



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00816/2013

THE IMMIGRATION ACTS

Heard at Field House
on 3rd October 2013

Determination Promulgated
on 18th November 2013

Before

THE HON MR JUSTICE MCCLOSKEY, PRESIDENT OF THE UPPER TRIBUNAL
and
UPPER TRIBUNAL JUDGE COKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RICHARD DEAN ROBERTS

Respondent

Representation:

For the Respondent: No appearance, no legal representation
For the Appellant: Mr G Saunders, Home Office Presenting Officer

DETERMINATION AND REASONS

[1] This is the Secretary of State's appeal against a decision of the First-tier Tribunal made on 5 August 2013. The Secretary of State, in a decision dated 14 April 2013, determined that Dean Roberts, who is the Respondent to this appeal, should be

deported. This decision was made on the ground that deportation would be conducive to the public good, under Section 5 of the Immigration Act 1971. The First-tier Tribunal, in its written determination dated 5 August 2013, allowed his appeal. The Secretary of State was granted permission to appeal to this Tribunal.

- [2] In very brief compass, the salient facts are that Mr Roberts is a Jamaican national who is now aged 24 years. When he entered the United Kingdom originally he did so lawfully at the age of 16, in 2005. He was accompanied by his sister and both proceeded to live with his mother. In substance, he has had continuous residence in the United Kingdom since then. Since entry, he has generated a criminal record. Of particular significance are the convictions which he accumulated during the period June 2012 to January 2013. He was the subject of six convictions during this period. In the main, these were offences of harassment and breaches of restraining orders. With the exception of an associated offence of a minor assault, these were targeted and inter-related offences. They concerned a female person with whom Mr Roberts had had a tempestuous relationship for some time. His offending was cumulative and escalating in nature. It culminated in the imposition of a commensurate sentence of ten months' imprisonment at Harrow Crown Court on 29 January 2013. This was the first, and only, custodial sentence to which Mr Roberts has been subjected. It was this sentence which provided the impetus for the Secretary of State's decision to deport Mr Roberts from the United Kingdom.
- [3] In her appeal the Secretary of State contends that the decision of the First-tier Tribunal is vitiated by two distinct errors of law. The first asserted error is that a material misdirection was committed by the Tribunal namely that the Tribunal erred in applying a two stage test in the Article 8 assessment.
- [4] The relevant provisions of paragraphs 396 and 398 of the Immigration Rules are the following:

396. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or 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 (our emphasis).

Paragraph 398 continues (in material part):

"Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention and –

- (a) The deportation of the person from the UK 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 at least 4 years; [or]*

- (b) *The deportation of the person from the UK 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; or*
- (c) *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."

- [5] We consider that on any fair and reasonable reading of the determination of the First-tier Tribunal the judge was cognisant of the relevant provisions of the Immigration Rules. Furthermore, they are set out fully in paragraph 8 of the Determination. The Tribunal was plainly alert to the strong public interest in deporting foreign criminals. In paragraphs 23 and 24 it directed itself impeccably.
- [6] Properly analysed, the crucial issue in this case was proportionality. This required the judge to decide how much weight, if any, to attribute to a range of factors, in a manner harmonious with paragraph 398 of the Rules and recognising the strong public interest in play. Although **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** had not been decided at the date of the Determination under appeal, it is evident that the First-tier Tribunal recognised the strong public interest in deportation. While the Tribunal applied the two stage exercise which is now not considered appropriate, we are satisfied that, as in **MF (Nigeria)**, this did not invalidate the outcome. In particular, we consider that the First-tier Tribunal made its assessment of proportionality in a manner harmonious with the exceptional circumstances requirement prescribed in paragraph 398 of the Immigration Rules. In this context we refer particularly to paragraphs [39] – [41] and [50] of **MF**.
- [7] It is appropriate to emphasise that the First-tier Tribunal expressly acknowledged [in paragraph 31] that this is a finely balanced case. This is an uncontroversial assessment, which one would expect most tribunals to have made. The First-tier Tribunal's conclusion, in reasoned and sustainable terms, was that this is an exceptional case and that it would be disproportionate to proceed with the deportation of the Respondent. We can identify no material misdirection in its decision. For the reasons elaborated, we conclude that the first error of law advanced on behalf of the Secretary of State has no foundation.
- [8] We turn to consider the second ground of appeal. We draw attention to how this is formulated in the Notice of Appeal:

