Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00535/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 2 July 2014	**On 30 July 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GERALDINE ADESUWA UGOWE

Claimant

Representation:

For the Claimant: Mr M Karnik, Counsel instructed by Binas Solicitors
For the Respondent: Miss Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent appeals with permission against the determination of the First-tier Tribunal (Designated Judge of the First-tier Tribunal McClure and Ms J A Endersby) in which they allowed the claimant's appeal against a decision by the respondent made on 27 February 2013 and that she is a foreign criminal to whom Section 32(5) of the UK Borders Act 2007 applies and should therefore be deported.

2. The claimant's grandmother came to the United Kingdom with her husband, lawfully, in 1966 and whilst here on 21 September 1967 she gave birth to claimant's mother appellant at Queen Charlotte's Hospital, Hammersmith. The family later returned to Nigeria where the claimant was born. Until 1983, British Nationality law discriminated on the basis of gender, and thus, by reason of her gender, her mother could not pass on her British Citizenship to her; had she been born in the UK, or had she been born after 1 January 1983, or had the British Citizen parent been male, she would have been British by birth.

3. The claimant was brought up for the greater part of her life believing that her mother (who had been 14 at the time of her birth) was her sister and that her grandmother was her mother. She was then brought to the United Kingdom where she was granted Indefinite Leave to Remain.

4. In 1997 the claimant gave birth to a son who was a British citizen by birth given that he was born here after she had acquired indefinite leave to remain.

5. On 6 July 2006 the claimant was convicted of arson, being reckless as to whether life should be endangered and three offences of robbery. She was sentenced to an indefinite sentence for the protection of the public with a direction that she should serve a minimum of six years in custody before a parole board could consider her release.

6. In passing sentence the judge did take into account the evidence that the appellant is suffering from serious mental ill-health which she contributed to the commission of her offences. On 26 July 2012 following an oral hearing the parole board directed that the appellant should be released.

7. The respondent's case is set out in the decision dated 27 February 2013. In summary, although noting that the appellant's child is a British citizen and was in contact with her and that the relationship between them is subsisting, she could maintain communication using other means of communication as she had done while in prison and that of the 21 years and one month she had spent in the United Kingdom approximately seven years had been spent in prison that she had spent her formative years in Nigeria and it would therefore not be unreasonable to expect her to readjust to her life there. It was submitted that there was no evidence to suggest that she was now in a position of being "estranged" from her country of origin to the extent that reintegration in to family and private life in the country would amount to undue hardship and that whilst a decision to remove to Nigeria would interfere with her rights under Article 8 and might not be in the best interests of her child, it was in accordance and with the permissible aim of prevention of disorder and crime noting that there were no significant and compelling factors apparent in her private life such that she should not be deported to Nigeria.

8. The claimant appealed to the First-tier Tribunal, submitting [10] that she has no family to return to in Nigeria, has not seen her father since 1991

and speaks to her son on a daily basis. Deportation would ultimately end the relationship between the appellant and her son, modern communication not being a substitute to a family unit; that removing her to Nigeria would expose her to great danger of going back to drugs and the violent life and her mental health problems that had caused her criminal behaviour and her deportation would be disproportionate given that she was now of low risk of reoffending.

The Hearing before the First-tier Tribunal

9. In what was clearly a complicated case, the Tribunal heard evidence on 6 August 2013 and 10 January 2014. In a careful and detailed determination they dealt first with the issue of the appellant's nationality [4] to [36] finding that the claimant was not entitled to British nationality by descent because under the provisions of Section 5 of the British Nationality Act 1948 which is applicable, children of female British citizens born outside the UK were not entitled to nationality by descent and the appellant could not now be allowed to acquire nationality by registration due to her criminal convictions. The panel noted also that the historic discrimination is a factor to be taken into account in assessing the appellant's circumstances [36] and that all the other members of her family now appear to be British citizens and to be in the United Kingdom.

10. The Tribunal found that:-

(i) the appellant was liable to deportation under Section 32(5).

