Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01312/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 December 2013	**On 17 December 2013**
Extempore	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SUBASH MANILAL MEHTA

Claimant

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Mr P Richmond of Counsel

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the determination of the First-tier Tribunal, (a panel comprised of First-tier Tribunal O'Garro and Mr Olszewski, non-legal member), promulgated on 7 October 2013 in which they allowed the appeal of Mr Subash Manilal Mehta, whom I refer to as the claimant, against the decision of the Secretary of State made on 21

June 2013 to make a deportation order against him by virtue of Section 32(5) of the UK Borders Act 2007.

2. The facts of this case are set out in detail in the decision of the First-tier Tribunal. There is no dispute about the fact that the appellant has lived in the United Kingdom for a substantial period of time. He is married to a British citizen and has been living in the United Kingdom since 1982. He has a daughter who is also a British citizen and the claimant has had indefinite leave to remain in the United Kingdom since 26 October 1984. On 29 November he was convicted and sentenced to three years imprisonment, on charges of obtaining money by deception and conspiracy to defraud. His sentence was reduced on appeal to two years.

3. The Secretary of State in her refusal letter considered that the appellant did not meet the requirements of the Immigration Rules that is paragraphs 397 to 399A nor was she satisfied that there were exceptional circumstances such that he should be given leave to remain in the United Kingdom.

4. When the matter came before the First-tier Tribunal on 6 September 2013 the panel found that the claimant did not fall within the terms of the Immigration Rules, specifically finding that he did not meet the requirements of paragraph 399B on the basis that the claimant had not shown that there were insurmountable obstacles to family life continuing with his wife outside the United Kingdom and therefore he did not fulfil the requirement of paragraph 399 (b)(ii).

5. The panel then went on to consider whether despite that the decision to deport the claimant was contrary to his rights set out in Article 8 of the European Convention on Human Rights. They adopted that course of action following the decision of the Upper Tribunal in **MF (article 8 new rules) Nigeria**[2012] UKUT 00393 (IAC) handed down by the Upper Tribunal. It is accepted by both parties that of course in light of the decision in **MF (Nigeria) v SSHD** [2013] EWCA Civ 1192 in the Court of Appeal that that is not the route that they should have taken, but it does not necessarily follow that their decision to do so was material.

6. The Secretary of State sought permission to appeal out of time and permission to appeal was granted by First-tier Tribunal Judge Brunnen on 5 November 2013.

7. In summary, the respondent's challenge to the decision is that the Tribunal failed to give adequate reasons for findings in respect of the public interest in deporting a foreign criminal, the argument being that they failed to consider the public interest extends beyond the issue of the likelihood of the claimant reoffending. It is also argued that the Tribunal failed to give adequate reasons for finding that his Article 8 rights would be breached by deportation given that there were no insurmountable obstacles to family life continuing in India. It is also submitted that the panel failed to make any findings of whether he had engaged with his role

in crime despite a finding that he was guilty, failing properly to engage with the decision in **Masih (deportation public interest basic principles) Pakistan** [2012] UKUT 46.

8. In the grant of permission Judge Brunnen drew attention to the fact that the panel may, as they had not had the benefit of the judgement of the Court of Appeal in **MF (Nigeria),** misdirected themselves as to the nature of an insurmountable obstacle that would need to be shown in order for the appellant to have succeeded under the Immigration Rules. Judge Brunnen found that it was arguable that the panel had erred in considering only the seriousness of the appellant's offence, considering only the risk of reoffending giving no consideration of weight to the wider policy considerations of deterrence.

9. I should add that subsequent to the grant of permission being given and served on the claimant, his solicitors served a letter before action to the First-tier Tribunal on 19 November 2013 arguing that First-tier Tribunal Judge Brunnen had erred in granting permission to the respondent to appeal eight days out of time. That letter which was in accordance with the pre-action protocol applicable to judicial review was followed by an application for judicial review which was made to the Upper Tribunal, and as I understand it is still pending.

10. There was subsequent to the issue of judicial review proceedings a request for an adjournment of these proceedings. That application was refused and Mr Richmond did not renew the application before me this morning.