"Failure to give reasons or adequate reasons for findings on certain material matters".

This ground is elaborated in the three paragraphs of substance which follow in the Notice. The resolution by this Tribunal of the second ground of appeal requires a fair, reasonable and intimate analysis of what is contained in the First-tier Tribunal's determination. In conducting this exercise we are required to have regard to all the evidence before the First-tier Tribunal and we have duly done so.

- [9] In our view, this ground of appeal is, properly analysed, a thinly disguised challenge to the merits of the decision of the First-tier Tribunal. One of its prominent themes is that of disagreement. It expresses disagreement with the Tribunal's assessment that certain factors were deserving of greater weight than others and that these factors cumulatively and ultimately, by a narrow margin as the Tribunal emphasised, outweighed the legitimate aim pursued by the Secretary of State.
- [10] We consider the main question for this Tribunal, in resolving this ground of appeal, to be whether there was sufficient evidence, direct or inferential, to underpin the First-tier Tribunal's findings and conclusions. We are satisfied that there was. There was no impermissible speculation. Nor is there any clearly demonstrated factual error of substance. The Tribunal's reasoning, in our judgment, satisfies the basic legal standards which are engaged in the exercise of compilation of any judicial decision, namely the requirements of coherence, intelligibility and objective sustainability. His disposes of the first two elements of this discrete ground of appeal.
- [11] The third limb of the second ground of appeal raises the issue concerning the risk posed by Mr Roberts in consequence of his offending. We consider that this was a matter pre-eminently requiring evaluative judgment on the part of the First-tier Tribunal. It is appropriate to remind ourselves that in considering this element of the second ground we must disregard what **this** Tribunal might have decided had it been conducting the same exercise as that of the First-tier Tribunal. This must be disregarded because it is legally irrelevant. We are satisfied that there is no disharmony between the available evidence and the Tribunal's consideration of this issue or its final proportionality assessment.
- [12] Ultimately, the task for this Tribunal is to consider whether any of the asserted errors of law in their various manifestations in the grounds of appeal has been demonstrated. We conclude that no such infirmity is established. There are two grounds of appeal in this case. We are satisfied that neither of these grounds of appeal has been established. Neither of the basic errors of law asserted by the Secretary of State has been demonstrated. It is appropriate to re-emphasise that there are many borderline cases in this field. Borderline cases present particularly challenging difficulties for judges, especially at first instance. This judge in this instance has undertaken the necessary exercise with commendable care and attention. While the decision reached might not necessarily have been made by every First-tier judge, the converse applies fully. This is the very essence of responsible and independent judicial decision making. In the United Kingdom legal system it is open to one duly constituted court or tribunal to lawfully make a decision which might not have been made by another. The rule of law accommodates this truism.

The relevant legal standards have been applied to this judgment, and we conclude that it passes muster.

Decision

[13] Accordingly we are satisfied that there is no error of law such as to set aside the decision of the First-tier Tribunal.

The appeal is dismissed. The decision of the First-tier Tribunal stands.

Footnote

[14] For the record, we add that after the hearing had concluded it appeared that the notification of hearing had been directed to an erroneous address: this might explain the Respondent's non-attendance. Given our decision we do not consider it necessary to relist the matter for further hearing.

Amund McCloskey.

Signed:

The Hon Mr Justice McCloskey,
President of the Upper Tribunal

Dated: 08 November 2013