Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00715/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 November 2013	**On 16 December 2013**

Before

UPPER TRIBUNAL JUDGE LATTER
UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GR
(Anonymity order made)

Respondent

Representation:

For the Appellant: Mr G Saunders, Home Office Presenting Officer
For the Respondent: Mr E Wilford of Counsel

DETERMINATION AND REASONS

1) This an appeal by the Secretary of State against a decision by a panel of the First-tier Tribunal comprising Judge of the First-tier Tribunal McIntosh and Mr Peter Bompas. The panel allowed an appeal under Article 8 by GR (hereinafter referred to as "the claimant"). The appeal was brought against a decision of 17 September 2012 by the Secretary of State to deport the claimant.

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2) An issue arose before us as to whether the decision to deport the claimant was made under section 32 of the UK Borders Act 2007 or under section 5 of the Immigration Act 1971. The First-tier Tribunal proceeded on the basis that the decision was made under section 32 of the 2007 Act but at the hearing before us it was pointed out that the decision appealed against of 17 September 2012 was made under section 5 of the 1971 Act. Mr Wilford had prepared for us an argument based on the proposition that the 2007 Act could not be used to instigate deportation proceedings against a person in respect of a conviction in 2004, which was when the claimant was convicted of the offences for which the Secretary of State proposed to deport her. However, as the decision appealed against was not made on the basis of the 2007 Act, it was not necessary for us to consider this argument. For reasons which will become apparent, we do not consider that the error made by the Tribunal as to the statutory basis under which the Secretary of State was proceeding was material to the outcome of the appeal.

Factual background

3) The claimant is a South African national who arrived in the UK in 1998 with leave as a working holiday maker. She was subsequently given leave until 2001 as a student. A further application for leave was refused. It seems the claimant then left the UK and re-entered in June 2003 as a visitor. She was then granted leave to remain as a student until 2004.

4) In March 2004 the claimant was convicted at Southwark Crown Court on 15 counts of furnishing false information relating to accounts. She was sentenced to 15 months' imprisonment on each count, each period running concurrently.

5) In 2005 the claimant applied for leave to remain as the partner of a British citizen. In 2007 she was informed of her liability to deportation. Meanwhile the claimant had formed a new relationship with DH, an Irish citizen, and the couple had a son, EH, born on 4 September 2007. In October 2009 the claimant was asked to provide further information about her family life in the UK. In February 2010 the claimant submitted further representations on her family life.

6) In January 2011 the claimant was convicted in the Magistrates' Court of an offence of destroying or damaging property and of an offence of battery. She was sentenced to a supervision requirement and a community order and required to pay costs and compensation. On 15 September 2011 she was again notified of her liability to deportation. In response in November 2011 she submitted that she was a party to family proceedings. She was asked to provide further evidence of this. The decision to deport the claimant was then made on 17 September 2012.

7) The family proceedings arose out of the breakdown of the claimant's relationship with DH. The claimant resided with her son from his birth in 2007 until the conclusion of the family proceedings in 2012, when residence

in relation to EH was awarded to the father, DH. The court granted a non-molestation order against the claimant but permitted supervised contact and indirect contact between the claimant and her son.

Decision of the First-tier Tribunal

8) In the present, the First-tier Tribunal found that the claimant could not benefit from either paragraph 399 or 399A of the Immigration Rules. So far as the child, EH, was concerned, he was now in the care of his father so the claimant was unable to show that there was no other family member who was able to care for the child in the UK.

9) The First-tier Tribunal then went on to consider the claimant's circumstances under Article 8, taking account the best interests of EH under section 55 of the 2009 Act. The Tribunal found that the claimant had established family and private life in the UK. The decision was an interference with her family life because she would not be in a position to continue the supervised contact with her son. This was not a case where the claimant had been recently convicted of a serious criminal offence and this weighed against the public interest in her removal. The Tribunal found that the claimant had used her time in custody to obtain further skills and she had followed the terms of her release on licence. Although the claimant had further convictions there were none for which she had received a sentence of at least 12 months. Following the claimant's separation from DH in 2008, she had had sole care of her son with his father having contact. The final order of the Family Court awarded residence to DH with supervised contact and indirect contact awarded to the claimant. The Tribunal found that the claimant continued to maintain contact with her son and was seeking to increase the level of this contact. The evidence showed that the claimant continued to have a genuine connection with her son, which the Family Court encouraged and supported. It was in the interests of the child to enjoy contact with his mother. This might progress to unsupervised contact as he became older. The Tribunal found that it was not proportionate for the Secretary of State to rely upon a conviction in 2004 to deport the claimant in 2013 interfering thereby with her established family life and the mother-son relationship. If contact were to cease this would have a negative impact on the claimant's son. The Tribunal therefore allowed the appeal.

