



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

Appeal Number: DA/00772/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14 November 2013**

**Determination  
Promulgated  
On 25 November 2013**

**Before**

**UPPER TRIBUNAL JUDGE MOULDEN**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR J K  
(Anonymity Direction Made)**

Respondent

**Representation:**

For the Appellant: Mr P Deller a Senior Home Office Presenting Officer  
For the Respondent: Mr A Ali a legal representative from Lawrence  
Lupin

**DETERMINATION AND REASONS**

1. The appellant is the Secretary of State for the Home Department. I will refer to her as the Secretary of State. The respondent is a citizen of the Ivory Coast who was born on 18 December 1974. I will refer to him as the claimant. The Secretary of State has been given permission to appeal the determination of a panel (First-Tier Tribunal Judge N M Paul and non-legal member Mrs V S Street JP) who allowed his appeal on human rights grounds against the Secretary of

State's decision of 28 March 2013 to refuse his asylum and human rights application and also to refuse to revoke the deportation made on 12 February 2008 under the provisions of s5(1) of the Immigration Act 1971.

2. The claimant first attempted to enter the UK on 6 May 2004 as a visitor. He was refused leave to enter but whilst awaiting removal made an application for asylum on 18 May 2004. This was refused and he appealed. His appeal was dismissed on 27 September 2004.
3. On 15 November 2007 at Blackfriars Crown Court the claimant was convicted of possession of a false instrument, namely a passport, and sentenced to 10 months imprisonment. He was also recommended for deportation. On 13 February 2008 he completed his custodial sentence but was detained in immigration custody. He was released on temporary admission on 3 March 2008. On 19 November 2007 he was served with a notice of liability to deportation followed by the decision to make the deportation order on 12 February 2008.
4. The claimant made representations on 1 February 2010 and 13 January 2011. The Secretary of State treated these as a fresh asylum and human rights application and an application to revoke the deportation order under the provisions of paragraph 390 of the Immigration Rules. On 28 March 2013 his further application in respect of his claim for asylum and his request that the deportation order be revoked were refused.
5. The claimant appealed and the panel heard his appeal on 27 August 2013. Both parties were represented, the claimant by Mr Ali who appears before me. The panel concluded that the deportation order should be revoked on human rights grounds and allowed the appeal.
6. The Secretary of State applied for permission to appeal which was granted by a judge in the First-Tier Tribunal. There is no Rule 24 reply from the claimant.
7. The claimant's wife first came to the UK in 2001. She now has indefinite leave to remain. The claimant and his wife have two children born in October 1995 and April 1998 who are living in this country and now have indefinite leave to remain. Their youngest child born in March 2006 is a British citizen.
8. There are three grounds of appeal which submit that the panel erred in law. The first is that the panel failed to follow correct procedures and made findings "without hearing any evidence or submissions from the Secretary of State's Presenting Officer". It is not clear whether this is an allegation that the panel refused to hear submissions from the Presenting Officer. The judge who granted permission to appeal said; "It is arguable that if the Tribunal refused to hear submissions from the Home Office Presenting Officer that

was a serious error. The Secretary of State will need to adduce evidence to that effect." Mr Deller accepted that the Secretary of State had produced no evidence about this. I find that evidence could have been produced. For example, there could have been a request for the panel to produce the record of proceedings. It is probable that the hearing would have been recorded and this could have been called for. Mr Deller said that the Presenting Officer had prepared a minute. This has not been produced. There is no witness statement from the Presenting Officer. There is no sufficiently clear indication on the face of the determination that the Presenting Officer was denied the opportunity to make submissions. I find that this ground is not made out.

9. Mr Deller relied on the grounds of appeal. In relation to the second ground of appeal he submitted that the panel had not considered the requirement in paragraph 399(a)(ii)(b) of the Immigration Rules that "there is no other family member who is able to care for the child in the UK" except as an afterthought in the last sentence of paragraph 23.
10. In relation to the third ground and paragraph 399(b)(ii); "there are insurmountable obstacles to family life with that wife continuing outside the UK", Mr Deller said that it was necessary to differentiate between insurmountable obstacles to leaving the country and insurmountable obstacles to being removed from the country. In relation to the claimant's wife and the children the Secretary of State's case was that they could go, not that they could be made to go. He made the general point that if they were allowed to stay here that did not mean that they could not choose to leave. In essence the Secretary of State's position was that the family could be expected to go to the Ivory Coast in order to preserve family life. In reply to my question, Mr Deller said that he was not aware of any jurisprudence on the point.
11. Mr Deller argued that whilst, at paragraph 22 the panel found that there were compassionate circumstances to outweigh the public interest to deport the claimant, these had not been identified. Delay on the part of the Secretary of State had not been for as long a period as the panel stated in paragraph 21. Any delay needed to be set in its proper context.
12. Mr Deller submitted that this was a case where paragraph 398(c) applied because; "the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that 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." Under paragraph 399 it was accepted that the claimant and his wife had a child who was a

