Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00376/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 January 2014	**On 14 March 2014**
Prepared 15 January 2014	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHRISTIAN CAMILO BAQUERO BERNAL

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Ms Ukachi-Lois, of Counsel instructed by Messrs Freemans Solicitors

DECISION AND DIRECTIONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Mayall who in a determination promulgated on 8 August 2013 allowed the appellant's appeal against a decision of the Secretary of State made on 8 February 2013 to deport the appellant to Colombia.

2. The decision to deport followed the appellant's conviction for possession with intent to supply a controlled drug class A – cocaine, for which he had been sentenced to a

period of two years' imprisonment on 3 February 2012. The decision was made under the automatic deportation provisions in Section 32(5) of the UK Borders Act 2007.

3. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent before the First-tier Tribunal. Similarly, I refer to Mr Christian Camilo Baquero Bernal as the appellant as he was the appellant in the First-tier Tribunal.

4. The appellant had arrived in Britain in July 1999 with entry clearance as a student. In December that year he applied for asylum. That application was refused and the appellant apparently left Britain before re-entering as a visitor on 19 December 2000.

5. Thereafter the appellant overstayed until July 2011 when he made an application for leave to remain as the spouse of Jenny Jimenez Delgardo Villota, a Colombian citizen whom he had married by proxy in March 2011.

6. In November that year he was convicted of the drugs offences noted above being sentenced the following February.

7. Judge Mayall quoted extensively from the letter setting out the reasons for deportation and the consideration of the Secretary of State of the application of paragraphs 398 and 399A of the Rules, and the conclusion of the Secretary of State that there were no exceptional circumstances which would mean that deportation would not be appropriate: the fact that the appellant and Ms Villota had a son as taken into consideration.

8. Judge Mayall noted the evidence of the appellant that he had been together with Ms Villota for ten years, that she had indefinite leave to remain and that their son, J was aged 5. The appellant had stated that since his release from prison his son's behaviour had improved, he was involved with his local church and that he looked after his son while his wife was working.

9. The appellant's wife also gave evidence stating that J, who had been born in Britain was a British citizen naturalised after she had been granted indefinite leave to remain. The basis of her leave to remain was that she had applied for residence under Regulation 8 of the Immigration (EEA) Regulations 2006 in 2008.

10. Judge Mayall recorded that he had noted during submissions that he was concerned as to the immigration status of the appellant's wife and son and the process by which they had obtained indefinite leave to remain and British citizenship respectively. The appeal had been adjourned at that stage for further information. A bundle of documents which had been produced at the appellant's wife's appeal was submitted by the Presenting Officer. It became apparent that the appellant's wife had been granted leave to remain after an appeal against a refusal had been allowed by another Immigration Judge. The appellant's wife had claimed that she was living in a family unit with her brother and his wife and that the appellant, the father of her

child, did not live with her. Her appeal was allowed in May 2010. Judge Mayall commented that –

> "Although the evidence was that there was contact between her and the appellant and that J had contact with his father it was clear that the evidence was that they did not and had not lived together."

11. Although the appellant's representative was told that the appellant's wife could give further evidence to clarify the position that opportunity was not taken up.

12. In paragraphs 42 onwards the judge set out some relevant law and in particular quoted from the judgment in **N (Kenya) v SSHD [2004] EWCA Civ 1094**. It was clear that he was also aware of the judgments in **AM [2012] EWCA Civ 1634**, **JO (Uganda) [2010] EWCA Civ 10** and **AD Lee v SSHD [2011] EWCA Civ 348**. Indeed he also quoted from the judgment of Laws LJ in **SS (Nigeria) [2013] EWCA Civ 550**.

13. In paragraphs 55 onwards the judge set out his assessment of the evidence. He started by stating that he did not believe that the appellant and his wife "were entirely frank with us". He stated that it was clear that the story put forward by the wife in support of her application for indefinite leave differs substantially from that before the Tribunal. It was stated that there was a stark contrast between the claim and that the couple had been living together for many years and the claim put forward by the wife at her appeal that they were not living together and she was a dependant of her brother and his wife.

14. Judge Mayall stated that therefore the evidence should be approached with caution. However, he went on to say that the evidence pointed towards the fact that whatever may have been the position in the past the couple were living together as a family unit with their child.

15. He did, in paragraph 57 state:-

> "In these circumstances we are prepared to accept that this family unit does now exist as a family all living together as husband, wife and child. We think it more likely that the evidence that was given before Immigration Judge White was false. We bear in mind that it was necessary for the wife to establish the dependence upon the EEA national which would have been much more difficult if the picture had been presented of her living together with her husband and child."

16. However, Judge Mayall stated that the child was not at fault and did have British citizenship and that it was accepted that they all lived together as a family unit.

17. Having accepted the appellant was fully involved in the life of his child and had childcare responsibilities as his wife was working, the judge stated that there was a very serious offence. He noted drug paraphernalia was found in the appellant's home where he claimed to be living with his wife and child but noted, however, that the trial judge had accepted the appellant's conduct was totally out of character.

18. The trial judge, he stated had found that the appellant had been duped by someone at the time he was estranged from his wife and miserable, who had lured him into taking cocaine and then after the appellant had reconciled with his wife and freed himself from his addiction, had come back and threatened him and demanding money from him. The appellant had foolishly agreed to take possession of the drugs to hold for this other person in return for that person to stop pursuing him.

19. The judge accepted the appellant had cooperated fully. He had given himself up to the police and had never attempted to hide or minimise his role.

20. The pre-sentence report indicated the risk of the appellant re-offending was low. The judge went on to state that the letter of refusal was contradictory in that it accepted it would be unreasonable to expect their J to leave Britain but the reason the appellant could be deported was use there was another family member who was able to care for him. He noted that the letter had said that should they wish it was open to the appellant's wife to return to Colombia with him.

21. In paragraph 65 he stated that:-

> "It was contended that there were two alternatives i.e. that the mother could remain to look after J in the UK or that the whole family could relocate. This seemed, to us, to be inconsistent with the acceptance that it would be unreasonable to expect J, as a British citizen, to leave the UK".

Having accepted however that the appellant could not come within the provisions of paragraphs 399A or 399B and that the appellant could not qualify under the private life provisions, Judge Mayall stated that that was not the end of the matter. He stated:-

> "Indeed it is strictly immaterial whether he meets the provisions of Rule 399 or not. The sole issue is whether one of the exceptions applies. The only exception that could possibly apply is that to remove him would be an unlawful interference with his Article 8 rights."

22. Having stated that he was applying the guidance set out in the judgment of Laws LJ in **SS (Nigeria)** he stated that the interests of the child as a matter of primary importance had to be balanced with the "great weight which the 2007 Act attributes to the deportation of foreign criminals". Having found that this was not an easy exercise he stated that it would not be reasonable to expect J to leave Britain as he was born here and is a British citizen. He stated the only realistic alternative is that the appellant is deported and his mother stays to look after J. That would split the family and remove the bond between father and child and would not be in J's best interests.

23. He went on to state:-

> "Sometimes the public interest in deporting foreign criminals requires that. This may be especially so if the father, for example, is a poor role model to the child. There is some evidence of that given that drugs paraphernalia were found in the family home.

> We have, however, found that, at least now, the appellant is a good father. There is an obvious strong bond between the father and the child. In addition there is an obvious strong bond between the appellant and his wife. Taking into account the fact that this appears, at least, to be one-off offence and that we have concluded that there is a low risk of further offending we have reached the conclusion that the public interest, in this particular case, does not require that the family be split up in that way."

24. The appeal was therefore allowed on human rights grounds.

25. The Secretary of State appealed stating that the Tribunal had applied a two stage test which was clearly wrong. The grounds of appeal referred to the judgment in **MF (Nigeria)** [2013] EWCA Civ 1192 quoting at length from that judgment.

26. The second ground of appeal stated that the Tribunal had failed to give reasons or adequate reasons for finding that the appellant's case was exceptional and that therefore the appeal should be allowed on Article 8 grounds.

27. It was submitted that "exceptional" meant circumstances in which if the requirements of the Rules had not been met refusal would result in an unjustifiably harsh outcome. Reference was made to the Supreme Court's judgment in **HH v Deputy Prosecutor of the Italian Republic (Genoa) [2012] UKSC** and in particular to the judgment of Lady Hale in which she had stated at paragraph 32:-

> "The second main criticism of the approach in later cases is that the courts have not been examining carefully the nature and extent of the interference in family life. In focussing on 'some quite exceptionally compelling feature' (para 56 in *Norris*), they have fallen into the trap identified by Lord Mance, tending 'to divert attention from consideration of the potential impact of extradition on the particular persons involved . . . towards a search for factors (particularly external factors) which can be regarded as out of the run of the mill' (para 109). Some particularly grave consequences are not out of the run of the mill at all. Once again, the test is always whether the gravity of the interference with family life is justified by the gravity of the public interest pursued (see also Lord Wilson, at para 152). Exceptionality is a prediction, just as it was in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 and not a test. We are all agreed upon that."

28. It was submitted that it was only in exceptional circumstances that removal would result in unjustifiably harsh consequences notwithstanding the public interest in removal and that the new Rules would not achieve an Article 8 compliant result. It was submitted that it was not exceptional circumstances just because the criteria set out in the family and private life provisions of the Immigration Rules had been missed by a small margin.

29. The grounds went on to state that the Tribunal had failed to provide adequate reasons as to why there were exceptional reasons as to why the appellant, his wife and child could not continue their family life elsewhere. It was submitted there were no reasons why the wife and child could not relocate to Colombia.

30. Reference was made to **SS (Nigeria)** where it was stated that an Article 8 claim made in reliance of the interests of a child of British citizenship by a foreign criminal

seeking to risk deportation under Section 32 of the UK Borders Act 2007 needed to be very strong to prevail given the pressing public interest in removal and the great weight to be attached to the deportation of foreign criminals. Moreover there is nothing to support the Tribunal's finding that the appellant was at low risk of re-offending. There are no reasons provided for their finding that the appellant had addressed his drug habit which was the cause of his offending and therefore it remained that he was at risk of re-offending.

31. In his submissions Mr Bramble accepted that the determination of the Tribunal had been promulgated some time before the judgment in **MF (Nigeria)** had been issued but it was still correct that the Tribunal were wrong to consider that there should be a two-step approach. Having identified that the appellant could not succeed under the Rules, the Tribunal should have looked at what the Rules stated regarding exceptionality rather than merely going on to the **Razgar** test. He argued that there was a failure to give adequate reasons. The Tribunal had ignored the way in which the appellant's wife had been granted indefinite leave to remain and that she had ties to Colombia to which she had travelled as recently as 2011. They had not taken into account the age of the child and had not stated why it would be detrimental for him to return to Colombia. They had not been able to identify why there was a claim to be a low risk of re-offending. The Tribunal had ignored the importance of what had been said by Laws LJ in **SS (Nigeria)**. In paragraph 46 of that judgment Laws LJ had stated that the more pressing public interest in removal or deportation the stronger must be the claim under Article 8 if it is to prevail". At paragraph 48 Laws LJ had stated:-

> "48. Where such potential deportees have raised claims under Article 8, seeking to resist deportation by relying on the interests of a child or children having British citizenship, I think with respect that insufficient attention has been paid to the weight to be attached, in virtue of its origin in primary legislation, to the policy of deporting foreign criminals. In *Sanade* the UT observed 'the more serious the offending, the stronger is the case for deportation' (paragraph 48). With respect that is no doubt right; but it applies as readily to a case where the offender is not subject to automatic deportation under s.32 of the 2007 Act and his removal is at the Secretary of State's discretion. In Strasbourg, within the *Üner/Maslov* criteria we find a comparable reference to 'the nature and seriousness of the offence committed by the applicant'.
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> 49. These references say nothing about the policy's origin in primary legislation. The policy's source, however, is as we have seen one of the drivers of the breadth of the decision-maker's margin of discretion when the proportionality of its application in the particular case is being considered. In relation to foreign criminals the point was almost alive in *AP (Trinidad & Tobago)* [2011] EWCA Civ 551, referred to in *Sanade* at paragraph 41, in which Carnwath LJ, as he then was, observed at paragraph 44:
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> > 'As I have said, Parliamentary endorsement is arguably a matter which should be taken into account in giving greater weight to such factors when drawing the balance of proportionality under article 8. ...it seems a little surprising... that this apparently definitive statement by Parliament has

made no difference in practice, at least where any form of private or family life is involved.'...

54. I would draw particular attention to the provision contained in s.33(7): 'section 32(4) applies despite the application of Exception 1...', that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. 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 judgment only be justified by a very strong claim indeed."

32. Mr Bramble then asked me to find that the Tribunal had identified no such compelling factors and therefore to find that they had made a material error of law.

33. In reply Ms Ukachi-Lois stated that the Tribunal had, in any event, applied the two stage approach in that they had considered both the Rules and the appellant under the Convention which indeed was the approach asserted in the Tribunal determination in **MF (Nigeria)** in the Upper Tribunal – the relevant authority at the time the determination was promulgated.

34. The tribunal were entitled to rely on the lack of risk of re-offending given the pre-sentence report which was in the bundle and at paragraph 63 they had set out the evidence on which they relied regarding the appellant kicking his drug habit. He had undertaken various relevant courses and the evidence of London Probation Trust was that he was no longer an addict. Similarly the evidence from the prison was positive.

35. It was not the case that the Tribunal had incorrectly interpreted the concept of exceptionality. The reality was that removal of the appellant would be unjustifiably harsh consequences for the appellant's child. It would be disproportionate and the Tribunal were correct to so find. They had taken into account the fact that the appellant was fully involved with the relationship of the child and had a relevant parenting role. They pointed out that the Secretary of State had in any event accepted that it would be unreasonable to expect J to leave Britain.

36. She asked me to find that the Tribunal had looked at the totality of the evidence and find that they had properly taken into account all relevant factors before reaching their decision which was fully open to them on the evidence.

Discussion

37. I find that there are material errors of law in the determination of the Tribunal. The reality is that Judge Mayall appeared, having found that the appellant could not qualify under paragraphs 398 and 399 of the Rules to have discounted the fact that that was the case and immediately gone on to the issue of proportionality under the

five stage **Razgar** process. That was clearly wrong. He had not taken into account what was laid down in legislation and indeed had not followed the clear guidance in the judgment in **SS** which stated that the more serious the offence the stronger needed to be the basis of the Article 8 claim.

38. The only fact which Judge Mayall identified was that J was British. He did not appear to take into account in the proportionality exercise that both J's parents were Colombian, that it appeared that either the appellant had not been living with his wife at the time of her appeal or that she had misled the First-tier Judge who heard her appeal against the refusal of the claim that she was a family member of an EEA national and had further ignored the fact that the appellant's wife had travelled back to Colombia as recently as 2011. The reality is that there appears no reason why, if the appellant is deported and the appellant and his wife decide that they should remain together as a family unit with their child that the appellant's wife and son should not accompany him to Colombia. While, of course, the Secretary of State accepts that it is not reasonable to claim that J should go to Colombia that is rather different from a conclusion that his parents could not make a decision that it is in his best interests that he remains part of a family unit with two parents returning to the country of nationality of both his parents. Judge Mayall did not consider the evidence relating to circumstances in Colombia and in particular the section relating to education in Colombia which is set out in the reasons letter.

39. The Tribunal did not appear to place weight on the decision to deport based on the provisions set out in Section 32 of the 2007 Act.

40. I therefore consider that there were material errors of law in the determination of the First-tier Tribunal and for that reason I set aside the decision. It is appropriate that this appeal proceeds to a hearing afresh on all issues.

Directions

1. The appeal is to proceed to a hearing afresh on all issues. It remains in the Upper Tribunal.

2. Fourteen days before the hearing a skeleton argument is to be submitted together with a bundle of all documents on which the appellant wishes to rely.

Signed Date

Upper Tribunal Judge McGeachy