Application for permission to appeal

10) Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal. The first ground of the application by the Secretary of State for permission to appeal was that the Tribunal had erred in law by applying a two stage test in considering the application of Article 8. The Immigration Rules, in particular paragraphs 398, 399 and 399A, set out a comprehensive approach to the application of Article 8 and the Tribunal erred in regarding these provisions as a starting point before moving on to a

free-standing Article 8 assessment. It was submitted on behalf of the Secretary of State that following the decision of the Upper Tribunal in MF (Nigeria) [2012] UKUT 00393 the scope for the Tribunal to reach its own view of the public interest and the weight to be attached to it was more limited than previously. The Immigration Rules now set out a clear expression of the public interest and the weight attached to it, as formulated by the Secretary of State and endorsed by Parliament. In allowing the appeal under Article 8 the Tribunal did not give adequate consideration to the public interest. In terms of SS (Nigeria) [2013] EWCA Civ 550 an Article 8 claim by a foreign criminal seeking to resist deportation under section 32 of the 2007 Act in reliance on the interests of a child with British citizenship needed to be very strong to prevail against the public interest in removal and the great weight to be attached to the policy of deporting foreign criminals.

11) Permission to appeal was granted on the basis of these grounds, having regard to the recent decision of the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192.

Submissions

12) Before us Mr Saunders, for the Secretary of State, relied upon the grounds of the application. He pointed out that in terms of paragraph 398(c) of the Immigration Rules, where a claimant does not fall within paragraph 399 or paragraph 399A it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors. The First-tier Tribunal did not properly consider the extent to which the Immigration Rules impacted upon the claimant’s case. As was pointed out by the Court of Appeal, the Rules were a complete code. The First-tier Tribunal observed that the claimant could not rely on paragraph 398(c), following the award of residence to the claimant’s former partner. Mr Saunders further submitted that there was no subsisting relationship at present between the claimant and her child. The claimant had no leave to remain in the long term. These factors had to be set against the interests of the child. The public interest was not fully considered by the First-tier Tribunal.

13) For the claimant, Mr Wilford relied in part upon a skeleton argument. Regrettably this was lodged at a late state, almost immediately prior to the hearing, giving Mr Saunders little time to study it. Mr Saunders was, however, willing to proceed.

14) Mr Wilford referred to the decision of the Court of Appeal in MF (Nigeria) and submitted that the effect of this decision was on matters of form rather than of substance. The court said that where the relevant Immigration Rules were not met then “very compelling” circumstances were required to succeed under Article 8. The Tribunal had to look to the consequences of deportation for the child, taking into account the fact that the claimant cared for the child until 2012 and still has contact. This was supervised contact once a month and fortnightly contact by Skype. The First-tier

Tribunal quoted from the sentencing remarks at paragraph 3 of the determination. The Tribunal were required to take into account the seriousness of the offence and, following N (Kenya), to look at the likelihood of further offending. In this case the claimant was to be deported on the basis of a conviction in 2004 but the decision to deport her was not made until 2012. The Tribunal clearly had regard to the public interest. The reasons given were adequate in terms of the case of Shizad (Sufficiency of reasons: set aside) [2013] UKUT 85. The reasons for the Tribunal's central conclusions did not need to be extensive and anyone reading them would be in no doubt as to what factors were taken into account. It was argued for the Secretary of State that the public interest ought to be given greater weight because of the Rules introduced in July 2012 but there was no authority to support this submission. The Upper Tribunal in MF (Nigeria) referred the new rules as enhancing awareness of the public interest but did not state that the public interest should be given greater weight. The Tribunal had considered all the relevant factors and did not make any material error of law.

15) In response, Mr Saunders said he did not dispute the position as set out in Shizad and it was not necessary for a judge to set out everything taken into consideration. If the First-tier Tribunal had acknowledged the seriousness of the claimant's offences the Tribunal might have done enough to justify its conclusions but it did not do this.

Discussion

16) We note that the First-tier Tribunal considered this appeal in August 2013 and therefore did not have the benefit of the views of the Court of Appeal in MF (Nigeria), handed down on 8 October 2013. In its judgment the court commented on whether there was a two stage test for the application of Article 8, as applied by the First-tier Tribunal, where the appeal is first considered under the Immigration Rules and then considered separately on a free-standing basis under Article 8. On this point the Court stated the following:

> "46. There has been debate as to whether there is a one stage or two stage test. If the claimant succeeds on an application of the new rules at the first hurdle, ie he shows that para 399 or 399A applies, then it can be said that he has succeeded on a one stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from the consideration of whether paragraph 399 or 399A applies. It is the second part of a two stage approach which, for the reasons we have given, is required by the new rules. The Upper Tribunal concluded (paragraph 41) that it is required because the new rules do not fully reflect Strasbourg jurisprudence. But either way, it is necessary to carry out a two stage process."

