Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00957/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25th October 2013	**On 7th November 2013**
	……

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PRINCEWELL OLUOHA

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Ms N Manyarara, counsel, instructed by Freemans Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals against a decision of a panel of the First-tier Tribunal (Judge Beach sitting with Mr D R Bremmer JP, a non-legal member of the Tribunal) who, by a determination promulgated on 3rd April 2013 allowed Mr Oluoha's appeal against a decision of the Secretary of State that he should be deported. That decision was made by the Secretary of State pursuant to the "automatic deportation" provisions of section 32 of the UK Borders Act 2007. That was because, Mr Oluoha, a Nigerian citizen date of birth 8th June 1976, had pleaded guilty to, been convicted of conspiracy to contravene s170(2)(b) of the

Customs and Excise Management Act 1979 Conspiracy to import cocaine from Nigeria) and had been sentenced to 7 years imprisonment. In November 2011, the Home Office (Her Majesty's Prison Service) transferred him to an open prison and he was granted increasing periods of resettlement day release and resettlement overnight release thus enabling him to cement and develop an already strong relationship.

2. The Secretary of State submitted an application for permission to appeal some 6 weeks late. Although no explanation was given for such delay, time was extended and permission granted on the grounds asserted namely that the First-tier Tribunal panel had erred in their assessment of Article 8.

3. The essence of the grounds relied upon by the Secretary of State and upon which permission was granted is as follows:

   a. The First-tier Tribunal misdirected itself in law by applying a two stage test, as derived from MF (Nigeria) [2012] UKUT 00393 (IAC). It was asserted that the First-tier Tribunal should not have regarded the Immigration Rules as a starting point before moving on to a second free standing Article 8 assessment; if the Tribunal considered that factors not addressed in paragraph 399 or 399A merit allowing the deportation appeal it should have considered them when looking at whether there were any exceptional circumstances under paragraph 397 or 398 such that the consequences of deportation produce an unjustifiably harsh outcome incompatible with Article 8. It was asserted that had the First-tier Tribunal had regard to the nature and weight of public interest as expressed in the Rules and had the First-tier Tribunal adopted that approach it would have reached a different conclusion.
   b. That the First-tier Tribunal had failed to provide adequate reasons as to why his British Citizen child could not relocate to Nigeria given he is only 3 years old; that there were no insurmountable obstacles or exceptional circumstances which prevent Mr Oluoha and his partner relocating. It was submitted that the First-tier Tribunal had failed to provide any findings with regards to Mr Oluoha's risk to the public; that he had sought to minimise his involvement and had failed to accept full responsibility for his actions.

4. Since permission to appeal was granted, the judgment in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 has been handed down.

Factual matrix and findings by the First-tier Tribunal

5. There is no dispute as to the factual matrix to this appeal. Mr Oluoha was previously married to a Greek national, the relationship having commenced when he was in Greece in 2002. He arrived in the UK on 9th September 2007 with leave to enter as a student until 31st October 2008. He married his Greek wife in

June 2008 and following an application made on 22nd October 2009 he was issued with a residence card on 24th September 2009 valid until December 2014. That marriage broke down and had broken down at the time he received his residence card.

6. He met his current partner in 2008; their relationship started in about March or April 2009 and they have lived together since November 2009 when she ended the tenancy on her own accommodation although they had moved in together before that. They had at the date of the hearing before the First-tier Tribunal one child together, born 23rd February 2010 and his partner was pregnant; as of the date of hearing before me the couple now have two children.

7. The First-tier Tribunal clearly recorded (in [40] and [41]) that Mr Oluoha had been sentenced to a period of imprisonment in excess of 4 years and set out the relevant parts of paragraph 398. At [41] the First-tier Tribunal went on to say

> Paragraphs 399 and 399A do not apply to the Appellant because he does not fall within Paragraph 398 (b) or (c). It will therefore be only in exceptional circumstances that the public interest in deporting the Appellant will be outweighed by other factors.

8. In [53] the First-tier Tribunal finds that the couple have

> …sought to exaggerate the Appellant's partner's difficulties in being a single parent

9. On 9th February 2010 he was arrested. He stated in his evidence that he took responsibility for the crime; that he hadn't known there were drugs in the packages but that he should have seen earlier that there was something wrong; he pleaded guilty and said that the 7 year sentence was a consequence of his error of judgment. The First-tier Tribunal refers to the OASYS report before them in [51] as follows

> …..In the recent OASYS report the Appellant seeks to minimise his involvement in the offence by stating that he was unaware that the package contained drugs. There was no evidence before us to suggest that the Appellant was sentenced on that basis and indeed the Appellant did not seek to suggest that was the case. This is of concern as it strongly suggests that the Appellant has failed to accept full responsibility for his offence and this may have had an impact on the outcome of the OAsys report which appears to have proceeded on the basis that what the appellant stated about not having knowledge of the contents of the packages was true and was the basis upon which he was convicted.

