



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01246/2013

THE IMMIGRATION ACTS

Heard at Field House
On 6 March 2014

Determination Promulgated
On 24 March 2014

Before

THE HON MR JUSTICE KENNETH PARKER
UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR R G F
(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr L Tarlow a Senior Home Office Presenting Officer

For the Respondent: Mr K Mak a Solicitor from MKM Solicitors

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Jamaica who was born on 15 November 1981 ("the claimant"). The Secretary of State has been given permission to appeal the determination of a panel consisting of First Tier Tribunal Judge Lindsley and non-legal member Dr J O de Barros ("the panel") who allowed the claimant's appeal against the Secretary of State's decision of 6 June 2013 to make a deportation order against him and that section 32 (5) of

the Borders Act 2007 applied, following his conviction at Inner London Crown Court on 5 January 2011 for possession with intent to supply of a Class A drug (crack cocaine) and a Class B drug (cannabis) for which he was sentenced to 4 years imprisonment.

2. The claimant entered the UK as a visitor on 14 September 2002 and then extended his leave as a student until 31 July 2003. A further extension was refused. On 15 November 2004 he married a British citizen and on 5 February 2005 he applied for leave to remain as a spouse. Their daughter, who is also a British citizen, was born on 27 June 2005. Leave to remain as a spouse was refused but the claimant was granted discretionary leave on the basis of his marriage for a period from 3 July 2009 to 2 July 2012.
3. In the decision letter dated 6 June 2013 the Secretary of State said that under section 32 (5) of the UK Borders Act 2007 she was obliged to make a deportation order in respect of a foreign national who had been convicted in the UK of an offence and had been sentenced to a period of imprisonment of at least 12 months unless he fell within one of the exceptions set out in section 33 of the same Act. Having reviewed the known facts she concluded that the claimant did not fall within any of the exceptions.
4. The Secretary of State quoted at length from the sentencing judge's remarks and said that she regards as particularly serious those offences involving violence, sex, arson and drugs. She considered the claimant's Article 8 human rights and the provisions of paragraph 398 of the Immigration Rules. Because of the nature of the offence and the length of the sentence the claimant's deportation was conducive to the public good. Neither paragraphs 399 nor 399A applied so that it would only be in exceptional circumstances that the public interest in deportation would be outweighed by other factors. The Secretary of State went on to consider the claimant's family life with his child and his wife. It was accepted that the claimant was living with them in subsisting relationships and that both were British citizens. The Secretary of State accepted that there were insurmountable obstacles to family life continuing with the claimant's wife and daughter in Jamaica and that as British citizens it was in their best interests to remain in the UK. The claimant's private life was considered together with any other possible exceptional circumstances. The Secretary of State reached the conclusion that there were no exceptional circumstances which outweighed the public interest in deportation.
5. The claimant appealed and the panel heard his appeal on 22 November 2013. Both parties were represented, the claimant by Mr Mak who appears before us. The panel heard evidence from the claimant and his wife. In a lengthy and detailed determination the panel concluded that deportation would have unjustifiably harsh consequences for the claimant's family so as to make the circumstances of the case exceptional. The appeal was allowed on Article 8 human rights grounds.

6. The Secretary of State applied for and was granted permission to appeal. The judge who granted permission thought that there was little merit in most of the grounds which argued that the panel erred in law by failing give reasons or adequate reasons for findings on material matters. These appeared to be no more than disagreement with the findings made by the panel. However, he accepted that the reference to paragraph 399 rather than paragraph 398 of the Immigration Rules in paragraph 51 of the determination might indicate the application of an incorrect test rather than a typographical error. However, leave to appeal was granted in respect of all the grounds.
7. Mr Tarlow submitted that not enough weight had been given to the public interest. In reply to our question he did not accept that the reference to paragraph 399 was inevitably a typographical error. He relied on the grounds of appeal but made no further submissions.
8. Mr Mak submitted that there was no error of law. It was clear that the reference in paragraph 51 was a typographical error rather than an error of principle. Everything else in the grounds was no more than disagreement with conclusions properly reached. We were asked to uphold the determination.
9. We reserved our determination.
10. The Secretary of State's grounds of appeal submit that the panel erred in law by failing to give reasons or adequate reasons for findings on material matters. We find that the panel took into account all the material evidence. Inordinate weight was not placed on the risk of reoffending or the assessment by the Probation service, even though we are surprised that in the circumstances of the claimant's offence there was a recommendation for a non-custodial sentence. The panel took into account the judge's sentencing remarks as well as the length of the custodial sentence. The point raised in paragraph 9 of the grounds is misconceived. The panel did not say that the claimant had been sentenced to a period of imprisonment of less than four years. At this point the panel was considering what the position might have been had he been sentenced to a period of less than four years. It is clear that they made their assessment on the basis that the sentence was one of four years which triggered the "exceptional circumstances" test in paragraph 398 (c) of the Immigration Rules so that paragraphs 399 and 399A did not apply. We find that the panel did give adequate reasons for their findings and that the grounds are in substance no more than a disagreement with conclusions properly reached on all the evidence.
11. The reference to paragraph 399 of the Immigration Rules in paragraph 51 is clearly incorrect. In the light of all that the panel said in the rest of the determination we find that this is a typographical error and that the intention was to refer to paragraph 398. In paragraph 3 the panel set out the reasons for the Secretary of State's decision that the claimant did not qualify under paragraphs 399 or 399A and that it would only be in exceptional circumstances that the public interest in deportation would be outweighed by

other factors. Under the heading of the panel's Decision and Reasons in paragraph 35 the correct test was set out and amplified by reference to the Immigration Directorate's Instructions. The relevant case law in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 was set out in paragraph 36. In paragraph 51, where the mistake occurs, it follows a summary of the correct test when the panel said; "we find that deportation from the UK amounts to a disproportionate interference with his right to respect for family life, and that to proceed with that deportation would have unjustifiably harsh consequences for his family so as to make the circumstances of this case exceptional in accordance with paragraph 399 (sic) of the Immigration Rules."

12. We have not been asked to anonymise this determination but we conclude that we should do so in order to protect the interests of the claimant's daughter.
13. We make an order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the claimant or any member of his family.
14. We find that the panel did not err in law and we uphold the determination.

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Signed
Upper Tribunal Judge Moulden

Date 18 March 2014