Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01584/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 11 February 2014	**On 26 February 2014**
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Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FMS

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr A Joseph, instructed by Gloucester Law Centre

DECISION AND REMITTAL

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited us to rescind the order and we continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Trevaskis and Mr M E Olszewski JP) which allowed an appeal under Article 8 of the ECHR against the Secretary of State's decision that s.32(5) of the UK Borders Act 2007 applied and to make a deportation order against FMS. That decision followed FMS' conviction on 24 August 2012 at the Gloucester Crown Court of wounding and assault occasioning actual bodily harm for which he was sentenced to 2 years' imprisonment and 6 months' imprisonment respectively; those sentences to run consecutively.

3. For convenience, we will refer to the parties as they appeared before the First-tier Tribunal.

The First-tier Tribunal's Decision

4. Before the First-tier Tribunal, the appellant relied upon Article 8 of the ECHR and, in particular, the impact upon his relationships with his two children in the UK (KF and KI) who were 6 and 4 years old respectively at the date of the hearing. Both children are British Citizens.

5. The First-tier Tribunal made a number of findings: the appellant had "generous unsupervised contact" with them; that such contact was "not contrary to the welfare of the children" (see para 39 of the determination); and the appellant's relationships with his children would be "seriously disrupted if he is deported, and we find that that disruption would be harmful to their best interests" (see para 41 of the determination).

6. At para 44, the First-tier Tribunal accepted that Article 8 was engaged in the following terms:

> "44. We find that Article 8 is engaged by this appeal. The appellant has been in the United Kingdom since 2002. He has established family life with his former partner and his children. He has established private life with his friends, who have supported his appeal."

7. Those findings are not challenged but it is perhaps surprising that the First-tier Tribunal found that the appellant continued to have family life with his former partner given that it was accepted that his relationship with her was "now over" (see para 24 of the determination). She was, in fact, the victim of the appellant's second offence, namely that of assault occasioning actual bodily harm.

8. Having found that Article 8 was engaged, in para 45 the First-tier Tribunal went on to find that the decision was disproportionate:

> "because of its effect on the appellant's family and private life."

9. As a consequence, the First-tier Tribunal allowed the appellant's appeal under Article 8.

The Appeal

10. The Secretary of State sought permission to appeal essentially on two grounds. First, the First-tier Tribunal had failed to make adequate findings to demonstrate that there were "exceptional circumstances" which outweighed the public interest. Secondly, relying upon SS (Nigeria) v SSHD [2013] EWCA Civ 550, the First-tier Tribunal, had failed to give adequate consideration to the public interest in deportation when assessing proportionality.

11. On 20 November 2013, the First-tier Tribunal (DJ Manuell) granted the Secretary of State permission to appeal on those grounds.

12. Thus the appeal came before us.

The Submissions

13. In his submissions, Mr Richards relied upon the grounds of appeal. First, he submitted that the First-tier Tribunal had failed to engage in the balancing exercise between the rights of the individual and the public interest. Secondly, Mr Richards submitted that the First-tier Tribunal had erred in law in its assessment of the public interest. In particular, he submitted that the First-tier Tribunal had fallen into that error in para 42 of its determination which was in the following terms:

> "42. We find that the Respondent has over-stated the seriousness of the offences for the purposes of the deportation decision and we do not consider that the Judge's sentencing remarks justify that assessment; the deterrent effect of the deportation decision is over-stated in our judgement, for the same reasons."

14. Mr Richards submitted that this was contrary to the established case law that serious offending invoked as an aspect of the public interest the importance of deterring foreign nationals from committing crimes. Mr Richards relied upon the Court of Appeal decision in OH (Serbia) v SSHD [2009] INLR 109 and the Upper Tribunal's decision in Masih (Deportation – Public Interest – General Principles) Pakistan [2012] UKUT 00046 (IAC). Mr Richards submitted that there was nothing to justify the First-tier Tribunal "downgrading" the seriousness of the offence or the importance of deterrence particularly in an automatic deportation case where the legislative policy was that the deportation of a "foreign criminal" namely someone who had been convicted of an offence for which they were sentenced to a term of imprisonment of at least 12 months was "conducive to the public good". Relying on SS (Nigeria) at [54], he submitted that the First-tier Tribunal had failed to demonstrate in its reasoning that there was a "very strong claim indeed" based upon the impact upon the appellant's family life to outweigh the public interest.