(ii) as the appellant had been sentenced to a term of imprisonment for at least over four years it was necessary to look outside the Rules for relief on the basis of Article 8 grounds [44];

(iii) in light of the Strasbourg jurisprudence and **MF (Nigeria) [2013] EWCA Civ 1192** that the Rules are not to be regarded as a perfect mirror;

(iv) the use of the term "exceptional circumstances" is to emphasise that in carrying out the balancing exercise due acknowledgment should be given to the public interest in deporting foreign criminals and it is only exceptionally that such foreign criminals should succeed under Article 8, noting that in carrying out the proportionality test it has to be recognised that the scales are weighted in favour of deportation and that there must be something compelling which warrants setting aside of the decision to deport;

(v) having had regard to the probation report the appellant's immigration history they found that the appellant had no other family members in Nigeria to whom she could turn for help and assistance;

(vi) that although she was a Nigerian national it was due to historical circumstances that she was not able to claim British citizenship [85];

(vii) that she had had serious mental health issues, the continuing abuse of cannabis and possibly alcohol leading to mental health problems and that but for being introduced to such substances she would not have committed the criminal offences; that they took into account the nature of the offences and the seriousness of the offences themselves; that she had managed to find employment and was maintaining it [90]; that she was free from drugs and cooperating with the authorities [91]; that she has a family life with her grandmother, brother and child in the UK [93]; and

(viii) taking into account all the relevant factors including nature and seriousness of the offences including the length of time the appellant had been in the United Kingdom and the consequences to her and her family of expulsion and that it would be in the best interests of the child that his mother remain here that it was not proportionate to deport her.

11. The respondent sought permission to appeal on the grounds that:-

(i) the panel had erred in allowing the appeal on Article 8 grounds outside the Rules, contrary to **MF (Nigeria)**;

(ii) that the Tribunal had erred in failing to consider the proper position as regards the Government's view on what are exceptional circumstances, and that an appellant would need to demonstrate the circumstances above and beyond that set out in 399(a) or 399(b) and had failed to state why they considered that it was in the child's best interest for the appellant to be involved in her life; that as the claimant had spent her youth and formative years in Nigeria and could adapt to life there and remain in contact with the family through modern methods of communication and visits there being no consideration of her ties to Nigeria other than family ties;

(iii) that the appellant's circumstances are not exceptional and her own separation has not only been caused by her own actions but it is proportionate to deport her, there being no factors to set it apart from an ordinary family life claim and in the circumstances are not strong enough to outweigh the public interest in line with **SS (Nigeria) [2013] EWCA Civ 550**;

(iv) that the Tribunal failed to give any consideration to the Secretary of State's public interest policies given the severity of the offence committed, ignoring the fact that the appellant has had a number of adjudications in prison which led to an extended stay;

(v) that the legitimate aim in preventing crime and disorder is not one dimensional it has the effect not only of removing the risk of reoffending by the deportee himself but of deterring other foreign nationals in the same position and that the deportation of foreign criminals creates public confidence in the system of control whose loss would otherwise turn towards crime and disorder and that the appellant had not given sufficient weight to the strong public interest in deportation.

12. On 30 April 2014 Upper Tribunal Judge C E Roberts granted permission to appeal stating that:-

> "Whilst it is clear that the panel has treated with care, as it is tasked to do, the evidence of the appellant's circumstances, it is arguably unclear that it has fully engaged with the Secretary of State's public interest policies encompassed in
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> (i) society's revulsion against violent crime;
>
> (ii) the needs to deter others **AM v SSHD [2012] EWCA Civ 1634**."

13. In response, by way of a letter pursuant to Rule 24 the claimant submitted:-

(i) that the respondent was now putting forward her case on an entirely different basis having not previously referred to deterrence and revulsion as aspects of the public interest which was not referred to in the refusal letter;

(ii) that the Upper Tribunal gave full consideration of and recognition to the public interest as set out in their determination the panel having properly directed themselves that there must be something compelling which warrants setting aside the decision to deport [9]; that the panel had not acted irrationally in taking full account of the evidence from the parole board in finding that the appellant was no longer at risk; at any rate this was a compelling case in which the claimant's interests outweigh the public interest.

