Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01329/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 26 November 2013	**on 10 December 2013**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PO
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Saunders, Senior Home Office Presenting Officer
For the Respondent: Ms Daykin, instructed by Blavo & Co Solicitors

DETERMINATION AND REASONS

1. For the purposes of this decision I refer to PO as the appellant and to the Secretary of State as the respondent, reflecting their positions as they were before the First-tier Tribunal.

2. In a decision dated 26 September 2013, First-tier Tribunal Judge P Rowlands and Mr D R Bremner allowed the appellant's appeal against automatic deportation on Article 8 ECHR grounds.

Error of Law

3. The respondent's challenge to that decision has merit.

4. It is well-rehearsed law within this jurisdiction that in an automatic deportation case when assessing an individual's Article 8 rights, proper weight must be given to the public interest in deportation. Prior to the UK Borders Act 2007, the Court of Appeal in a series of cases beginning most prominently with *N (Kenya) v SSHD [2004] EWCA Civ 1094* set out the facets of the public interest that had to be weighed in a deportation appeal. The facets of the public interest were summarised by Wilson LJ (as he then was) in *OH (Serbia) v SSHD [2008] EWCA Civ 694* at [15] in the following terms:

> "(a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important fact.
>
> (b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.
>
> (c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.
>
> (d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case."

5. The subsequent case law of the Court of Appeal makes plain that the public policy factors identified in *OH (Serbia)* continue to apply in automatic deportation cases. One such case is *RU (Bangladesh) v SSHD [2011] EWCA Civ 651* in which at [40], Aikens LJ reiterated that the policy factors identified in *OH (Serbia)* continued to apply in automatic deportation proceedings. He said this:

> "40. At all events on an appeal from the SSHD's decision that section 32(5) applies in a case where the *'foreign criminal'* has argued that removal pursuant an automatic deportation order would infringe his Article 8(1) rights and be disproportionate, the tribunal or court concerned must recognise and give due weight to all the public policy factors identified in *OH (Serbia)*. It must acknowledge that the SSHD is entitled, indeed obliged, to give due weight to them. The tribunal or court must also acknowledge and give due weight to them when drawing the *'proportionality balance'* under Article 8(2)."

6. Also, in *Rocky Gurung v SSHD [2012] EWCA Civ 62*, Sir Stephen Sedley, delivering the judgment of the Court of Appeal, agreed with the submission that had been made by both Counsel in *RU* and by both Counsel in *Rocky Gurung* that, first the public interest factors summarised in *OH (Serbia)* were no less important in automatic deportation appeals; secondly that the effect of s.32(4) of the 2007 Act made "no difference in practice" in assessing proportionality under Art 8.2; and thirdly, a Tribunal was required to consider, for itself, the "content and extent" of the public interest having regard to the public interest factors summarised in *OH (Serbia)*.

7. The importance of the public interest being afforded appropriate weight also features in more recent Court of Appeal decisions, for example, in *SS (Nigeria) v SSHD [2013] EWCA Civ 550*, which states at [54]:

> "The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgement only be justified by a very strong claim indeed."

8. In *MF (Nigeria) v SSHD [2013] EWCA Civ 119* at [40] the Court of Appeal accepted the respondent's submission set out in [39] that, such is the weight to be afforded to the public interest:

> "It is only exceptionally that such foreign criminals will succeed in showing that their rights under article 8(1) trump the public interest in their deportation."

9. In *AM (Turkey) v SSHD [2012] EWCA Civ 1634* the Court of Appeal indicated at [31]:

> "While the landscape for qualification for deportation has changed in consequence of the 2007 Act by the creation of "automatic deportation" of "foreign criminals", it seems to me, in agreement with Aikens LJ in *RU (Bangladesh)* and Sir Stephen Sedley in *Gurung*, inevitable that in measuring proportionality the public interest in deterrence is a material and necessary consideration. The public interest is an important component of the balancing exercise required to test proportionality (for the purpose of section 33(2)(a)) whether or not the Secretary of State expressly says so in her decision letter or in the presenting officer's submissions to a tribunal. It is an indelible feature of the balancing exercise that the decision maker weighs the consequences of deportation against the full import of the legitimate aim to be achieved. Mr Saeed, with some skill, sought to persuade the court that we could infer from the express language used by the FTT that it had well in mind the public interest which the domestic cases identify. I accept that this court should not readily conclude that a specialist tribunal erred in law but also "that it is for the Tribunal to demonstrate that it has applied the correct test when striking that balance" (per Pill LJ in *OH (Serbia)* at paragraphs 27 and 32). With some regret I must conclude that no such inference is available. The only expression of the legitimate aim which appears in the FTT's determination (see paragraph 27 above) is that which Article 8(2) expressly identifies. The emphasis in the FTT's self-direction of law is upon the harsh consequences of separating a family which may follow an immigration decision. It drew no distinction between the public interest considerations arising in immigration decisions (to which Lord Bingham was referring in *Razgar* and *EB (Kosovo)*) and in deportation decisions following