15. Mr Joseph on behalf of the appellant accepted that the First-tier Tribunal had not considered, in terms, whether there were "exceptional circumstances" under para 398 of the Immigration Rules (HC 395 as amended) such as to outweigh the public interest. However, he submitted that that error was not material as the First-tier Tribunal had, in substance, considered the appellant's claim under Article 8. The

First-tier Tribunal had not, therefore, offended against the approach set out by the Court of Appeal in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 at [43]-[44]. Secondly, however, Mr Joseph accepted that he was in some difficulty in relation to paragraph 42 of the First-tier Tribunal's decision. He accepted that the Tribunal had downplayed the seriousness of the appellant's offending, in particular the importance of deterrence.

Discussion

16. At the conclusion of the submissions, we indicated that we were satisfied that the First-tier Tribunal had materially erred in law in allowing the appellant's appeal under Article 8 of the ECHR. We now give our reasons for that decision.

17. There are a number of difficulties with the First-tier Tribunal decision.

18. First, at paragraph 40 of its determination the Tribunal concluded that the appellant:

> "…cannot meet the requirements of paragraph 399(a) of the Immigration Rules."

19. That is undoubtedly correct. As the First-tier Tribunal pointed out in paragraph 40, the appellant could not show, although he had a genuine and subsisting parental relationship with his children who were under the age of 18 and British Citizens, that there was:

> "no other family member who is able to care for the child in the UK".

20. The children are in the care of their mother, the appellant's former partner.

21. Having noted, therefore, that the appellant could not meet the requirements of that rule, the First-tier Tribunal made no reference to the principal Immigration Rule which was engaged as a result of the appellant's proposed deportation. That is para 398 of the Rules which, so far as relevant, is in the following terms:

> "Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> ….
>
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;
>
> ….
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors." (emphasis added)

22. At no point did the First-tier Tribunal direct itself that it was concerned to determine whether there were "exceptional circumstances" such as to outweigh the public interest in deportation represented by the appellant's offending.

23. That might properly be regarded as an error in form rather than substance, if, in fact, the First-tier Tribunal had gone on fully and properly to deal with Article 8 "outside the Rules". That is because, as the Court of Appeal recognised in MF (Nigeria), the provisions in paras 398, 399 and 399A are a "complete code" encompassing, in effect, the balancing exercise involved in proportionality. At [44] of the Court's judgement that is recognised as follows:

> "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 the relevant Article 8 criteria into account….."

24. Consequently, had the First-tier Tribunal taken into account "all the relevant Article 8 criteria", both telling in favour of deportation and resisting deportation, the First-tier Tribunal's failure specifically to consider whether there were "exceptional circumstances" (or as glossed by the Court of Appeal at [76] - "sufficiently compelling" circumstances) then any error by the First-tier Tribunal would not have been material. But it did not do so for the reasons we now give.

25. Secondly, turning to the First-tier Tribunal's assessment of proportionality, we accept Mr Richards' submissions that the First-tier Tribunal failed properly to carry out that exercise. It is established law that the public interest in deportation cases takes on three facets: (1) the risk of reoffending; (2) the need to deter foreign nationals from committing serious crimes by leading them to understand one consequence maybe deportation; and (3) as an expression of society's revulsion of serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crime. Those three facets are set out in the often cited passage in the judgement of Wilson LJ (as he then was) in OH (Serbia) at [15].

26. Those facets of the public interest remain engaged in automatic deportation appeals (see RU (Bangladesh) v SSHD [2011] EWCA Civ 651; Gurung v SSHD [2012] EWCA Civ 62 and AM v SSHD [2012] EWCA Civ 1634). The continuing importance of the public interest in carrying out the balancing exercise required by proportionality and, in particular, the importance of deterrence was noted by Pitchford LJ in AM at [31] as follows:

> "31. While the landscape for qualification for deportation has changed in consequence of the 2007 Act by the creation of 'automatic deportation' of 'foreign criminals', it seems to me …inevitable that in measuring proportionality the public interest in deterrence is a material and necessary consideration. The public interest is an important component of the balancing exercise required to test proportionality (for the purposes of section 33(2)(a)) whether or not the Secretary of State expressly says so in her decision letter or in the Presenting Officer's submissions to a Tribunal. It is an indelible feature of the balancing exercise that the decision maker weighs the consequences of deportation against the full import of the legitimate aim to be achieved."

