Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00970/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 4th December 2013	**On : 13th December 2013**

Before

Upper Tribunal Judge McKee

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

C. W. D.
(anonymity direction continued)

Respondent

Representation:

For the Appellant: Miss Alice Holmes of the Specialist Appeals Team
For the Respondent: Miss O. Ukachi-Lois of Freemans Solicitors

DETERMINATION AND REASONS

1. A deportation order under section 32(5) of the UK Borders Act 2007 against Mr CD was made on 22nd October 2012, following his conviction two years previously of a drugs offence for which he was sentenced to three years' imprisonment. It was not his first offence, and indeed the trial judge, in his sentencing remarks, said that Mr CD had "*a dreadful record*." It may not have been with high hopes of success that notice of appeal was given to the First-tier Tribunal, but on 8th August 2013 the

appeal came before a panel comprising Judge Parkash Aujla and Ms Vivien Street, JP, and the appeal was allowed. The panel accepted that the appellant before them had been a police informer in the past, that this would be known about and greatly disapproved of in his native Jamaica, and that on his return there he would be at real risk of serious harm from drug gangs. Mr CD's removal would therefore be contrary to Article 3 of the European Convention. The appeal was also allowed under the private life aspect of Article 8 of the ECHR, as encapsulated by paragraph 399A of the Immigration Rules, and under the family life aspect of Article 8 outside the Immigration Rules, using the approach approved in cases such as *Izuazu* and *Nagre*.

2. The Secretary of State challenged this outcome, but permission to appeal to the Upper Tribunal was initially refused by Judge Ford, who considered the panel's findings to be adequately reasoned and fully open to them on the evidence. On renewal, however, leave was granted to the Home Secretary on 4th November 2013 by Upper Tribunal Judge Grubb, save for a ground which would only have been appropriate in the context of an asylum claim. When the matter came before me, it was agreed on all hands that this ground should be disregarded.

3. Mr CD attended the hearing with his partner, Miss MD, and I had the advantage of very full and careful submissions from both representatives. Although the First-tier Tribunal had reached what seemed at first blush a surprising conclusion, in the end it did not appear to me that they had made a material error of law which required their determination to be set aside. My reasons for this are set out briefly below.

4. If the panel did not err in respect of Article 3, Mr CD cannot be deported, however strong the public interest in his deportation. The Secretary of State's challenge is here directed to an absence of corroborative evidence that he needed to be put "on protection" while serving his sentence at HMP The Mount, having (he said) received threats from fellow-prisoners because of his previous informing. The panel are also criticised for not drawing the inference that Mr CD could not have continued operating in the drug scene, as he did, if he had been execrated as a police informer.

5. That the appellant before them had been a police informer was, It seems to me, a finding which the panel were entitled to adopt, on the *Devaseelan* principle, from the determination of the adjudicator, Mrs Lane, who heard his appeal in November 1998. This was backed up by an article in the Express on Sunday, which reported that Mr CD had been working for the police since 1991, and was still working for them in 1997. As for the appellant's claim that this activity was still remembered at the present time and held against him, the panel had the testimony of CD himself and his partner. As explained at paragraphs 40-41 of their determination, the panel found this testimony credible. They found CD "*honest and straightforward*" in his oral evidence, giving as an example of this his admission that he still smoked cannabis occasionally, when it might have seemed more advantageous to him to pretend that he had abjured drugs altogether. I cannot say that the panel were not entitled to reach this finding. They had the advantage of hearing and seeing live evidence from witnesses, and an appellate tribunal will not lightly interfere with credibility findings made on that basis.

6.. The panel went on from there to find that "*it is reasonably likely to assume that the information that he provided to the police would have proved useful in bringing*

criminals to justice as well as perhaps resulting in some offenders being removed from the United Kingdom to Jamaica." It could readily be inferred that members of powerful criminal gangs in Jamaica would bear a grudge against CD, and relying on the 'country guidance' in *AB (protection – criminal gangs – internal relocation) Jamaica* CG [2007] UKAIT 18, the panel held that CD would be at risk from them in Kingston, whence he hailed, that the police would not be able to offer effective protection, and that it would not be reasonable to expect him to relocate to a rural area, on account of his disability. The chain of reasoning adopted by the panel here cannot, I think, be castigated as illogical or not based on evidence. The upshot is that the finding on Article 3 has to stand.

7 As Article 3 trumps Article 8, the outcome of this appeal is not affected by what does seem to be an error in the panel's decision on private life. They noted that CD had lived in the United Kingdom for 27 years, and found that he had "*no ties (social, personal or family) with Jamaica*." But this misquotes paragraph 399A(a) of the Immigration Rules, which refers to 'cultural', not 'personal', ties. As the Grounds of Appeal argue, CD had spent the first 20 years of his life in Jamaica, and "*would have knowledge of the culture and customs there*." It is not as if he was brought to the United Kingdom as a young child, and spent all his formative years here

8. On the other hand the panel have not, in my judgment, made an error of law in their setting of the proportionality balance under Article 8 in its family life aspect. Having reached the fifth of Lord Bingham's questions in *Razgar*, they consider the factors which should be weighed on the public interest side of the balance. First they observe that according to the OASys Report completed on 3rd December 2012 the risk of CD re-offending is 'low', and that he has been classified by the London Probation Trust as 'being of low risk of harm'. Then they set out at length the well-known passages from *N (Kenya)* and *OH (Serbia)* in which the Court of Appeal enjoins adjudicators/ immigration judges to keep in mind certain important facets of the public interest. The panel do not omit the injunction of Lord Justice Wilson (as he was then) that "*the risk of re-offending is one facet of the public interest but, in the case of very serious crimes, not the most important facet*." Those other facets are also quoted. They are, of course, deterrence, the expression of society's revulsion, and the building of public confidence.

9. Save for the passages quoted from *N (Kenya)* and *OH (Serbia)*, the panel do not refer explicitly to those other facets of the public interest when they say, "*We have carried out a balancing exercise between the public interest in removing the Appellant in the interest of maintaining law and order and preventing crime on the one hand and the Appellant's and his family's compassionate circumstances on the other*." They are very clear that "*the Appellant had committed very serious offences over time. He was engaged in drug dealing and other offences*." Have they said enough to assure the reader that the public interest has been properly taken into account?

10. It seems to me that the instant case can be distinguished from *PK (Congo)* [2013] EWCA Civ 1500, in which the First-tier Tribunal allowed an appeal against deportation by a man with an appalling criminal record, whose risk of re-offending had been assessed as high, but who had regular contact with children of his. There was no mention at all of the public interest facets listed in *OH (Serbia)*. The Court of

Appeal upheld the Upper Tribunal's finding that the First-tier Tribunal had not taken account of those facets and had accordingly erred in law. Those facets have, of course, been set out by the panel in the instant case. Having done that, can they be said to have forgotten about them almost immediately, when carrying out the all-important balancing exercise? The structure of this part of the determination does not support such a notion. Having looked at the public interest at paragraphs 55-59, the panel look at the factors going the other way at paragraphs 60-61, including the best interests of the children (which, Miss Ukachi-Lois points out, a family court thinks will be served by having contact with CD). At paragraph 62 the panel carry out the balancing exercise and conclude that deportation would be disproportionate.

11. Matters of weight are classically not matters of law, and I cannot say that the panel here erred in law by holding that the public interest was outweighed in the present case. It follows that, overall, the First-tier determination must stand.

DECISION

The Secretary of State's appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

7th December 2013