Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01121/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 July 2013	**On 01st Aug 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

KERON GEORGE MCLEOD TERRELONGE

Claimant

Representation:

For the Secretary of State: Mr S Whitwell, Senior Home Office Presenting Officer
For the Claimant: Mr A Slatter, Counsel, instructed by

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the determination of the First-tier Tribunal (the panel comprising First-tier Tribunal Judge KW Brown and Mr GF Sandall) promulgated on 25 March 2014 in which they allowed the claimant's appeal against the decision of the respondent of 21 May 2013 to refuse to revoke the deportation order against him.

2. The claimant was born on 21 September 1967 and is a citizen of Jamaica. He entered the United Kingdom on 26 January 1997 with leave as a visitor

which was subsequently varied to leave as a student. He was later granted leave to remain on the basis of his marriage to a British citizen and on that basis was granted indefinite leave to remain on 11 October 2001. The couple have a daughter who lives with her mother; the marriage no longer subsists.

3. On 21 November 2001 the claimant was convicted of causing grievous bodily harm with intent. The initial sentence of three years' imprisonment was subsequently increased by the Court of Appeal to three years and nine months.

4. Consequent to that conviction, the Secretary of State decided to make a deportation order against him. The appeal against that decision was dismissed in 2004 but, for reasons which are unclear, no deportation order was signed until 27 July 2011 after which time the claimant had twice applied for and had been refused naturalisation as a British citizen.

5. Subsequent to the signing of a deportation order the claimant's representatives made representations to the Secretary of State to the effect that the order should be revoked. It is against the refusal to do so that the appeal to the First-tier Tribunal was made.

6. The reasons for the refusal to revoke deportation are set out in the refusal letter dated 21 May 2013. In summary, the respondent noted [18] that the claimant had failed to comply with his release conditions upon completion of his sentence on 21 November 2003 and failed to notify his change of address. It is noted that he came to the attention of the Criminal Casework section through representations made in respect of his son, Keron Anthony Terrelonge, who was deported from the United Kingdom on 1 July 2012.

7. The respondent considered that the claimant did not fall within the exceptions set out in paragraph 399(a) or 399(b) of the Immigration Rules as she was not satisfied that he was in a genuine and subsisting relationship with his daughter as he was no longer in regular contact with her and thus he was no longer in a relationship with a British citizen spouse or partner. She considered also that he did not fulfil the requirements of paragraph 399(a) as he had not lived in the United Kingdom continuously for at least twenty years and he had not shown that he has no ties to Jamaica [47].

8. The respondent considered also that there were not in this case exceptional circumstances although she did note that he suffers from a rare condition of the spinal cord, HTLV-I associated myelopathy (HAM), and whilst it was incurable, the medication currently prescribed is available in Jamaica.

9. The First-tier Tribunal directed themselves that this is a case where they had to consider whether there are exceptional circumstances whereby the

public interest in deportation was outweighed by other factors [31] and, having directed themselves in line with **Razgar**, concluded that:-

(i) the evidence of the claimant's family life in the UK is minimal [33]; that his private life has largely developed since his release from prison involves membership of a Pentecostal Church [34] and as he is being treated for a rare condition which will lead to further disability [34] asserting that he was unable to work due to his condition;

(ii) substantial weight was to be given in the claimant's favour due to the lack of action to enforce the deportation order made on 27 July 2001 (sic), there being no evidence whatsoever that the respondent had sought to enforce that order and there being no evidence of any failure of the claimant to report or a non-compliance with the conditions of his release [38];

(iii) a new deportation order had been signed on 27 July 2011 there being a considerable number of opportunities prior to that when the respondent might have considered deporting the claimant but took no action [40]; that although the claimant has a family and private life attracting protection, it is not extensive and "only marginally passes the first steps set out in **Razgar**" and the respondent's inaction in failing to enforce the original deportation order in a prompt and timely manner weighs heavily in the balance in favour of the claimant

10. The respondent sought permission to appeal on the grounds that the Tribunal had erred in law as they had:-

(i) failed to identify why the claimant's circumstances are exceptional as there was no evidence that he is in a relationship or has contact with his daughter other than his own self-serving evidence; that there is no reasons why he could not continue his relationships with family by modern methods of communication and by visits; that there is no evidence he requires any support currently and his dependence arising from medical conditions went beyond normal emotional ties; that there is nothing exceptional about his private life that cannot be continued in Jamaica, a country to which he has ties in the form of his son who had been deported there recently and thus the circumstances are not exceptional;

(ii) failed to give adequate consideration to public interest, failing to make findings as to whether he has addressed his behaviour or as to his future risk of harm;

(iii) erred in their assessment of the Secretary of State's failure to enforce the deportation, they delay being in fact due to the claimant's actions and he had failed to provide evidence that he had informed the Secretary of State through his representatives regarding failure to comply with reporting restrictions in 2003, it being submitted that he had in fact absconded, had failed to comply with reporting

constrictions and failed to provide evidence as to why he had not reported;

(iv) failed to carry out a thorough assessment of the public interest, taking into account the fact that deportation is not one dimensional effect but deters other foreign nationals and preserves public confidence in the system of control, the public interest in deportation going well beyond the need to deprive individuals of the chance to re-offend in this country.

11. On 23 May 2014 Upper Tribunal Judge Kekic granted permission to appeal.

The hearing

12. After some discussion it was agreed that contrary to what the Tribunal had believed, no deportation order had been signed in respect of the claimant until 2011. As there had been an earlier decision, to make a deportation order, and it is that decision which gave rise to the first appeal in 2003, there was no "new" order signed.

13. Mr Whitwell submitted that there were no exceptional circumstances in this case and it was to be noted the Tribunal had found a minimal family and private life. He submitted also that it was clear from the refusal letter that the applicant had not been reporting and that it appeared that at points the claimant had left the United Kingdom. Mr Whitwell submitted also that the panel had made no mention of the public interest which was a serious error given the very marginal nature of the claimant's private and family life.

14. Mr Slatter submitted that it was evident from the Tribunal's reference to exceptional circumstances in their self-direction at [31]. He submitted further that the panel were entitled to conclude that this was an exceptional case given the substantial period of inaction during which time the claimant had made two applications for naturalisation and it was significant that the Secretary of State had taken no actions to enforce. He submitted further that the panel had given adequate consideration to the public interest and that the findings of fact impugned in the grounds were sustainable.

Decision

15. The Tribunal directed themselves correctly [31] that they have to consider whether there are exceptional circumstances in the claimant's case whereby the public interest in deportation is outweighed by other factors. That, given the acceptance that the exceptions set out within paragraph 398 and 399(a) were not met is the correct approach but in doing so, careful attention needs to be brought on what the public interest requires.

16. In **MF (Nigeria)** [2013] EWCA Civ 1192 (decided shortly after **SS (Nigeria)**) the Court of Appeal also addressed the strength of the public interest in deporting foreign criminals. In particular the court focused upon

the strength of the "other factors" which would need to exist before a justification for deportation would be set aside. In paragraph 40 of their judgment the Court of Appeal stated:

> "Does it follow that the new rules have effected no change other than to spell out the circumstances in which a foreign criminal's claim that deportation would breach his Article 8 rights will succeed? At this point, it is necessary to focus on the statement that it will only be 'in exceptional circumstances that the public interest in deportation will be outweighed by other factors'. Ms Giovannetti submits that the reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. 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."

17. In paragraph 42 the Court stated that in cases of criminal deportation: "...the scales are heavily weighted in favour of deportation and something very compelling (which will be exceptional) is required to outweigh the public interest in removal". In paragraph 43 the Court stated that the general rule was that in the case of foreign prisoners to whom paragraphs 399 and 399A did not apply "very compelling reasons" would be required to outweigh the public interest in deportation.

18. While the Tribunal did carry out a balancing exercise in assessing proportionality, as they are required to do, there is little indication of what weight they attached to the public interest in so doing. It was incumbent on them to take into consideration the aims or object of the policy in question and then to set against that assessment the factors said to warrant departing from the stated object or policy. In the present case the object or policy in question is the public interest, set out in an Act of Parliament, in favour of deporting criminals. There can be little doubt that Parliament views the object of deporting those with a criminal record as a very strong policy albeit that the weight to be attached to that object will also include a variable component which reflects the criminality in issue

19. In considering how the Tribunal approached the balancing exercise, it is important to note in this case that they found the strength of the claimant's private and family life was described as "minimal" and accepted [41] that he only marginally passed the first steps in **Razgar**. It is established law that the threshold set out in the second question in **Razgar** is low.

20. Further, it is to be borne in mind that in the balancing exercise, the final step set out in **Razgar** the scales are not evenly weighted; Parliament has tilted them strongly in favour of deportation. It is clear from case law that for the tilted scales to return to the level and then swing in favour of a criminal opposing deportation that there must be compelling reasons which must be exceptional, all the more so where, as here, there was little in the way of family or private life established in the United Kingdom.

21. In this case other than the respondent's inaction and the fact the claimant had not committed further offences, no other factors are relied upon by the Tribunal in concluding that the scales have tipped in the claimant's favour.

22. Whilst a long period of delay may be capable of amounting to an exceptional circumstance, in this case the mistake of fact in the determination [38]. They referred to a lack of action to enforce deportation made on 27 July 2001. Whilst that might be thought of as a typographical error given that the deportation order was signed on 27 July 2011, they then go to refer to the appeal rights being exhausted by September 2004 and to say that there is no evidence whatsoever that the respondent sought to enforce that order. In fact, as is noted above, there was a notice of intention to deport issued in 2003, followed by an appeal. There was no "new" deportation order; there was only one order signed in July 2011.

23. It is, however, evident that the Tribunal had in mind a failure to enforce a deportation order for some ten years which is significantly different from the lesser period which occurred here.

24. The fact that the claimant had not committed further offences is not one which can properly attract weight in his favour; not committing crimes is something that is expected of all members of society.

25. In the circumstances, I consider that the reasons given by the Tribunal for finding that the strong public interest in deporting the claimant was displaced are inadequate and unsustainable.

26. Accordingly, I am satisfied that both the decision of the First-tier Tribunal did involve the making of an error of law.

27. In considering whether to remit the decision to be remade in the Upper Tribunal or remitted to the First-tier Tribunal, I am mindful of the fact that both parties wish to adduce additional evidence which will result in a requirement to make fresh findings of fact both as to whether or not the claimant had complied with reporting restrictions and as to whether, as the respondent contends, he had continued to commit criminal offences.

28. Given the strong similarity between the claimant and his son's names, and given that the son was deported following a number of convictions, a detailed fact-finding exercise will be necessary. Accordingly, I am satisfied that, having had regard to the overriding procedure and the presidential statement, that it would on the facts of this case be appropriate to remit the decision to the First-tier Tribunal for a fresh determination. None of the findings of fact are preserved.

Signed Date

Upper Tribunal Judge Rintoul