Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00470/2014**

THE IMMIGRATION ACTS

Heard at Birmingham Magistrates Court	**Determination Promulgated**
On 20 August 2014	**On 29 August 2014**

Before

Upper Tribunal Judge Southern
Upper Tribunal Judge Coker

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IRFAAN ALI JUGUT

Respondent

Representation:

For the Appellant: Mr N. Smart, Senior Home Office Presenting Officer
For the Respondent: Not represented.

DETERMINATION AND REASONS

1. The respondent, who of course was the appellant before the First-tier Tribunal, is a citizen of Mauritius born on 11 March 1995. For convenience of expression we shall refer to him in this determination as the claimant and to the appellant as the Secretary of State.

2. The claimant arrived in the United Kingdom in December 2000, then aged 5 years old, with his mother and younger brother. They came, with entry clearance, to join

the appellant's father who was present as a student. In due course each member of the family, including the claimant, was granted indefinite leave to remain.

3. The claimant was convicted before the Luton Crown Court of serious offences of robbery, attempted robbery and possession of an imitation firearm. Although then only 15 years old, these were not his first offences and he was sentenced to 3 years detention in a Young Offenders' Institution. As he was under 18 years of age when convicted he was not liable to "automatic deportation" under the provisions of s.32 of the UK Borders Act 2007. Despite that the Secretary of State, who was plainly entitled to take a serious view of the offences, as was reflected in what was a lengthy custodial sentence to be imposed on a 15 year old child, decided that deportation of the claimant was conducive to the public good so that a deportation order should be made under s.5(1) of the Immigration Act 1971.

4. The claimant, who we are told was not in receipt at that time of legal advice, did not appeal against that decision and a deportation order was made on 10 January 2014. Subsequently he did access legal advice and solicitors advanced some representations on his behalf. The Secretary of State treated those representations as an application to revoke the deportation order but, by a letter dated 11 March 2014, decided not to do so but to maintain the decision that the claimant's deportation was conducive to the public good and not unlawful because of rights protected by article 8 of the ECHR. It was against that decision that the claimant brought his first appeal.

5. That appeal came before First-tier Tribunal Judge Cox, sitting with a non-legal member of the Tribunal, on 18 June 2014. By A determination promulgated on 24 June 2014 the judge allowed the appeal. In so doing the judge said:

> "… the real issue in this case is a narrow one…"

And went on to focus upon paragraph 399A(b) of the immigration rules and the question of whether the claimant retained any ties with his country of nationality. Before we consider what the judge said about that it is helpful to put it into its context by setting out paragraph 398 also, so far as is relevant to this appeal, in the form those rules were at the relevant time:

> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) …
>
> (b) …
>
> (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.
>
> 399. …

> 399A. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) …
>
> (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.
>
> 399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted."

6. It will be seen from this that where a foreign criminal falls within paragraph 399A the Secretary of State accepts that the public interest in his deportation will have been outweighed by other factors so that he may, instead, be granted a period of leave to remain. The judge said, concerning this:

> "… that suffices without more to settle the "proportionality" issue and to prevent deportation. In other words, neither we nor the Secretary of State need concern ourselves with such matters as the seriousness of the offences, the risk to the public or the need to deter others or to reflect society's revulsion at the offending. On the Secretary of State's criteria as enshrined in the Rules, deportation would be disproportionate in Article 8 terms."

7. The current guidance set out in the IDIs certainly supports that view:

> "Paragraphs 398 to 399A of the Immigration Rules set out when a foreign criminal's private and/or family life will outweigh the public interest in deporting him…"

8. Thus the focus of the determination was upon the narrow issue of whether it could properly be said that the claimant had no ties (including social, cultural or family) with his country of nationality.

9. Before embarking upon an examination of the evidence available to inform that assessment the judge directed himself in terms of the guidance given in *Ogundimu* (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC) saying that ties:

> "… may be strong, they may perhaps be more or less loose or weak, but they must in context, and on authority, be meaningful, that is to say something more than merely remote or abstract links to the country of proposed deportation."

