Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01446/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 6th December 2013	**On 6th January 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CEPHAS MATANHIRE

Respondent

Representation:

For the Appellant: Mr Diwnycz, Home Office Presenting Officer
For the Respondent: Miss Harrison, instructed by Halliday Reeves

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Batiste made following a hearing at Bradford on 30th September 2013.

Background

2. The claimant is a citizen of Zimbabwe born on 26th June 1959. He appealed against the Secretary of State's decision to make an automatic deportation order against him under Section 32(5) of the UK Borders Act 2007. On 4th January 2010 the claimant was convicted of two counts of obtaining property by deception and one count of fraud by false representations and was sentenced to fifteen months' imprisonment concurrently on each count. The dishonesty concerned holding himself out as an immigration lawyer when he was not entitled to do so.

3. The claimant arrived in the UK as a visitor on 3rd December 1999. He made an unsuccessful application for leave to remain as a student but on 22nd November 2002 applied for indefinite leave to remain as the spouse of a person settled in the UK and was granted indefinite leave on that basis on 7th May 2004.

4. The claimant has three adult children from that marriage and he has four grandchildren. It seems that he has also been in a long term relationship with a lady called Joy Nyadete and they have four children together aged 19, 12, 10 and 1. Three were born in the UK and have indefinite leave to remain here. It was conceded at the hearing that it would not be proportionate to argue the case on the basis that they should return with the claimant to Zimbabwe.

5. The judge had the benefit of a social worker's report which he accepted as an independent assessment of the wishes and circumstances of the children. It was clear that all three of the older children have a firm and settled wish for their father to remain with them and they spoke of the central role that he played in their lives. The judge saw documents which spoke of behavioural changes in the older two children when their father was imprisoned.

6. The judge took a poor view of the claimant's evidence, which he said was unimpressive, and he observed that in the sentencing remarks of the judge who imposed the fifteen months' sentence it was clearly his view that the claimant was a devious and manipulative individual. He was unable to accept anything that he claimed without independent verifiable evidence.

7. The judge concluded that the claimant did not enjoy family life with his wife or her adult children which could not be maintained by indirect means. There were however factors suggesting that the decision was not proportionate, chief amongst which were the best interests of his children with Joy. He noted that the author of the pre-sentence report was concerned that he might commit similar offences in the future but observed that the claimant had been at liberty for well in excess of three years and had not committed any further offences which were in any event towards the lower end of offences which carried a mandatory deportation order. They were financial rather than involving violence or sexual offences.

8. On balance he concluded that, placing considerable weight upon the impact of the claimant's removal on his children, it would be in their best interests for them to grow up with their father being actively involved in their life, and it would not be proportionate for him to be removed.

The Grounds of Application

9. The Secretary of State sought permission to appeal on two grounds. First, the judge had erred in applying a two stage test in the Article 8 assessment and had misdirected itself in law. The Secretary of State relies on MF (Nigeria) v SSHD [2013] EWCA Civ 1192 when the Court of Appeal held that the new Immigration Rules are a complete code for considering Article 8 claim. Paragraphs 398, 399 and 399A of the Rules reflect the Strasbourg principles in a way that ensures a contingency of assessment. Given the comprehensive approach and the ability to take into account exceptional factors as set out in paragraph 397 to 398 it was an error of law to apply a two stage test.

10. The Tribunal should not have simply have regarded the Rules as a starting point before moving on to a second freestanding Article 8 assessment. The new Rules have "enhanced judicial understanding of the public interest". They are a clear expression of the public interest and the weight attached to it as set out by the Secretary of State and endorsed by Parliament. The Tribunal must have regard to the nature and weight of that public interest as expressed in the Rules when assessing a claim under Article 8. Had the Tribunal adopted this approach it would have assessed the case in line with the Immigration Rules and it would have reached a different conclusion.