> the commission of serious crime. As Richards LJ held in *JO (Uganda)* different considerations apply when the balance is to be struck against a separate and more powerful public interest. For this reason I am unable to conclude that the FTT did have in mind both the existence and the breadth of the legitimate aim which the deportation order was pursuing.."

10. Like the Court of Appeal in *AM*, I am reluctant to conclude that the First-tier Tribunal erred in law but I am unable to identify that it properly identified or weighed the public interest in this appeal. There is formal reference to it only as part of the rehearsal of the standard questions set out in *Razgar [2004] UKHL 27 [2004] INLR 349* at [16]. Ms Dayton pointed out that it was also referred to in the anonymity direction at [27]. The latter appeared to me to be referring to an entirely different aspect of the public interest in deportation cases.

11. I did not accept that those references or any other part of the determination showed a proper understanding or weighing of the public interest in this appeal. There is nothing in the determination that shows that the various aspects of the public interest from *OH (Serbia)* were considered. I found that to be a material error of law.

12. Further, as identified by Mr Saunders, this case really turns on the accepted family life between the appellant and his young son. Where there is that family life, the best interests of the child fall to be weighed as a primary factor. This is also a well-rehearsed principle beginning with *ZH (Tanzania) (FC) the Secretary of State for the Home Department [2011] UKSC 4*, through *MK (best interests of child) India [2011] UKUT 00475 (IAC)* and *SS (Nigeria)*.

13. At [22(ix)] the First-tier Tribunal refers to:

> " … the problems the son has over the Appellant being in custody and away from him. We believe that in taking into account the Appellants offending behaviour the best interests and well-being of his son does include contact with the Appellant."

14. At [23] it states:

> "We have considered the best interests of the child as we are required to do and on the face of it he has, apart from the time that he was in prison, spent all of his life with his father and would realise that his father was no longer present."

15. And at [25]:

> "We believe that deportation of this Appellant would result in separation of him from his son and that, in all the circumstances, would be disproportionate. We do not consider notwithstanding what we have said about the circumstances of the offence that it is seriousness (sic) to justify the separation of father and child."

16. That assessment of the child's best interests does not include any reference to the fact of the child being able to remain in the UK with his mother whether or not the appellant is

deported. It was not disputed before me that the mother is the primary carer of the child. The assessment is made on the limited evidence of the appellant concerning the difficulties his child had whilst he is in prison which has left him anxious about his father going away again. The Tribunal does not take into account at any point that the evidence about the child provided by the appellant was not supported by the mother of the child from whom there was no evidence at all, on the child's best interests or anything else. There was also no social work report or evidence from the child's school that might have provided objective and professional evidence on the child's difficulties were the appellant to be deported.

17. Where the evidence about the child and best interests assessment is limited, it is not possible from the decision of the First-tier Tribunal to establish what it was about the best interests of this child, even taking the appellant's evidence at its highest, that could outweigh what is rightly identified as a "particularly abhorrent" criminal offence and the strong public interest in deporting this appellant that arises therefrom. I also found the approach to the best interests of the appellant's child amounted to an error on a point of law.

18. Both these errors led me to find that the decision of the First-tier Tribunal had to be set aside and re-made.

Preliminary Issues

19. Ms Dayton submitted that the appeal should be remitted to the First-tier Tribunal because of the fact-finding exercise that would have to be conducted and in the alternative that any re-making should be adjourned in order for the appellant's partner to attend to give evidence.