10. The judge said that the only ties identified by the Secretary of State in the refusal letter was the fact that the appellant spoke English, that being one of the languages of Mauritius. That was said to be a cultural tie. He went on to extract from the evidence before him the following matters, which he considered relevant to the assessment to be made:

    a. Since his arrival in the United Kingdom aged 5 years old, the claimant had spoken English at home and was no longer able to speak Creole;

    b. The claimant said he had no relatives in Mauritius. His father volunteered the information that he had a younger brother remaining in Mauritius, who would

be the claimant's uncle and who had a son. However, that brother had Downs Syndrome and the claimant's father had fallen out with him and there had been no contact with either;

c. The claimant's father is now divorced from the claimant's mother and had re-married a lady who is presently in Mauritius but who is expecting to come to the United Kingdom;

d. The claimant's mother had two sisters in Mauritius but there had been no contact with them since they fell out some time ago over a land dispute.

11. The key findings made by the judge are set out at paragraph 17 of the determination, which we reproduce in full:

> " We have considered all of the above. As to the Respondent's original and still major point concerning English as a cultural tie, we do not find this a viable argument. One might just as well say that because my colleague and I speak English we thereby have a cultural tie with Mauritius. In any event if language alone could qualify as a cultural tie sufficient to defeat compliance with paragraph 399A(b), it is difficult to see how anyone could qualify thereunder and the provision would thereby be rendered nugatory. In our finding, language by itself cannot constitute a meaningful cultural tie. As to the other matters bulleted above, we again find that nothing meaningful in the way of ties is revealed. The appellant has, understandably, forgotten Creole but in any event we would repeat what we have already said on the language issue. There are some family members still in Mauritius but without exception, as we accept because we found father and mother credible witnesses who were entirely open with us, they are estranged from the appellant and his family and essentially unknown to the appellant himself. There is no prospect of help for the appellant from those quarters and in any event they do not constitute any sort of meaningful family tie with Mauritius. The suggestion that the appellant could go and live with his father's new wife, who is in any event planning to come back to the UK to rejoin her husband when entry clearance permits, is neither realistic nor indicative of a meaningful family or social tie with Mauritius."

Having made reference once again to the guidance in *Ogundinu* and noting the potential relevance of length of residence and age on arrival; the extent of exposure to the cultural norms of the country of nationality; language and family and social networks there, the judge said that he was reinforced in his conclusions by that guidance, He then went on to say:

> " We therefore come to the conclusion that the appellant fits squarely into the paragraph 399A(b) criteria. … The appeal against the respondent's refusal to revoke the deportation order must therefore be allowed."

12. The grounds for seeking permission to appeal complained that the judge had failed to engage properly with "the entirety of the factors present"; was wrong not to appreciate that the claimant was "not incapable" of picking up Creole, as he has once spoken that language, and had failed to appreciate the significance of the claimant having grown up with Mauritian national parents. The grounds asserted that the judge was wrong to rely upon the estrangement from those relatives remaining in Mauritius because on return it would be open to him to "build bridges" and strengthen those ties.

13. In granting permission to appeal, First-tier Tribunal Judge Levin made clear that he was unimpressed by the challenge to the finding of fact that the claimant had no

meaningful ties with Mauritius, saying that the challenge in that respect was "no more than a disagreement with the panel's finding which was open to them on the evidence". However he granted permission because, in his view:

> "… it is arguable that the panel's failure then either to go on to consider whether the revocation order should be revoked having regard to all the circumstances of the Appellant's case…"

14. Mr Smart made clear that he did pursue the challenge to the finding that the appellant had no meaningful ties with Mauritius, notwithstanding the view taken in the grant of permission that it disclosed no error of law but was simply an expression of disagreement with a finding of fact open to the judge. The main focus of the challenge he pursued before the Upper Tribunal was, though, that the judge erred in failing to appreciate, or failing to appreciate sufficiently, that he was dealing with an appeal against a refusal to revoke a deportation order rather than an appeal against the decision to make the deportation order. In Mr Smart's submission, a different approach was called for in a revocation appeal in that, while paragraphs 399 and 399A of HC 395 were relevant, that was in informing the assessment to be carried out under paragraph 390 of HC395.