10. In [52] the First-tier Tribunal refers to Mr Oluoha's time in prison, work outside prison, community voluntary work and that

> …..These factors all show that the Appellant is considered by the prison authorities to be a prisoner who can be trusted. It also suggests that the Appellant has used his time in prison constructively.

11. He has been in an open prison since November 2011; he went home five days in every 28 and was on day release alternate weekends; he is currently on licence and on immigration bail.

12. Prior to his imprisonment he had worked and studied. When detained in prison his partner and child used some of his savings and he was still owed money from his previous employment. Whilst detained he was one of 25 prisoners who had earned the privilege of working and was supporting his wife and child on a weekly basis.

13. He has a widowed mother in Nigeria, a sister in Holland and a sister in Canada. The First-tier Tribunal found that Mr Oluoha had close relatives in Nigeria who may well be able to assist in the short term and that he had obtained qualifications in the UK which he could use to help him re-establish himself in Nigeria. The First-tier Tribunal goes on to say in [54]

> Of course, the Appellant's partner would prefer to remain in the UK but this does not automatically mean that there are exceptional circumstances in terms of deportation.

14. His partner works part time as a teaching assistant in a primary school in Southampton. Her unchallenged evidence was that she knew of Mr Oluoha's conviction and that it was related to drug importation. She said she could not go to Nigeria for fear of the consequences to her and her child's safety and health. Her widowed mother, who lives about 1 ½ hours away, is retired and her sister, who lives about 2 ½ hours away has recently been made redundant. There were very limited job opportunities for her near her mother.

15. In [55] the First-tier Tribunal found

> ….We do not find it credible …that the Appellant would not have realised that he should have informed the Home Office of his change in circumstances [the breakdown of his marriage to his Greek wife]….the Appellant deliberately chose not to inform the Home Office of his change in circumstances because he would then have been without any status in the UK…

16. In [56] the First-tier Tribunal found that the Appellant had not shown there were exceptional circumstances under the Immigration Rules and went on to say in [57] that the

> …Appellant cannot fulfil the Immigration Rules relating to article 8. In line with **MF** we find that where … the Appellant cannot meet the requirements of the Immigration Rules but raises Article 8 in his grounds of appeal, we must still consider Article 8 as a separate legal entity from the Immigration Rules.

17. The First-tier Tribunal then went on to consider the proportionality of the deportation of the appellant "under Article 8" and said as follows

> 63. The Appellant has been convicted of a serious offence and received a lengthy prison sentence. There are important public interest issues in this matter including the need for deterrence.
> 64. Balanced against this is the fact that the Appellant is considered to be at low risk of reoffending and that he has undertaken courses whilst in prison. He is also considered to be a trusted prisoner by the prison authorities and is allowed on home visits and to undertake work outside the prison.
> 65. …. It has been accepted in **ZH** that it will often be unreasonable to expect a British national child to leave the UK to be with a foreign national parent as it will mean a consequent loss of the benefits which being British in Britain brings to a child……we accept that this [relocation] would be difficult although not insurmountable…… Whilst she [the child] is young enough to adapt to life in Nigeria she is a British national and this carries considerable weight. We find it would not be reasonable to expect the Appellant's child to relocate to Nigeria. In those circumstances it would also not be reasonable to expect the Appellant's partner to relocate to Nigeria because otherwise their child would be left without any parents.
> 66. We take account of the significant role that public interest plays in assessing Article 8 claims. Were it simply the Appellant's rights under Article 8 that we had to consider or even those of just the Appellant and his partner, then we would find that the Respondent was justified in deporting the Appellant given his history. However we must also take account of the effect on the Appellant's daughter and their unborn child….. Even taking account of the fact that the Appellant's involvement with his daughter was to some extent likely to have been exaggerated given that the Appellant's partner is the full time carer and the Appellant is necessarily a part time carer given his current situation, we find that it is clear from the Appellant's partner's evidence that the Appellant plays a significant role in his daughter's life when he is on home release……
> 67. This case is very finely balanced. However we find that he Appellant's daughter's relationship with the Appellant is just of sufficient importance and significance as to outweigh the public interest. …..In making this decision, we note that the case law in relation to Article 8 clearly states that the Appellant does not need to show exceptional circumstances and that his case can therefore be distinguished from the Immigration rules.