17) Insofar as the use of the word "exceptional" is concerned, in considering whether there are exceptional circumstances outweighing the public

interest where paragraphs 399 or 399A do not apply, the Court pointed out that the word "exceptional" is often used to denote a departure from a general rule. The court then continued, at paragraph 43:

> "The general rule in the present context is that, in the case of a foreign prisoner to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".

18) The decision of the Court of Appeal in MF (Nigeria) was considered by the Upper Tribunal in Kabia (MF: paragraph 398 – "exceptional circumstances" [2013] UKUT 00569. The Tribunal pointed out that the new rules relating to Article 8 claims advanced by foreign criminals seeking to resist deportation are a complete code and the "exceptional circumstances" to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. Where the new rules speak of "exceptional circumstances" it was made clear by the Court of Appeal in MF (Nigeria) that exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate.

19) In the appeal before us the First-tier Tribunal did not use the terms "very compelling reasons" or "unjustifiably harsh consequences". Nevertheless, the Tribunal properly applied a two stage test. Having accepted that the claimant would not succeed under paragraph 399 or 399A, the Tribunal went on to consider whether deportation would nevertheless be disproportionate having regarding to the public interest as well as to the best interests of the claimant's child.

20) We should point out that in hearing the evidence in this appeal the Tribunal noted that the child suffers from a medical condition for which he receives treatment. We have observed from the medical evidence that this is a serious condition of a continuing nature. The child has been diagnosed as suffering from epilepsy. This is a matter to which the First-tier Tribunal did not refer expressly in their reasons but had they done so it would have served only to strengthen those reasons.

21) It has been argued for the Secretary of State that the Tribunal did not give sufficient regard to the public interest. One of the observations made on behalf of the claimant by Mr Wilford at the hearing before us was that if the claimant were to be deported, the likelihood was that she would have no direct contact with her son, now aged 6, for a 10 year period, by which time he would be 16. Again, it is not a matter to which the Tribunal referred expressly in its reasoning but it appears to have been a factor of which the Tribunal was aware. The Tribunal noted that during the course of the proceedings in the Family Court the claimant applied to take her son to South Africa. The court, however, awarded residence to the child's father with contact by the claimant restricted in the manner we have noted. There

seems, accordingly, little prospect of the child being able to visit the claimant in South Africa while he is a minor, particularly having regard to the potentially serious nature of his medical condition, for which he requires continuing treatment and supervision.

22) We mention these matters as factors to which the First-tier Tribunal should have had regard and may have done so implicitly. The First-tier Tribunal did have specific regard to a number of other matters, such as the length of time since the conviction on which the decision to deport was based. At the time the claimant was convicted, she had no children and it was some three years until her son was born. After the child was born she and her partner cared for him together until 2008, when they split up. The claimant then had care of her son until 2012, when the Family Court awarded residence to the father. So far as the child is concerned, his mother has been his principal carer for most of his life. The Tribunal rightly considered that this was a significant matter to be weighed against the public interest in deportation and that the public interest itself was diminished by the lapse of time since the offence giving rise to liability to deportation.

23) The Tribunal noted the claimant had committed further offences, for none of which she received an immediate custodial sentence. While no offending behaviour is to be excused, we would recognise that the level of acrimony which is likely to arise from a long-running dispute over residence and contact in relation to a small child may contribute to the sort of behaviour which has resulted in a non-molestation order having been made against the claimant.

24) In broad terms the position of the First-tier Tribunal was that the public interest in deportation was greatly weakened by the lapse of time since the conviction in 2004 on which the deportation decision was based and that the relationship between the claimant and her son, born in 2007, was important not only from the claimant's point of view but also looked at from the best interests of the child. The Tribunal was entitled to find that there were circumstances outweighing the public interest in deportation. These circumstances might properly be described as exceptional, in accordance with paragraph 398(c) of the Immigration Rules. Although the Tribunal did not have the benefit of the terminology used either by the Court of Appeal in MF (Nigeria) or by the Upper Tribunal in Kabia, the impact of deportation so far as the claimant and her child are concerned, and the prospect that they would have no direct contact for 10 years, could readily be described as unjustifiably harsh. The First-tier Tribunal did not refer expressly to exceptional circumstances but its reasoning clearly falls within this concept, whether described in terms of very compelling reasons or unjustifiably harsh consequences. On this basis, we consider that the Tribunal was entitled to reach the decision which it did and made no error of law affecting the outcome of the appeal.

Conclusions

25) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law

26) We do not set aside the decision.

Anonymity

27) The First-tier Tribunal made an order pursuant to Rule 45(4)(i) of the Asylum & Immigration Tribunal (Procedure) Rules 2005.

28) We continue that order (pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

Upper Tribunal Judge Deans