



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00791/2013

THE IMMIGRATION ACTS

Heard at Field House
On 14 November 2013

Determination Promulgated
On 29 November 2013

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MICHAEL GEORGE BOYD
(Anonymity Direction Not Made)

Respondent

Representation:

For the Appellant: Mr P Deller a Senior Home Office Presenting Officer

For the Respondent: Mr J René of counsel instructed by Hetheringtons

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 Jamaica who was born on 1 June 1987. I will refer to him as the claimant.
2. The Secretary of State has been given permission to appeal the determination of a panel (First-Tier Tribunal Judge Buckwell and non-legal member Dr P L Ravenscroft) who allowed the claimant's appeal against the Secretary of State's

decision of 2 April 2013 to make a deportation order under s 32(5) of the UK Borders Act 2007.

3. The claimant arrived in the UK on 25 December 1999 and was given leave to enter as a visitor for a period of six months. In 1999 Jamaican citizens did not require entry clearance to visit this country. At that date the claimant was 11 years old. The following year his mother made an application on his behalf for a grant of indefinite leave to him to remain as her dependant. The application was refused in January 2003 and the appeal was dismissed on 25 March 2005. The claimant's appeal rights became exhausted on 15 April 2005. The claimant's father was deported to Jamaica in May 2001 following involvement in what the Secretary of State said were criminal affairs including drug importation.
4. On 28 April 2008 the claimant was served with a notice advising him that he was an overstayer. However, was granted temporary admission on 1 May 2008.
5. On 21 October 2010 at Wood Green Crown Court the claimant pleaded guilty to an offence of wounding with intent. He was sentenced to 30 months imprisonment and there was no appeal against sentence. Notice of his liability to automatic deportation was served on 23 December 2010 and he responded on 11 January 2011. The claimant claimed asylum on 19 September 2012. The application for asylum was refused on 2 April 2013 at the same time as the deportation order was made.
6. The claimant appealed and the panel heard his appeal on 23 August 2013. Both parties were represented, the claimant by Mr René who appears before me. The panel heard evidence from the claimant and four other witnesses. The panel concluded that to remove the claimant from the UK would infringe his Article 8 human rights. It would be disproportionate to require him to move to and live in Jamaica. The appeal was allowed.
7. The Secretary of State applied for permission to appeal which was granted by a judge in the First-Tier Tribunal. The claimant's representatives have submitted a Rule 24 response.
8. Having checked the documents with Mr René I understand that I have all the documents which were before the panel.
9. At an early stage in Mr Deller's submissions it became apparent that he was seeking to put forward matters which were arguably not within the grounds of appeal. He made an application to amend the Secretary of State's grounds so that the first ground should include; "The First-Tier Tribunal has failed to perform a proper balancing exercise in that its determination is bereft of reference to any question of the weight to be afforded to the public interest. No regard is had, within or outside the context of the post 9 July 2012 Rules, to the seriousness of the offence, the public interest in expressing revulsion that

such crime or the interest of deterrence of others". Mr René did not object to the amended grounds and said that he was in a position to deal with them without adjournment. I permitted the grounds to be amended.

10. Mr Deller submitted that the panel had failed to apply the Article 8 provisions of the Immigration Rules. There was no suggestion that the claimant met the requirements of these Rules. The panel concluded that the claimant had no family life in this country, only private life. The main thrust of his submissions was that whilst considering the factors in favour of the claimant at great length the panel failed to take into account any element of the public interest in deportation. The factors in favour of the claimant had been over emphasised. The public interest elements were material and essential matters. Without them there was no proper balance. The panel failed to demonstrate that it had any regard to the public interest and did not even consider whether the claimant had committed a serious offence.
11. It was also submitted that the statement in the last four lines of paragraph 53 was partially but significantly incorrect. It was correct to say that paragraph 398 applied but not that paragraphs 399 and 399A did not. The panel set out the correct position in paragraphs 9 and 10 but did not follow this and instead applied an incorrect line of reasoning in paragraph 53. The panel lost sight of what it was required to do. I was asked to find that the panel erred in law and to set aside and remake the decision.
12. Mr René relied on the claimant's Rule 24 reply. He submitted that the panel had carried out a proper balancing exercise. He drew my attention to the reference to the public interest and public interest elements in paragraphs 52, 55 and 57. In paragraph 56 they said that all the factors before them had been considered on a cumulative basis. In response to my question, Mr René said that the public interest elements were dealt with in paragraphs 49 to 61 of the refusal letter. The panel summarised the relevant aspects of the refusal letter in paragraphs 9 to 11.
13. Mr René accepted that the claimant came within paragraph 398(b) but could not bring him within paragraphs 399 or 399A. He claimed and the panel concluded that there were exceptional circumstances such that the public interest in deportation was outweighed by other factors under paragraph 398(c). The panel had only taken delay into account from 2010 and the issue of the letter indicating the claimant was liable to be deported. The Secretary of State delayed from then until April 2013 when the deportation order was issued.
14. Mr René argued that the second ground of appeal was no more than a disagreement with the findings properly reached by the panel. The current jurisprudence was contained in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 (08 October 2013). I was asked to find that there was no error of law and to uphold the decision. I asked Mr René what course he submitted should be followed if I found that there were errors of

