence to non British citizens, already in the country, and to those likely to come here, so as to ensure that it is clearly understood that, whatever the circumstances, one of the consequences of serious crime may well be deportation and in [63] the Tribunal said that the sentence of nine years and the evil of Class A drugs made it impossible for it to say that it came anywhere near allowing the appeal.

18. However, this followed a previous comment that it had taken all matters into consideration including the appellant's desire to remain in the UK and that on the evidence, having given the matter all anxious scrutiny, it had come to a very certain conclusion. We are satisfied that when the determination is read as a whole that the Tribunal took into account all material matters and reached a decision properly open to it on the evidence. Its decision on proportionality and the way it struck the balance between the public interest and the interference with the appellant and his family's right to respect for their public and private life fell well within the range of decisions properly open to it. In summary, we are not satisfied that the Tribunal erred in any way capable of affecting the outcome of the appeal.

Decision

19. The First-tier Tribunal did not err in law and its decision stands. This appeal is dismissed.

20. There has been no application to vary or discharge the anonymity order made by the First-tier Tribunal and that order remains in force.

Signed Date: 1 October 2013

Upper Tribunal Judge Latter