Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01707/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 March 2014	**On 29th April 2014**

Before

THE HONOURABLE MR JUSTICE PARKER
SITTING AS A DEPUTY JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE ESHUN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LEONARD THAQI

Respondent

Representation:

For the Appellant: Mr J Parkinson, Home Office Presenting Officer
For the Respondent: Mr Bandegani of Counsel

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal comprising Judge Digney and Mrs Holt. The appeal before the First-tier Tribunal was brought by Leonard Thaqi. He was born on 19 January 1985, is a citizen of Kosovo, and he appealed against the decision of the Secretary of State, the respondent, dated 7 August 2013 to make a deportation order under Section 35A of the Immigration Act 1971.

2. The background is set out by the Tribunal in paragraph 3 of the determination and we recite that background for convenience. The appellant claimed to have entered the United Kingdom on 12 September 1999. He was granted exceptional leave to remain until 19 January 2003 and subsequently, after a successful appeal, was granted discretionary leave until 16 May 2008. He subsequently made an application for indefinite leave to remain and that application was outstanding when, on 18 May 2009 he was convicted at Kingston Crown Court of supplying a class A drug and sentenced following a successful appeal to the Court of Appeal Criminal Division to ten months' imprisonment. He was served with a deportation order and a decision to refuse indefinite leave on 16 February 2010. An appeal against that decision was dismissed on 15 September 2010 and a deportation order was signed on 7 October 2010.

3. On 2 January, that constitutes a very substantial period of delay, the appellant was detained on reporting because he was not living at the bail address. Further representations were made and these were treated as an application to revoke the deportation order. An appeal against the decision was made but the appeal was not heard as the decision was withdrawn when it became apparent that the decision of 7 October 2010 was invalid because it purported to be an automatic deportation order.

4. The Tribunal referred at paragraph 8 to the offences. On 11 December 2008 the appellant committed two offences. He was in possession of a class A drug. There was only one deal. The Tribunal said that the appellant's evidence about that matter was not as clear as it might be. In his statement he said nothing about the supply, he simply said that the offence of possession was for his own use and the Tribunal records that that must have been correct. It also recorded at paragraph 8 that the appellant had stolen from meters. It also stated that the appellant had given some explanation of his offending. He said that he was not working on a regular basis.

5. The Tribunal at paragraph 11 referred to a relationship that the appellant had formed with one Anjali Rhodes on 12 July 2012. This appeal before the First-tier Tribunal was heard on 13 November 2013 and it appears that the appellant and Ms Rhodes had been living together since June 2013. Therefore, on any view, it was a relatively short-lived relationship. The appellant produced for the First-tier Tribunal a number of photographs of the appellant and Ms Rhodes but only one predated the start of the relationship. A number of points were made about the relationship to the Tribunal.

6. The Tribunal considered the application of the Immigration Rules to the circumstances of this offence. They directed themselves to Rule 398 of the Immigration Rules, in particular 398C that reads as follows:

> "The deportation of the person from the United Kingdom is conducive to the pubic good because in the view of the Secretary of State their offending has caused serious harm or they are a persistent offender

> who shows a particular disregard for the law. The Secretary of State in assessing that claim will consider whether paragraphs 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."

7. The respondent submitted before the First-tier Tribunal that the appellant's offending, namely the supply of a class A drug, fell within the terms of Rule 398C as an offence that caused serious harm and therefore the respondent maintained that Rule 398C was fully applicable in this case. If then regard was had to Rule 399 and 399A it would appear that the appellant would not have benefited from those provisions and therefore the deportation could only be precluded if there were exceptional circumstances.