law and set aside the decision. He accepted that I would not need to hear any further evidence. He had made all the submissions he would wish to make in connection with my remaking the decision. I reserved my determination.

15. I have not been asked to make an anonymity direction and I see no good reason to do so.
16. The panel set out its reasoning in paragraphs 50 to 61. All the factors which assist the claimant are set out. I need to consider whether the factors which go to the public interest in deportation have been equally or at least sufficiently considered.
17. The principle that the private and/or family life rights of the claimant need to outweigh the public interest in seeing him deported is referred to in paragraph 52. In paragraph 55 the panel said; "we have paid careful and particular account to the terms of the respondent's deportation decision letter which set out the reasons why the respondent considered that it was appropriate to make a deportation order." The relevant part of the decision letter refers to the legitimate aims of preventing disorder and crime and maintaining an effective immigration control, the public good and public interest which would be served by the removal of the claimant, the nature and seriousness of the offence which the Secretary of State regarded as serious and compelled her to give significant weight to the question of protecting society against crime.
18. In paragraph 57 the panel said; "the decision and the consequences must be proportionate to the legitimate and lawful aim of the respondent in discharging her duty with respect to ensuring an appropriate system of immigration control. Accordingly the ultimate test is whether, on the facts, the same is proportionate in all the circumstances. Of course we take into account issues involving public interest and the economic interests of society."
19. It would have been better if the panel had spelt out the factors relevant to the public interest in terms and not by reference but I find that in a clear and detailed determination the panel did pay sufficient regard to the factors going to the public interest. The panel considered and did more than pay lip service to the public interest factors which the Secretary of State had set out.
20. The panel referred to MF (Article 8 - new rules) Nigeria [2012] UKUT 393 (IAC) (31 October 2012) and followed a two-stage process in considering Article 8 under the Immigration Rules and the Strasbourg jurisprudence. Since the hearing before the panel. The Court of Appeal have now heard the appeal in MF (Nigeria) and concluded that a two-stage process is not required, although a one stage or a two-stage process are not likely to lead to different conclusions. MF (Nigeria) in the Court of Appeal has since been revisited by the Upper Tribunal in Kabia (MF: para 298 - "exceptional circumstances") 2013 UKUT 00569 (IAC). This was not before me or addressed at the hearing

but I consider that it makes no material change to the guidance contained in MF (Nigeria) in the Court of Appeal.

21. I find that the panel did have proper regard to the Immigration Rules in making the Article 8 assessment. This is apparent from paragraph 53 of the determination and the reference to paragraph 397 of the Immigration Rules in paragraph 61 which contains the same exceptional circumstances test as paragraph 398(c).

22. I find that the panel did not err in its consideration of the effect of delay by the Secretary of State and that the criticisms of the panel's reasoning in the second ground of appeal are no more than disagreements with findings properly made. They do not identify any error of law.

23. In paragraphs 43 to 45 of MF (Nigeria) the Court of Appeal said;

"43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 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".

44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not "mandated or directed" to take all the relevant article 8 criteria into account (para 38).

45. Even if we were wrong about that, it would be necessary to apply a proportionality test outside the new rules as was done by the UT. Either way, the result should be the same. In these circumstances, it is a sterile question whether this is required by the new rules or it is a requirement of the general law. What matters is that it is required to be carried out if paras 399 or 399A do not apply."

24. In paragraph 61, albeit as an alternative conclusion, the panel found that the claimant's circumstances were exceptional and outweighed the public interest in deportation. Taken in context I find that the exceptionality test which the panel applied was not materially different to the test of very compelling reasons which the Court of Appeal equated to exceptional circumstances. The conclusion was generous but one open to the panel on the all the evidence. I find that the panel did not err in law and I uphold the determination.

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Signed
Upper Tribunal Judge Moulden

Date 15 November 2013