Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/00021/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 5 February 2014	**On : 10 February 2014**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

PVV

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Kadic, instructed by Trott & Gentry LLP Solicitors
For the Respondent: Mr G Saunders, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Vietnam, born on 5 August 1994. Following a grant of permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to deport him from the United Kingdom, I found, at an error of law hearing on 11 July 2013, that the Tribunal had made errors of law in their decision. I directed that the decision be set aside and re-made by the Upper Tribunal with respect to Article 8 of the ECHR.

© CROWN COPYRIGHT 2014

2. The appellant arrived in the United Kingdom in May 2005 and first came to the attention of the UKBA following his conviction on 22 March 2012 for production of a controlled drug, cannabis, for which he received a four month Detention and Training Order. On 20 June 2012 a National Referral Mechanism (NRM) referral was made from a police officer who had interviewed the appellant, which was allocated to a Competent Authority on 26 June 2012. On 4 July 2012 the respondent advised the appellant that the Competent Authority had concluded that there were reasonable grounds to believe that he had been trafficked. The appellant was not granted any leave as a result, but on 27 July 2012 he made an application for asylum. As part of his application he also claimed to have established a family life with his partner, LNL, and her daughter, A, a British citizen. On 18 December 2012 the respondent refused the appellant's asylum and human rights claim and made a decision to deport him by virtue of section 5(1) of the Immigration Act 1971.

3. In the reasons for deportation letter, the respondent noted that paragraph 398(c) of the immigration rules applied to the appellant on the basis that the nature of his offending was considered to pose a risk of serious harm to the public. The respondent went on to consider the appellant's Article 8 claim, accepting that he had developed a close relationship with his partner's daughter, A, but concluding that he had not established a parental relationship with her for the purposes of Article 8 and that accordingly paragraph 399(a) did not apply. It was considered further that he could not meet the requirements of paragraph 399(b) because his partner had only discretionary leave to remain in the United Kingdom and he himself had never had valid leave to remain. Paragraph 399A was not considered to apply because he had not spent at least half his life in the United Kingdom and it was not unreasonable for him to return to Vietnam and build a life for himself there. The respondent did not accept that there were any exceptional circumstances in the appellant's case and accordingly concluded that his deportation would not breach Article 8.

4. The appellant appealed against that decision and his appeal was heard before the First-tier Tribunal by a panel consisting of First-tier Tribunal Judge Davda and Mr P Bompas. By that time the appellant and his partner LNL had had a baby together, JV, who was less than three months old. LNL's own immigration status was uncertain, as she had initially been granted discretionary leave to 14 May 2005 and had made an application for an extension of that leave but her application remained outstanding. LNL's daughter, A, had acquired her British nationality from her father, LNL's former partner, who was a British citizen. The Tribunal did not find that the appellant would be at risk on return to Vietnam and considered that his deportation would not breach Article 8 of the ECHR. They dismissed the appeal on all grounds.

5. Permission was subsequently granted to the appellant to appeal to the Upper Tribunal and the appeal came before me on 11 July 2013 for the error of law issue to be determined. At the hearing a letter of grant of further discretionary leave to LNL was produced, which confirmed that she had been granted further leave under Section EX.1.(a) of Appendix FM of the immigration rules on the basis of her parental relationship with her child. I found the First-tier Tribunal's determination to be materially flawed, for the following reasons:

"Mr Deller indicated that he found himself unable to support the decision of the First-tier Tribunal, given the inadequacy of their findings on the relationship between the appellant and LNL and on the best interests of the children. In the light of his concession and for the reasons that follow, I set aside the decision with respect to the Tribunal's findings on Article 8.

At paragraph 42 of their determination the Tribunal referred to inconsistencies in the evidence as to the length of the appellant's cohabitation with LNL. However they did not go on to make any specific findings as to whether, or to what extent, the evidence was accepted or rejected. As Ms Thirumaney pointed out, the reasons for deportation letter accepted the relationships between the appellant and LNL and her daughter and thus indicated an acceptance that family life had been established between them. Mr Deller agreed that that was the case and indicated that the area of uncertainty appeared therefore to be as regards the longevity of the relationship between the appellant and LNL rather than the subsistence of the relationships. To the extent that the Tribunal failed to make any proper findings in that regard, they erred in law and their decision would have to be re-made in that respect.