15. Before we address that issue, we can deal shortly with the first aspect of the Secretary of State's challenge. We agree with Judge Levin that no error of law is disclosed in the reasoning or the finding it led to that the claimant had no remaining ties (including social, cultural or family) with Mauritius. The judge looked carefully at all the evidence the parties chose to put before him, and in doing so had the advantage of hearing oral evidence from the claimant's parents which he was plainly entitled to accept as truthful and correct. He gave clear and legally sufficient reasons for arriving at a conclusion that was plainly one open on the facts. This was a claimant who left Mauritius when just 5 years old, since when he has had no contact with anyone living there; has had no cause to speak Creole, which he has lost command of, and it was open to the judge to find that the claimant had no social network of any kind available in Mauritius to look to for assistance in establishing himself in what would be for him an entirely unfamiliar country. True it is that he might be able to "build bridges" and attempt to repair broken relationships with relatives who were estranged from his own family. But he himself has had no contact at all with those persons. Indeed, he was unaware that he had an uncle with Downs Syndrome in that country, that information being volunteered by his father in oral evidence. Further, the judge was required to consider the position as it was at the date of the hearing and not how it might be at some indeterminate point in the future. Having said that, the judge's finding was that "there is no prospect" of the claimant securing assistance from the estranged relatives, which does indicate a degree of contemplation of what might be achieved at least in the foreseeable future.

16. Which leave's Mr Smart's challenge to the approach taken by the judge. Before examining that, it is helpful to set out paragraphs 390 and 391 of HC395, so far as they are relevant:

> "Revocation of deportation order

> 390 An application for revocation of a deportation order will be considered in the light of all the circumstances including the following;
> (i) the grounds on which the order was made;
> (ii) any representations made in support of revocation;
> (iii) the interests of the community, including the maintenance of an effective immigration control;
> (iv) the interests of the applicant, including any compassionate circumstances.
>
> 390A Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors."

17. We are entirely satisfied that the judge had in mind clearly throughout that he was dealing with a revocation appeal and not an appeal against the initial decision to make a deportation order. Having referred specifically at paragraph 5 of the determination to the Secretary of State's "refusal to revoke the order" he said:

> "It is against that decision that the Appellant now appeals…"

Making clear beyond doubt that the judge had not become distracted by his examination of paragraph 399A, he referred again to the fact that this was an appeal against a refusal to revoke a deportation order at paragraph 19, in setting out the conclusion that the appeal fell to be allowed.

18. Nor are we persuaded that the judge fell into legal error in focussing on paragraph 399A to the extent that he did. As can be seen, paragraph 390 itself requires, in the context of a revocation appeal, the question to be asked whether paragraphs 399 or 399A applies. Mr Smart's submission, if we understand it correctly, is that the difference in a revocation appeal is that the conclusion that the claimant did fall within paragraph 399A was not a complete answer to the matter, as it would be in a deportation appeal, because instead that was a factor to be taken into account when addressing the issues raised in paragraph 390.

19. The difficulty with that submission is illustrated by considering, for example, what is required by paragraph 390(ii). The representations made in support of revocation included that the claimant fell within paragraph 399A. Once that was accepted by the judge to be established, the position was that a deportation order had been made against someone in respect of whom the Secretary of State accepts, both in the immigration rules and in her own policy guidance, that the public interest in his deportation has been outweighed by other factors. Therefore, a review of the grounds upon which the deportation order was made, the representations made in support of revocation and the interests of the appellant would all point to the same conclusion. Paragraph 390 mandates also a review of the public interest arguments but, as we have explained, the Secretary of State accepts that those will be outweighed by the fact that the claimant falls within paragraph 399A.

20. For all those reasons we are satisfied that the determination of the judge discloses no error of law. The question is not whether we would have reached the same conclusion but whether the conclusion reached was open to him. Essentially, this was a factual assessment for the judge to make and, having heard oral evidence from the witnesses, he was best placed to make it. He made no error in his approach to the legal framework applicable either.

Conclusions:

The First-tier Tribunal Judge made no error of law and his determination will stand.

The appeal to the Upper Tribunal is dismissed.

Signed

Date: 26 August 2014

Upper Tribunal Judge Southern