British citizen. However, this did not assist the claimant because his wife was a family member who was able to care for that child in the UK.

13. Mr Deller accepted that if I found there to be an error of law there was no challenge to the findings of fact made by the panel. I was asked to remake the decision if I considered that there was sufficient information before me to do so.
14. Mr Ali submitted that the first ground of appeal had not been made out because the Secretary of State had failed to provide any evidence to support the allegation. He said it was clear that the panel applied Strasbourg jurisprudence outside the current Immigration Rules dealing with Article 8. In paragraph 23 the panel reached a conclusion by reference to paragraph 398 and it was open to them to find that the decision, which could only come within paragraph 398(c), did not do so. At this point I allowed Mr Deller to intervene. He said that, having heard Mr Ali's submissions, he accepted that there was nothing in the reasons for refusal letter which indicated that the Secretary of State considered the case came within paragraph 398(c). Clearly it did not come within subparagraph 398(a) or (b). In the circumstances he conceded that the appeal fell to be decided under Strasbourg jurisprudence not the Immigration Rules which came into effect in July 2012.
15. Mr Ali submitted that under Strasbourg jurisprudence the panel made a proper assessment of proportionality and reached conclusions open to them. Even if there was an error of law, which he did not accept, there was no reason to set aside the decision because, absent any error, the same conclusion would inevitably have been reached.
16. I reserved my determination.
17. The panel made an anonymity direction which should continue in force. I make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the claimant, his wife or children.
18. There have been unnecessary digressions considering paragraphs 398, 399 and 399A of the Immigration Rules. There is no mention of them in the lengthy and detailed refusal letter. Mr Deller properly concedes that they do not apply. Clearly paragraphs 398(a) and (b) do not apply because the claimant was not sentenced to a period of imprisonment of at least four years or less than four years but at least 12 months. Paragraph 398(c) does not apply because the Secretary of State has not said that the deportation of the claimant is conducive to the public good because his offending has caused serious harm or he is a persistent offender who shows particular disregard for the law. In paragraph 23 the panel were

correct to conclude that paragraph 398 did not apply. The further conclusion that the claimant could bring himself with one of the exemptions in paragraph 399 matters not where paragraph 399 does not apply.

19. In paragraph 4 of the determination the panel correctly summarises the provisions of paragraph 390 of the Immigration Rules under which the decision was made in the refusal letter. These included "any compassionate circumstances"; a factor to which the panel returned in paragraph 22 when giving the reasons for their conclusion.

20. I have found that the first ground of appeal is not made out. The second ground is based on a misconception. It would only have been necessary for the panel to consider whether there was any other family member who was able to care for any a child if paragraph 399 applied, which it does not.

21. The third ground of appeal submits that the panel should have considered whether there were insurmountable obstacles to the family continuing family life in the Ivory Coast. Under Strasbourg jurisprudence "insurmountable obstacles" is not the correct test. The Secretary of State is importing a test from paragraph 399, which does not apply.

22. I find that there is no evidence to substantiate the allegation in paragraph 3 of the grounds of appeal that either the claimant's wife or the children failed to disclose their relationship with the claimant or delayed making any application for leave. Between paragraphs 16 and 22 the panel gave sufficient reasons for the conclusion that the compassionate circumstances of the case outweighed the public interest in deporting the claimant. The panel's treatment of delay and its consequences in paragraph 21 was correct; indeed not materially different from what the Secretary of State submits should have been done namely; "that the delay allowed the appellant to develop stronger Article 8 rights in the UK".

23. I find that the panel reached conclusions open to it on all the evidence. There is no error of law and I uphold the determination.

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Signed  
Upper Tribunal Judge Moulden

Date 15 November 2013