Furthermore, the Tribunal plainly failed to undertake a complete and proper assessment of the effect on the family of the appellant's deportation. At paragraph 48 they considered the situation of the family returning to Vietnam as a unit, but failed to give any consideration to the fact that LNL had previously been granted discretionary leave, which was claimed to have been on the basis of having been a victim of trafficking, and that her application for further leave was outstanding. There was no attempt to consider the reasonableness of LNL having to leave the United Kingdom to keep the family intact, other than a consideration of the effect on her daughter of being separated from her biological father. Neither was there any analysis of the alternative situation, of the family being separated through the appellant's departure and the effect that that would have on LNL's child and his own child. Whilst they went on, at paragraphs 51 to 53, to refer to the principles established in case law as to the best interests of the child, they did not undertake any proper analysis of the appellant's circumstances in the light of those principles. They therefore failed to make findings on material matters and as such they again erred in law.

Accordingly, I find that the Tribunal's assessment of Article 8 was fundamentally flawed and that their decision has to be set aside. Ms Thirumaney was in agreement that the grounds of appeal did not challenge the Tribunal's decision with respect to asylum, humanitarian protection and Article 3. Thus the decision falls to be re-made with respect only to Article 8.

Neither Ms Thirumaney nor Mr Deller considered that they were in a position to proceed immediately to the re-making of the decision. Ms Thirumaney, for her part, wished to prepare a supplementary statement for the appellant including the recent change in circumstances as a result of the grant of further leave to LNL. Mr Deller was also concerned that the Court of Appeal were to consider the Upper Tribunal's decision in MF (Article 8 - new rules) Nigeria [2012] UKUT 393 the following week and that the outcome of that appeal could have a direct bearing on the appellant's case, given his inability to meet the requirements of the immigration rules. Furthermore, both parties wished to give further consideration to the judgment of the Court of Appeal (Criminal Division) in the case of L; HVN; THN; T -v- R [2013] EWCA Crim 991 which I had produced and which I considered to be of potential relevance in assessing proportionality.

Accordingly, it was agreed that the appeal would be listed for a resumed hearing at a later date. It was agreed that none of the Tribunal's findings in regard to Article 8 could be preserved and that the appeal would be heard afresh on those grounds, including the hearing of oral evidence. Mr Deller accepted that the starting point would be that the subsistence of the appellant's relationship with LNL was accepted and that clarification would be sought only as to the longevity of that relationship."

6. The appeal came before me for a resumed hearing on 9 October 2013 but had to be adjourned again, at the request of Mr Parkinson who was representing the respondent at the time, on the grounds that no further action appeared to have been taken to refer the case to the Criminal Casework Directorate to consider the impact of the judgment in L & Others. He had since spoken to the CCD team who had agreed to review the deportation decision. However, following the hearing, Mr Parkinson advised the Upper Tribunal, in a letter dated 15 November 2013, that the Secretary of State had decided that unless and until the appellant successfully challenged his criminal conviction in the courts it would not be appropriate to review the deportation order and that he therefore remained liable for deportation action.

Appeal hearing and submissions

7. The appeal came before me again on 5 February 2014. Ms Kadic advised me that the appellant had instructed criminal solicitors to appeal his conviction and that the appeal was due to have been lodged in January 2014. However she understood that it would take a long time to be dealt with and she preferred that the deportation appeal proceeded without further delay. Mr Saunders acknowledged that the outcome of the appeal against the conviction may be significant to the appellant's case but was nevertheless content to proceed.

8. After some discussion as to the issues before me, it was agreed that the relevant facts were not in dispute. Mr Saunders agreed that the respondent had accepted that the appellant was a victim of trafficking inside the United Kingdom and that it was accepted by the respondent, in the grant of discretionary leave to LNL, that it was not reasonable to expect her or her child to leave the United Kingdom; that the appellant had a subsisting relationship with LNL and her child; that he had a child with LNL and another was expected shortly; and that LNL's daughter was a British citizen and regularly saw her British father who was living in the United Kingdom. It was agreed by all parties that there was, accordingly, no need for further oral evidence.

9. Mr Saunders said that there was little he could say by way of submissions and had nothing to add to the refusal letter. He asked me to regard the appellant's conviction as not quashed but accepted that that was a weighty factor in the appellant's favour in the Article 8 proportionality balancing exercise. He accepted that the facts were uncontentious, aside from when the relationship between the appellant and LNL commenced, but he agreed that that was of little relevance. He accepted that circumstances had moved on, particularly with the grant of discretionary leave and the clarification of the basis for that grant. He asked that the appeal be dismissed.

10. Ms Kadic submitted that there were exceptional circumstances outweighing the public interest in deportation, namely the circumstances of the appellant's conviction, the fact that he had been a victim of trafficking in the United Kingdom and the fact that his family life could not be continued in Vietnam. His deportation would accordingly breach Article 8 of the ECHR and his appeal should be allowed.