The Hearing

14. Ms Johnstone submitted that there was no indication in the determination that the panel had taken into account the public interest as set out in the refusal letter of 2013 nor had they properly addressed the issue of what amounted to exceptional circumstances. She did, however, concede that this was a reasons challenge.

15. Mr Karnik submitted that on that basis, it could not properly be argued that this was a decision to which the Tribunal was not entitled to reach. He submitted it is evident from the decisions it now had [42 to 44] as well as at [47], [48] expressly addressed the issues towards directing

themselves properly as to the public interest. He submitted that viewed properly, the facts of this case are in fact exceptional and that the particular circumstances in which the offences committed in this case arose should be taken into account, it not being disputed she was mentally ill at the time.

16. Mr Karnik submitted that the panel had set out in ample detail why they had reached the conclusions reached, having had due regard to the public interest.

17. In reply Ms Johnstone asked me to note that the panel had failed to take into account the adjudications against the appellant in prison which again are referred to by the parole board at pages 22 and 23 of their report.

Decision

18. It is evident that the Tribunal considered the issue of Article 8 outside the Immigration Rules as did the Upper Tribunal in **MF (Nigeria)** rather than within the context of paragraph 398 of the Rules. That was properly described by the Court of Appeal as not being a material error, merely being one of form rather than substance. The same applies here.

19. It is evident from the case law that, contrary to what is averred by the Secretary of State, the Tribunal's task is not to look for "exceptional circumstances" but to undertake a balancing exercise albeit one in which the starting point is that the scales are heavily weighted in favour of the Secretary of State, that weight flowing from the strong public interest in deporting foreign criminals. There is no test of exceptionality; but the result of carrying out a balancing exercise in which the public interest in deportation is so strong means that it is rare that a decision to deport a foreign criminal will not be proportionate, and thus such cases will be exceptional.

20. There is no merit in Mr Karnik's submission that it is inappropriate for the respondent to raise the decision in **AM v SSHD** at this stage. It is not arguable that the public interest is not involved in a multi-dimensional approach.

21. The Tribunal refer in detail to the test to be applied following **MF** at [47] having directed themselves clearly as to the provisions of the Immigration Rules [43], [44] and the relevant case law [45]. Of particular note is the self-direction at [47]:-

> "The Rules expressly contemplate weighing public interest in deportation against all other factors, which are relevant to proportionality and all those other factors have to be taken into account. As was recognised in paragraph 40 of **MF** the use of the terms exceptional circumstances is there to emphasise that in carrying out the balancing exercise due acknowledgement should be given to the public interest in deporting foreign criminals and that it is only exceptionally that foreign criminals should succeed under Article 8. It is accepted that it is not introducing a test of exceptionality but rather that in carrying out the proportionality test within Article 8 it has to be recognised that the scales are weighted in favour of deportation and that there must be something compelling which warrants setting aside the decision to deport. It is also acknowledged that the new Rules constitute a complete code".

22. It is evident also from the Tribunal's comments to the claimant's offences being serious [94] that they took that factor into account, but is not sufficiently evident that in weighing the public interest, they took into account that the sentence passed in this case was for an indefinite sentence with a minimum of six years. That is in itself indicative of just

how serious the offences were; the nature and severity of the crimes were a factor to be weighed and there is no indication that this was properly taken into account. There is no proper indication of the public interest considerations being considered alongside the factors in the claimant's favour, and had they taken these into account, it is not at all certain that the Tribunal would have come to the same conclusion.

23. In the circumstances, I am satisfied that the Tribunal erred in reaching a conclusion that was not one open to it, and for which they had not given adequate reasons. The error is, in the circumstances, material, and thus the decision of the First-tier Tribunal must be set aside. The findings of fact with respect to the claimant's nationality and parentage are preserved.

DIRECTIONS

1. It is arguable that the remaking of the decision must take place in the light of the changes introduced by section 117 of the 2002 Act. In the circumstances, and given that fresh findings of fact will need to be made, I remit the case to the First-tier Tribunal.

Signed Date

Upper Tribunal Judge Rintoul