20. I was not with Ms Dayton on either of her applications. The Senior President's Practice Statement dated 25 September 2012 states at paragraph 7.2 that it "is likely" that the Upper Tribunal will "proceed to re-make a decision, instead of remitting the case to the First-tier Tribunal." It did not appear to me that there was much, if any "fact-finding" in the re-making of this appeal, the dispute between the parties really being about the weight to be afforded to the generally accepted competing factors in the Article 8 proportionality assessment.

21. Secondly, the direction for the hearing before me stated clearly that the parties should prepare for any remaking, providing any further evidence, including supplementary oral evidence to be considered "at that hearing (original emphasis)". I noted that the appellant's partner did not attend or provide any evidence for the First-tier Tribunal hearing. There is still no witness statement or other evidence from her. There was nothing from her to explain her absence or willingness to attend a future hearing. The appellant maintained that she could not attend the hearing due to child-care issues but it was not clear to me how that could be so given the importance of the hearing to the future of the family.

22. I determined that the appeal should be re-made in the Upper Tribunal and that an adjournment was not necessary in order for the appeal to be determined fairly and justly.

My Decision

23. In order for the appellant to succeed under the provisions of the Immigration Rules on the basis of his relationship with his son, I must decide whether he can meet the requirements of paragraph 399 (a) (ii) (b) which states that there must be "no other family member who is able to care for the child in the UK." The appellant cannot succeed on this basis as the child's mother is here, albeit in an uncertain immigration status, there being no suggestion that her departure was imminent

24. The First-tier Tribunal found at [16] that the appellant may have a relationship with the mother of his child but that the evidence does not show this to be a family life in terms of Article 8. Even were it shown to be "a genuine and subsisting relationship" it is not one that can meet the requirements of paragraph 399 (b) given the partner's lack of immigration status and her Nigerian nationality indicating that she can be expected to return to Nigeria with the appellant.

25. It was not suggested that the appellant can meet the private life requirements set out in paragraph 399A of the Immigration Rules.

26. Where the appellant cannot meet the requirements of paragraph 399 or 399A I must go on to assess whether there are "exceptional circumstances" that outweigh the public interest in deportation. This is set out in *MF* at [44], thus:

> "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."

27. At [43] the Court of Appeal in *MF* described "exceptional circumstances" thus:

> "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".

28. That guidance must be considered in the proportionality assessment together with the jurisprudence set out above on the weight that attracts to the public interest in this matter.

29. The advocates before me made submissions on the proportionality of the decision as none of the other intermediate questions set down in *Razgar [2004] UKHL 27 [2004] INLR 349* are in dispute.

30. I set out my proportionality assessment in line with the guidance provided in *Boultif v Switzerland 2001 ECHR 54273*, as confirmed by *Uner v the Netherlands 2007 Imm AR 303*, in which the European Court of Human Rights said that in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued, the following criteria had to be considered:

(i) The nature and the seriousness of the offence committed by the Appellant;
(ii) The length of the Appellant's stay in the country from which he or she was to be expelled;
(iii) The time that had elapsed since the offence was committed and the claimant's conduct during that period.
(iv) The nationalities of the various parties concerned;
(v) The Appellant's family situation, such as length of marriage and other factors expressing the effectiveness of the Appellant's family life;
(vi) Whether the spouse knew about the offence at the time he or she entered into the family relationship;
(vii) Whether there are children in the marriage and if so their ages;
(viii) The seriousness and the difficulties which the Spouse is likely to encounter in the country of the Appellant's origin;
(ix) The best interests and well being of any children of the Appellant; and in particular the seriousness of any difficulties that they would be likely to encounter in the country to which the Appellant would be expelled;
(x) The solidity of social, cultural and family ties with the host country and with the country of destination.