Consideration and findings

11. It is not disputed that the appellant is unable to meet the requirements of the immigration rules. Paragraph 399(a) does not apply because there is another family member, namely LNL, who could care for A in the United Kingdom and paragraph 399(b) does not apply because LNL has only discretionary leave and the appellant has never had valid leave to remain here. Paragraph 399A does not apply because he has not spent at least half his life living continuously in the United Kingdom. Accordingly, and pursuant to paragraph 398, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

12. In MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 the Court of Appeal considered what was meant by "other factors" and "exceptional circumstances" and found, at paragraph 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."

and at paragraphs 43 and 44 that

> "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".
>
> 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."

13. This view was endorsed in Kabia (MF: para 398 - exceptional circumstances) (Gambia) [2013] UKUT 569, where the Upper Tribunal held at paragraphs 17 and 18 that

> "The new rules speak of "exceptional circumstances" but, as has been made clear by the Court of Appeal in ***MF (Nigeria)***, exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context, ""exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate".
>
> The new rules relating to article 8 claims advanced by foreign criminals seeking to resist deportation are a complete code and the exceptional circumstances to be considered in the

balancing exercise involve the application of a proportionality test as required by the Strasberg jurisprudence: ***MF (Nigeria)*** at para 43."

14. It seems to me that there are various factors in the appellant's case from which it is to be concluded that his deportation would result in unjustifiably harsh consequences for himself and his family and that there are very compelling reasons which outweigh the public interest in his deportation.

15. The public interest in the appellant's deportation arises out of his criminal offending and lack of lawful status in the United Kingdom. With regard to the former, there is a very high probability that his conviction will be quashed on appeal, albeit that for the time being the conviction still remains. As Mr Parkinson for the respondent previously accepted, the appellant's case appeared to be on all fours with L & Others: in that case the appellants had their appeals quashed in identical circumstances to those of the appellant, where it was recognised that the criminal activity was inextricably linked to them being child victims of trafficking. In this case, the appellant was a minor at the time the offence occurred. The view of the Crown Court Judge in sentencing the appellant was that he had to a degree been exploited and that, as a "gardener", he had a lesser role in the production of cannabis. In their assessment of 20 October 2012 Hackney Youth Offending Team, whose report appeared in the appellant's appeal bundle before the First-tier Tribunal, made it clear that they considered the appellant to be a victim who had been manipulated into offending. There is no question of any risk of re-offending. As Mr Saunders agreed, such circumstances weigh heavily in the appellant's favour in the balancing exercise and reduce the public interest in his deportation.

16. Other factors in the appellant's favour are his age on arrival in the United Kingdom and the length of time spent here, albeit without any lawful basis. He came here as a boy of nine years of age and has been in the United Kingdom for eight years. His claim to have few remaining ties to Vietnam does not appear to be in dispute and the circumstances of his arrival in the United Kingdom provide some response to his lack of lawful status. The appellant's offence was committed at a time when he was a minor and he has not offended since that time, nor, according to the reports submitted, is he likely to. Clearly the principles in Maslov v. Austria - 1638/03 [2008] ECHR 546 are applicable, as set out in paragraph 75 of the judgment: "… for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

17. Of particular weight are the appellant's family life ties which, whilst not being such as to enable him to meet the requirements of paragraphs 399(a) and (b), are of a compelling nature.

18. It is not disputed that the appellant has established a family life with his partner, nor, I believe, is it now disputed that family life exists between himself and his partner's daughter A. In any event I accept that to be the case. A is a British citizen who retains a relationship with her British father and, on that basis, it has been accepted by the Secretary of State, in granting LNL discretionary leave, that it would not be reasonable to expect A

(and thus also LNL herself) to leave the United Kingdom. Furthermore, the appellant and LNL have, together, a one year old child and another baby expected in the next two months. Given the basis of the grant of the discretionary leave and considering the family life ties between A and her biological father it would clearly not be possible for the family to relocate to Vietnam as a family unit. Accordingly, the appellant's deportation would split the family and separate him not only from his partner and her daughter, but also from his own child(ren). There is no doubt that the children's best interests lie in the appellant being able to remain in the United Kingdom. Clearly, as found by the Court of Appeal in Lee v Secretary of State for the Home Department [2011] EWCA Civ 348 the splitting up of a family may well be considered as proportionate in some cases, particularly those involving serious criminality. However it cannot be considered to be the case here, when taking into consideration the circumstances of the appellant's conviction.

19. In the circumstances, it seems to me that the proportionality balance has to fall in the appellant's favour. There clearly are very compelling reasons amounting to exceptional circumstances in this case such that the public interest in deportation is outweighed. Accordingly, I find that the appellant's deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention and that, certainly in so far as his partner has leave to remain here, he should not be removed from the United Kingdom.

DECISION

20. The making of the decision of the First-tier Tribunal involved an error on a point of law. The decision of the First-tier Tribunal is therefore set aside. I re-make the decision by allowing the appeal.

Signed Date

Upper Tribunal Judge Kebede