MF (Nigeria) v SSHD [2013] EWCA Civ 1192

18. MF (Nigeria) considers the question of the circumstances in which the deportation of a foreign criminal is contrary to Article 8. Until paragraphs 398, 399 and 399A of the Immigration Rules were introduced the issue was governed entirely by caselaw; caselaw involved two stages: the first to determine whether the decision is in accordance with the Immigration Rules and the second to determine whether the decision is contrary to the appellant's Article 8 rights. It

was against that background that MF (Nigeria) considers the proper interpretation of the current Immigration Rules.

19. In [36] the Court says

> What is the position where paras 399 and 399A do *not* apply either because the case falls within para 398(a) or because, although it falls within para 398(b) or (c), none of the conditions set out in para 399 (a) or (b) or para 399A (a) or (b) applies? The new rules provide that in that event, "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors"…..

20. The Secretary of State in MF (Nigeria) made clear that the new rules were not intended to herald a restoration of the "exceptionality test" and that they should be interpreted consistently with the Strasbourg jurisprudence [39]. The court went on to say [39] that

> ….. the rules expressly contemplate a weighing of the public interest in deportation against "other factors". In our view, this must be a reference to all other factors which are relevant to proportionality and entails an implicit requirement that they are to be taken into account.

21. The Court accepted the Secretary of States submission [41] that the reference in the rules to exceptional circumstances "serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under Article 8(1) trump the public interest in deportation." It went on to say

> 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. …. 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….
> 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. 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.
> 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 a consideration of whether para 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 UT concluded (para 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.
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> ……
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> 49. …. We would observe that, if "insurmountable" obstacles are literally obstacles which it is *impossible* to surmount, their scope is very limited indeed. We shall confine ourselves to saying that we incline to the view that, for the reasons stated in detail by the UT in *Izuazu* at paras 53 to 59, such a stringent approach would be contrary to article 8.

The Secretary of State's case

22. MF (Nigeria) points out that the position of the Secretary of State as to the meaning of the rules and how they should be applied has not always been easy to understand. In the present case the Secretary of State relied upon SS (Nigeria) [2013] EWCA Civ 550 and Richards [2013] EWCA Civ 244 as precursors to MF Nigeria. She submitted that legislative weight is to be attached to the strong public interest in deporting foreign criminals rather than considering this as mere executive policy. She submitted that the First-tier Tribunal had failed to show that they had grappled with the significance of the crime for which Mr Oluoha had been convicted; that the references in [63] and [66] of the First-tier Tribunal determination were simply inadequate. It was submitted that where the decision had been taken under the 2007 Act there is a greater requirement upon the claimant to show that the decision was disproportionate and that in the present case the child had been the determining factor. It was submitted that the First-tier Tribunal had failed to provide any analysis but had merely noted them, that there were significant credibility issues that had not been addressed and that the First-tier Tribunal had simply failed to weigh in the other factors as required in reaching their assessment. It was submitted that although the rules assessment reflected the great weight placed upon the public interest, the, what could be termed, "Razgar" assessment failed to do this.

Decision

23. The First-tier Tribunal Panel decision sets out in detail its conclusions on the evidence before it. It draws attention to evidence which leads to conclusions adverse to Mr Oluoha, for example the availability of relatives in Nigeria to assist, the acceptance of responsibility for the crime and the ability of his partner to cope as a single parent. Although inaccurately formulated in the determination as three steps – the Rules, whether there were exceptional circumstances and then Article 8, it is plain that this experienced panel has at each step in its consideration taken full account of all relevant matters in reaching its decision. The Court of Appeal in MF (Nigeria) has explained that in

reaching a decision whether as per a 'two stage' approach as set out in MF (IAC) or in contemplation of consideration completely within the Rules, Strasbourg jurisprudence remains highly relevant. It is incorrect to characterise the First-tier Tribunal panel decision as having reached a perverse decision under Article 8 either because of a failure to consider the evidence before it or to place adequate weight on the public interest or because the appeal failed under the Rules. It is plain that the First-tier Tribunal panel took all of these matters into account. It states clearly that had it not been for the British Citizen child the appeal would have been dismissed; it is equally clear that the panel did not view the position of the child as a trump card but as a significant factor which they took into account.

24. It is the established role of the judiciary to assess evidence and reach decisions in complex cases such as this one. The Panel reached a decision which other Panels may not have reached but was a decision that was reasonably open to them on the evidence before them.

Conclusion:

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

I do not set aside the decision

The appeal of the Secretary of State is dismissed and the decision by the First-tier Tribunal stands.

Anonymity

The First-tier Tribunal made did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Date

Judge of the Upper Tribunal Coker