11. Second, in essence, the Tribunal had erred in law in failing to give adequate reasons for findings on material matters. The Tribunal had found that the claimant was at low risk of reoffending but the offender manager had found him not to be remorseful and was likely to reoffend. Whilst he may not have reoffended he has shown that he is still devious and manipulative as found by the Tribunal and there was no evidence that he had rehabilitated.

12. The Tribunal had failed to provide adequate reasons why the claimant could not continue family life from abroad, why it was not proportionate for him to do so and why it was in his children's best interests to remain in the UK. Whilst the children may be negatively affected by his absence, it was of his own making and they could learn to cope without him as they did when he was outside the UK and in prison. The social worker's report stated that the children experienced problems prior to 2009 which demonstrates that their problems were not purely related to his absence during imprisonment.

13. Permission to appeal was granted by Judge Pullig for the reasons stated in the grounds on 30th October 2013.

14. On 21st November 2013 the claimant served a comprehensive Rule 24 response arguing that there was no error of law in the judge's decision which should stand.

Submissions

15. Mr Diwnycz relied on his grounds but said he was not pursuing them with any vigour.

16. Miss Harrison relied upon her reply.

Findings and Conclusions

17. In MF the Court of Appeal held:

> "We would therefore hold that the new Rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involved the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not 'mandated or directed' to take all these relevant Article 8 criteria into account (paragraph 38).
>
> Even if we were wrong about that it would be necessary to apply a proportionality test outside the new Rules as was done by the UT. Either way the results should be the same. In these circumstances it is a sterile question whether this is required by the new Rules or it is a requirement of the general law. What matters is that it is required to be carried out if paragraphs 399 or 399A do not apply.
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> There has been debate as to whether there is a one stage or two stage test. If the claimant succeeds on an application of the new Rules at the first hurdle, i.e. he shows that paragraph 399 or 399A applies then it can be said he has succeeded on a one stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether paragraph 399 or 399A applies. It is the second part of a two stage approach which, for the reasons we have given, is required by the new Rules. The UT concluded (paragraph 41) that it is required because the new Rules do not fully reflect Strasbourg jurisprudence. But either away it is necessary to carry out a two stage process."

18. It is therefore difficult to see how the Secretary of State is justified in relying on the decision in MF for the proposition that it was an error of law for the judge to apply a two stage test.

19. It was conceded at the hearing that the claimant could not bring himself within the family and private life consideration of paragraphs 399 and 399A of the Immigration Rules. The judge recorded, the concession having been made, that it was therefore not necessary for him to consider the issue. There is no error in that approach. There is no support in the decision of MF that the judge was not entitled, albeit that the new Rules were a complete code, not to have allowed the appeal on classic Article 8 principles in that case.

20. The court held:

> "Although we have disagreed with the UT on the question whether the new Rules provided a compete code the differences between our approach and theirs is one of form and not substance. They conducted a meticulous assessment of the factors weighing in favour of deportation and those weighing against. As they said, the factors in favour of deportation were substantial. They properly gave significant weight to the serious view taken by the Secretary of State of MF's criminality and his poor immigration history. On the other hand, they attached considerable importance to the interests of F. The decision was finally balanced and a contrary decision would have been difficult for the Appellant to challenge. But they did not take into account any irrelevant factors and they did not fail to take into account any relevant factors. In these circumstances the UT were entitled to strike the balance in favour of MF. We can find no basis for interfering with their decision."

21. The same applies here. This is a careful and considered determination of all of the relevant issues. The judge noted the reservations in the pre-sentence report and made his own observations on the claimant's character. It cannot be said that he did not take into account the matters relied on in the grounds. Ground two, as Mr Diwnycz candidly acknowledged, is a mere disagreement with the decision. It was for the judge to decide whether the clear best interests of the three minor children were determinative in concluding that removal would be disproportionate, bearing in mind all of the other circumstances of the case, and there is no basis for interfering with that assessment.

Decision

22. The judge did not err in law. The Secretary of State's appeal is dismissed.

Signed Date

Upper Tribunal Judge Taylor