11. Mr Duffy sought permission to amend the grounds of appeal to include a reference to a failure on the part of the First-tier Tribunal to follow the guidance given in **SS (Nigeria)** [2013] EWCA Civ 550 in failing to take into account the proper weight and the serious and significant weight that should be attached to the public interest in deporting foreign criminals given that is now enjoined by statute passed by Parliament through the UK Borders Act 2007.

12. Mr Richmond objected to that application and I refused permission to amend the grounds of appeal. It is not a good reason for amending grounds of appeal that the point was obvious; if it was obvious then it should have been raised. Second, there has been ample time for an application to be made for the grounds to be amended. No such application was made until the day of the hearing and this was done without notice to the claimant. In all the circumstances I am not satisfied that it would be a proper exercise of judicial discretion to admit an amendment of the grounds of appeal at this stage. This is not a case where the amendment has been sought because of new facts coming to light or in light of a supervening binding decision.

13. Mr Duffy's submission is that the Tribunal did not in reaching the decision explain adequately what weight they attached to the public interest, failing to set out in any detail or any adequate detail why they had come

to the conclusion that it was proportionate and that there was insufficient indication that they had taken into account the public interest in deporting foreign criminals which extends beyond the risk of reoffending and into the factors set out in **AM v SSHD** [2012] EWCA Civ 1634.

14. Mr Richmond's submitted that the Tribunal gave sufficient reasons for the finding that the decision to deport the appellant was not proportionate, and it is evident from the determination at paragraphs 46, 47, 48 and 49 that the panel had taken these factors into account; that it was clear also from paragraph 28 of the determination that they have considered the Secretary of State's policy on deportation; and, it was also evident from their consideration of paragraphs 397 to 399 of the Immigration Rules which are set out in the determination that they have borne in mind the public policy as shown in the Rules in reaching their decision.

15. In reply, Mr Duffy's submission is in relation to paragraph 46 and the following paragraphs that there was no reasoning shown as to the effect that these considerations, if they had taken them into account, had in the proportionality analysis.

16. I have considered the determination of the First-tier Tribunal carefully. I consider that there is significant merit in Mr Richmond's submissions. It is evident that the panel had set out the Rule properly, it is evident that they have taken account of the policy on deportation on foreign criminals within chapter 13 of the IDIs and it is clear at paragraph 28 that they said "we have had full regard to the Secretary of State's policy when coming to our decision". It is clear also that they have had regard to the public interest which I accept goes beyond the need to deter reoffending, and it is clear from what is said at paragraph 46 and 47 that these have been taken into account. Their consideration of these matters was adequate and the panel has addressed themselves fully to the **Maslov** factors as is clear from paragraph 49.

17. The claimant has lived in the United Kingdom for 30 years with leave and is married to a British Citizen who has lived here for over 40 years. It is not arguable on the facts of this case that this decision is in any way perverse or is not one that the panel could properly have come to taking into account all the factors which they said they had taken into account. I am satisfied when read as a whole that the determination shows in adequate detail why on the particular facts of this case the panel considered that deporting the appellant was disproportionate. On that basis I find that there was no error of law disclosed in the determination which is capable of affecting the outcome of the appeal.

18. Having said that, it is agreed between the parties that in light of the decision of the Court of Appeal in **MF (Nigeria)** that the exercise that the panel has conducted in considering Article 8 should have been carried out within paragraph 398 of the Immigration Rules. Whilst it is implicit in the determination that the panel found that the appellant did not meet the requirements of the Rules and went on to consider Article 8 as a separate

ground of appeal, they do not expressly say so in the conclusion. This however, is not material; as the Court of Appeal noted in **MF (Nigeria)** there is no real difference in the consideration of proportionality within paragraph 398 or under article 8; it is a difference of form rather than substance, and I am satisfied that had the Tribunal considered proportionality within a consideration within paragraph 398 of whether there were exceptional circumstances, they would inevitably, given their sustainable findings, have concluded that there were.

19. I therefore uphold the decision of the First-tier Tribunal subject to the clarification that the appeal should have been allowed under the Immigration Rules on the basis that there were exceptional circumstances such that the claimant met the requirements of paragraph 398 and subject to substituting that as the basis on which the appeal is allowed I uphold the determination.

SUMMARY OF DECISIONS

1 The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it, subject to the clarification that the appeal was allowed under the immigration rules.

Signed Date

Upper Tribunal Judge Rintoul