27. In his concurring judgement in AM, Elias LJ also emphasised at [42]:

> "…the importance of a Tribunal giving full weight to these different aspects of the public interest in the proportionality assessment. "

28. The First-tier Tribunal did consider the public interest. The Tribunal, having cited the guidance set out in the head-note of Masih, recognised that the:

> "deterrent effect of the deportation of foreign criminals is an important consideration in this case."

29. At paragraph 36, the Tribunal noted that the appellant's offences were "serious". At para 36, the First-tier Tribunal noted the Sentencing Judge's comment that the offences were out of character for the appellant, he had no previous convictions for violence and the offences were committed in the context of relationship difficulties which, while not providing an excuse, provided a context for them being "out of character". The Tribunal noted that the Sentencing Judge considered the appellant to present an overall "low" risk of harm which they took to mean that the appellant was not a man of "violent character or propensity".

30. At paragraph 37, the Tribunal accepted that the appellant was genuinely remorseful and, given that his partner had brought their children to visit him 14 times in 12 months in prison, there was evidence that she had forgiven him for his offences. We have already set out para 42 of the Tribunal's determination (above at para 13) where it concluded that the respondent had "over-stated" the seriousness of the offence and the "deterrent effect" of his deportation.

31. Despite the Tribunal reminding itself of the importance of the public interest, in particular the deterrent effect of deportation of foreign criminals in para 42, in our judgment, the Tribunal fell into error in seeking to diminish the importance of the public interest. There was no justification for concluding, in particular, that the offence of malicious wounding with a sentence of imprisonment of 2 years merited anything other than "full weight" in carrying out the balancing exercise required in assessing proportionality.

32. Likewise, it is difficult to see why the "seriousness" of the offence is diminished because of anything said by the Sentencing Judge in his sentencing remarks. The offence occurred in a club against a person whom the appellant thought was having an affair with his partner. The appellant hit the victim with a beer bottle that he had in his hand and, after it smashed on the floor, it would appear that the victim was badly cut by the fragments of glass. In all events, the Tribunal offered no substantive reasons for its conclusion that the "seriousness" of the offence had been overstated by the Secretary of State. It was, of course, not the Secretary of State's view that counted. As this was an automatic deportation, it was Parliament's policy. The Sentencing Judge considered the offence to be serious and, by virtue of the 2007 Act the sentence passed engaged the legislative irrebuttable presumption that the appellant's deportation was in the public interest. In our judgement, in para 42 of its determination, the Tribunal fell into error in its approach.

33. Finally, the Tribunal failed to give adequate reasons for its finding that the appellant's deportation would be disproportionate. It was incumbent upon the Tribunal to give reasons for reaching its conclusion that the public interest was outweighed by the impact upon his relationships with his children. Whilst the Tribunal recognised the seriousness of the appellant's offending and the impact upon his children, its stated conclusion in para 45 that "the decision is disproportionate" is not accompanied by any reasons. At no point did the Tribunal, for example, reason that the impact upon the appellant's relationships with his children gave rise to "compelling circumstances" (see MF) or amounted to a "very strong claim" (see SS). We do not suggest that any particular form of words is required. The phraseology used in the case law is intended only as an indication of the strength of the individual's circumstances that is required to outweigh the public interest in an automatic deportation case. Here, leaving aside what we have already said to be in effect a misdirection as to the weight to be given to the deterrent effect of deportation, the Tribunal set out the pros and cons of deportation and then merely asserted the conclusion that the appellant's deportation is disproportionate. The reader is left uncertain as to why the cons outweighed the pros rather than the pros outweighed the cons. In our judgement in failing to give even a brief explanation of why the Tribunal struck the balance one way rather than another, the Tribunal erred in law.

Decision and Disposal

34. For these reasons, the First-tier Tribunal's decision to allow the appellant's appeal under Article 8 involved the making of an error of law. That decision is set aside.

35. Mr Joseph indicated that the appellant might wish to submit updated evidence concerning his relationship with his two children now that he has been out of prison for sometime. That, of course, is a central issue in the appeal. It was accepted by both representatives that we could not proceed to remake the decision at this hearing. In the light of that, and that additional evidence maybe submitted on the central issue of the appellant's relationship with his children, having regard to para 7.2 of the *Senior President's Practice Statements* we concluded that it was appropriate to remit this appeal to the First-tier Tribunal for a rehearing.

36. Thus, the appeal is remitted to the First-tier Tribunal (other than Judge Trevaskis or Mr M E Olszewski JP) to determine the appeal afresh.

Signed

A Grubb
Judge of the Upper Tribunal

Date: