



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/01327/2013

THE IMMIGRATION ACTS

Heard at Field House  
On 8 April 2014

Determination Promulgated  
On 16<sup>th</sup> April 2014

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR DAMION FORRESTER

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Peterson, Counsel instructed by CK Solicitors  
For the Respondent: Mr G Jack, HOPO

DECISION ON ERROR OF LAW

1. The Secretary of State has been granted permission to appeal the determination of the First-tier Tribunal (FtTJ Lester and Ms J A Endersby (NLM)) allowing the appeal of the appellant against the deportation order made against him by virtue of section 32(5) of the UK Borders Act 2007 dated 28 June 2013.

2. The appellant is a citizen of Jamaica born on 15 July 1980. He came to the UK aged 14 on 23 November 1994 as a visitor and made an application to settle in the UK with his father, Mr Donald Forester as his dependant child. The application was refused by the Home Office but after various appeal hearings, the Home Office decided on 18 July 2000, to grant the appellant indefinite leave to remain in the UK.
3. On 12 August 2011, at the age of 21, the appellant was convicted at Wood Green Crown Court of possession of class A controlled drugs, heroin and cocaine, with intent to supply, for which he was sentenced to four years' imprisonment. He was also subject to a confiscation order under the Proceeds of Crime Act 2002 for £20,905 or in default to serve twelve months' imprisonment consecutive to the term of custody he is liable to serve for the substantive offence. The benefit was calculated at £62,307.46.
4. In granting permission, UTJ Lister said that the grounds satisfied him that it is arguable that the First-tier Tribunal failed to give adequate weight to the public interest, particularly, taking into account the length of the appellant's sentence, the fact that he fell within the provisions of paragraph 398(a) of the Immigration Rules and the observations of the Court of Appeal in **SS (Nigeria) [2013] EWCA Civ 550**.
5. I find that as the appellant's offence engages paragraph 398(a) of the Immigration Rules, the Tribunal were right to find that paragraphs 399 and 399A did not apply. I note that whilst the Tribunal at paragraphs 46, 47 and 48 made mention of **SS (Nigeria)** and **MF (Nigeria) [2013] EWCA Civ 1192** and reminded themselves that the public interest in deportation will only be outweighed by exceptional circumstances, I find that the Tribunal failed to adopt this approach in their consideration of the appellant's appeal. This is because the Tribunal at the end of paragraph 48 interpreted the phrase "exceptional circumstances" to mean the "weighing of the competing factors for and against deportation" of foreign criminals. In **MF (Nigeria)** the word "exceptional" was held to mean "circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate. As a consequence the Tribunal at paragraph 50 set out the factors weighing in the balance against deportation; and at paragraph 51 set out the factors in favour of deportation. The first four bullet points at paragraph 51 were references to the appellant's criminal offences. I do not consider that these references amount to adequate and proper consideration of the weight to be attached to the public interest.
6. I also find that at paragraph 49 the Tribunal adopted the wrong approach by carrying out a conventional article 8 analysis in paragraphs 50 and 51 without first applying the requirements of the Immigration Rules and only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. This is the approach set out by the Upper

Tribunal at paragraph 31 of **Shahzad (Article 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC)**.

7. Accordingly, I accept Mr Jack's argument that the Tribunal failed to give adequate weight to the public interest, particularly, taking into account the length of the appellant's sentence, the fact that he fell within the provisions of paragraph 398(a) of the Immigrations and the observations of the Court of Appeal in **SS (Nigeria)**.
8. In terms of his risk of serious harm, the OASys Report indicated that he was at medium risk of serious harm. The letter from the appellant's offender manager said that the group re-conviction scores indicated that he was at low risk of re-offending. Whilst the panel found in the appellant's favour that his re-offending was described as low, there was no discussion that he was at medium risk of serious harm.
9. I also find that the Tribunal placed undue weight on the appellant's relationship with his daughter and in so doing appeared to consider her best interests as a trump card and not one of the matters to be considered in a proportionality balancing exercise.
10. The Tribunal made the finding that it is quite possible that his daughter would exert a positive influence on her father so that she did not return to drugs. The Tribunal failed to give any reason for their finding given that there was no evidence that his daughter had exerted a positive influence on him in the past.
11. For all these reasons I find that the Tribunal's decision is materially flawed. It cannot stand. It has to be re-made.
12. I remit this appeal for re-hearing at Taylor House by a differently constituted Tribunal other than First-tier Tribunal Judge Lester and Ms J A Endersby (Non Legal Member).

Signed

Date

Upper Tribunal Judge Eshun

## **DIRECTIONS**

Appeal to be reheard at Taylor House

Time Estimate – 3 hours

No interpreter required

Any further documents to be relied by the appellant should reach the Tribunal 7 days before the hearing.