31. The appellant was convicted on 31 May 2012 of theft and sentenced to 20 months imprisonment and ordered to pay compensation of £12,520. The sentencing remarks were as follows:

> "… the offence for which I must sentence you is one of the utmost seriousness. I've got to deal with you for a single charge to which you've pleaded guilty, of the theft of £12,520 from a lady who was on any view an extremely vulnerable victim. Mary Fanshaw is an elderly lady, she is a lady with disabilities in terms of learning difficulties and also mental health problems which makes it necessary for her to live in supported complex accommodation which she does in Rickmansworth in Hertfordshire. She lives there and is assisted by a number of care workers of whom at the material time you were one and because of her various difficulties in order to get money from her bank account or debit card is left available to be used by her at her request in charge of the care workers responsible for the supported complex in which she lives, you are one of those people that had direct access to her debit card. She is a lady who plainly relies very heavily on those who are there to help though she lives in a sense independently, you've known her for quite some time and indeed it is clear that you had known her at a previous home at which you worked and that which she was a resident before she moved to the accommodation we are concerned with in this case, and it's plain that you were her favourite and treated by her as her favourite, no doubt you ingratiated yourself with her

> to the extent of being able to acquire from her information which would have included the pin number used in conjunction with the debit card to get access to the money that she had in her account and what happened over a period of thirteen months was that you made no less than forty-seven separate withdrawals from that woman's bank account using the card and using, no doubt, the pin number that you had obtained for use in conjunction with it and the total amount of money of £12,520 effectively drained her account to the point that when other members of staff went to draw money out they realised that there was very little money in that account, it had all gone into your pocket…
> …
> The starting point in those circumstances is one of two years custody and when I look at the aggravating features which are spelt out in the guidelines, one of the aggravating features I'm required to take into account is the long course of offending, well thirteen months and 47 withdrawals speaks for itself in terms of a long course of offending and any more vulnerable victim than the unfortunate Ms Fanshaw it would then be very hard to imagine. It seems to me that not only does this cross the custody threshold but it crosses it by a mile and it would be a dereliction of duty reposed in me by the public for me to regard this as a matter that deserved anything less than a substantial term of imprisonment, and that is a sentence that I'm going to impose upon you.
> …
> I must give you a discount for your plea of guilty. The discount would be greater if you had chosen to admit that matter from the beginning, but when you are questioned by the police about this you made no comment and it wasn't until you got caught and realised how hopeless your position was that you entered the guilty plea you did.
> …
> The mitigation advanced on your behalf is your ill health, the fact that you have a child and are partly responsible for the child, that you have the intention of paying the money back by realising a property you have inherited the country from which you came and are in the process of trying to sell. It may well be that is all perfectly true, but I don't see why the fact that you are in the course of realising that property to get money from it should necessarily be a reason not to give you the sentence which in my judgement you richly deserve. Having regard to the mitigation and not least your good character it seems to me I can properly, taking it together with your plea of guilty, reduce the starting point I have mentioned by a full third but that still means that the least sentence that I can impose upon you is one of twenty months imprisonment, and that is the sentence of this court."

32. It is clear from the sentencing remarks that the appellant's offence must be weighed extremely heavily against him, it being "one of the utmost seriousness".

33. Some weight in the appellant's favour must arise from his having paid, in two instalments, beginning in September 2013, £40 of the compensation of £12,520 owed to his victim. The sums involved show that the weight for the appellant thereby must be rather small, however.

34. Ms Dayton submitted that if the appellant leaves the UK, the compensation order ends and thereby the obligation to repay his victim. She suggested that is something that benefitted the appellant in the proportionality assessment as it had to be in the public interest for compensation to be paid. It must most certainly be greatly preferable for this appellant to follow through on his evidence that he wishes to live free from the guilt of this crime and pay back his victim in full wherever he may be. The fact that at present,

well over a year after the compensation order, he has not been able to raise capital from a property he owns in Nigeria and has only paid back £40 does not suggest to me that the victim or the public interest is likely to benefit greatly from his continued presence in the UK.

35. I accept that other than this offence, the appellant is generally of good character and I place little weight on his driving offence from 2004, that being a historical and minor matter.

36. I also accept that the Pre-Sentence Report (PSR) dated 23 May 2012 identified the appellant as at a low risk of reoffending. I noted that it suggested a suspended sentence in order to protect the appellant's housing and ability to care for his child upon release. It remains the case, as the sentencing judge made very clear, that a custodial sentence was the only appropriate sentence in this matter.

37. I also accepted that the OASys Assessment dated 2 August 2013 also identified the appellant as being a low risk of any harm to others and at low risk of reoffending.

38. Risk of reoffending, however, is only one aspect of the public interest in deportation as identified in the case law set out above. There remains the factors of deterrence and of expression of public revulsion at the offence. It appeared to me that both of these factors had to weigh heavily against the appellant, particularly so given the very vulnerable nature of his victim and extended period over which he took advantage of her.

39. Turning to the other *Boultif* criteria that have purchase in this case, the appellant has been in the UK for a substantial period of time, 12 years, and has been here lawfully all of that time. There is no doubt that he has established a private life here, one of substance given the length of his residence, his working life and the concomitant links that he will have formed in the community. These matters clearly weigh in his favour.

40. I accept, subject to my comments on the compensation order above, that the appellant's conduct since his conviction has been positive. He has not reoffended. I was shown a letter dated 14 August 2013 from HMP Brixton confirming his good conduct there which included attending courses, being put in trusted positions and training as a Listener for the Samaritans.

41. I accepted the findings of the First-tier Tribunal that the appellant that that the appellant has a relationship with his partner but cannot place a great deal of weight on it where there is really very little of substance explaining its depth and seriousness. Any assertions by the appellant on those matters have to be weighed against the non-appearance of the partner at two hearings and absence of any evidence from her in support of his Article 8 claim. There is also the matter that the appellant's partner appears to have been here unlawfully at all times and neither she nor the appellant have approached the authorities in that regard.

42. As above, it is the appellant's 3 year old son and his best interests that lie at the heart of this assessment. I am turning to this factor in the order set down by *Boultif* but this does

not in any way reflect my approach to it as being anything other than a primary factor, and one that in the final balancing of all the competing interests must be considered first.

43. As above, there is limited evidence before me about the child and his best interests. The appellant maintains that his son suffered emotionally whilst he was in prison and continues to exhibit anxiety when the appellant is not present. The appellant believes that his son will be very damaged if he is deported.

44. I accept that the appellant and his son have the expected strong and important relationship between a father and child. They have lived together since the child was born other than when the appellant was in prison. The records from the prison show that the appellant's son visited him regularly and they appear to be living together again now. I also noted a comment in the letter dated to September 2013 from Sylvia Nteleza at page 34 of the appellant's bundle that the appellant's son had become withdrawn whilst he was in prison and had stopped eating properly, the child being very close to his father.

45. Where the future of this child is at stake, I found it appropriate to weigh the evidence that I have about him at its highest. It can only but be a very serious matter for a small child if the father with whom he has grown-up and with whom he has formed a close bond is deported. It was not suggested that there is any question of the British child accompanying the appellant to Nigeria. I accept that the child will be significantly damaged in the short and long-term if his father returns to Nigeria and cannot come to the UK to see him for what is likely to be at least 10 years if not a longer period. More than that I cannot find as regards the child's best interests, however, given the limits of evidence placed before me.

46. I also noted the three letters from friends confirming he is good character and links to the community. I accept that it weighs in favour of the appellant that he has worked in the past rather than relying on benefits and is actively seeking to do so again. The appellant is not dispute that he has close family members in Nigeria, however. On his own evidence he has significant assets there by way of family property.

47. The appellant is understandably apprehensive as he has been diagnosed with diabetes which has led to an operation for a cataract on one eye and he is waiting for a second operation on his left eye. He takes insulin and manages his diet in order to treat this disease. This is a common condition, however, and not one for which it can seriously be suggested that there is no treatment available in Nigeria. It is also difficult to see how the appellant can seek to have weight in his favour on the basis of medical provision in Nigeria given that the PSR indicates that one of the reasons he stole from his disabled victim was to pay for medical treatment which he chose to seek in Nigeria rather than in the UK.

Conclusion

48. Having set out my view on the relevant and competing factors in this matter, I must come down on one side of the balance.

49. In the final analysis, it was my view that the seriousness of the appellant's offending behaviour and weight that must be placed on the public interest side outweighed the interference to the appellant's family and private life. Put simply, I did not find there to be "very compelling reasons" or that this was "a very strong claim indeed" even after assessing the best interests of the child and the damage the absence of his father will do to that child and the appellant's relatively long and lawful residence at their highest. I found that the respondent's decision was proportionate.

Decision

50. **The determination of the First-tier Tribunal discloses an error on a point of law and is set aside.**

51. **I re-make the appeal as refused.**

Anonymity

I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, his partner or his child. I do so in the best interests of the child in order to protect his identity.

Signed: 
Upper Tribunal Judge Pitt Dated: 26 November 2013