8. The Tribunal rejected that interpretation and application of Rule 398C. Today Mr Bandegani of Counsel on behalf of the appellant directed us to the determination **Mohammed Rahim Barr v Secretary of State for the Home Department [2012] UKUT 00196 (IAC)** before the President, Mr Justice Blake and Upper Tribunal Judge Gill. In particular, Mr Bandegani relied upon paragraphs 30 and 32 of that determination for the proposition that it is for the Tribunal on the appeal to determine for itself whether the criteria within the Rule before the Tribunal, in this case Rule 398C, have been satisfied. The Tribunal is not bound in any way by the determination that the Secretary of State has made. The Tribunal must look at the matter and apply its own judgment. That proposition appears to be unchallengeable and the issue simply resolves to whether or not the Tribunal in exercising that undoubted jurisdiction that it enjoyed, did apply the correct legal test under the relevant Rule.

9. The Tribunal appears to have taken the position that because in this case the amount of the supply of the class A drug was small, no more than a single gram, then it could not sensibly be said that the offence had caused serious harm. The Tribunal also supported that conclusion by reference to the lack of any evidence of risk of re-offending by this appellant. The Tribunal said in terms in paragraph 17:

> "It is impossible to say that the supply of about, at most, a gram of cocaine, has caused serious harm. It is also not possible to see the appellant who committed an offence of simple possession and two other offences of stealing from meters as a persistent offender who has shown a particular disregard for the law. It follows that we conclude that the respondent was wrong to rely on paragraph 398C."

10. It should also be remarked that at paragraph 15 the Tribunal attached weight to the length of the sentence. The Tribunal began by saying that the offence was clearly at the lowest level, that the Court of Appeal had reduced the sentence to a figure that meant that the appellant could be released immediately, something that suggested that an even lower sentence would have been passed if the Court were untrammelled by the

time already served. We regard those remarks as highly inappropriate. The Court of Appeal, when it quashes a sentence and substitutes another sentence, substitutes the sentence that the Court of Appeal determines in all the circumstances is the appropriate sentence and is one that is not manifestly excessive. In our judgment, the Tribunal should not have speculated that the Court of Appeal might have passed an even lower sentence in the circumstances that prevailed in this case. Such an observation is likely, among other things, to give rise to an unjustified sense of grievance on those whose sentences have been substituted in these circumstances. The Tribunal must proceed, and must proceed only, on the basis that the ten month sentence that was substituted by the Court of Appeal was a sentence that was not manifestly excessive and was appropriate for the offence that was actually committed. No observations such as those that are found in paragraph 15 in this determination should be made in the future.

11. This approach may have led consciously or unconsciously to colouring the Tribunal's view of the seriousness of the offending by leading the Tribunal to believe that an even lower sentence than the ten months imposed would have been justified in the circumstances of the case. We proceed on the footing that the ten month sentence was the sentence that appropriately measured the gravity of the offending and we note that it was a substantial sentence in any event.

12. Mr Bandegani today has sought to maintain the conclusion of the First-tier Tribunal, namely that it was for the Tribunal to assess the seriousness and their approach in this case was not flawed. We do not accept that argument. It appears to us that the Tribunal has unjustifiably in this case belittled the nature and gravity of the offence that was committed. The supply of class A drugs, whether it is cocaine, heroin or other class A drugs is a very serious matter indeed whether or not the supply is of a very substantial quantity or whether, as in this case, it is a lesser supply. The effect on those who are using drugs is serious, the harm caused by supply of drugs even in the quantities indicated in this case is serious. Those facts are really too well-known to need recitation at length. Therefore we come to the conclusion that the approach in law to the gravity of the offence and to the serious consequences for those to whom drugs, even in small quantities are supplied, is not supportable. The only conclusion open to the Tribunal in the circumstances of this case was that the offending fell within 398C of the Rules. The Rules then required exceptional circumstances.

13. The Tribunal did go on to consider whether, even if it had been wrong in regard to the application of Rule 398C, whether the circumstances were here exceptional. On this aspect we were helped by Mr Bandegani. He has drawn our attention specifically to the observations made in **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192**, (the Master of the Rolls, Lord Justice Davis and Lady Justice Gloster). The Master of the Rolls in his judgment said this at paragraph 42:

> "42. In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, 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 our view, it is no coincidence that the phrase 'exceptional circumstances' is used in the new Rules in the context of weighing the competing factors for and against deportation of foreign criminals. "

Then at paragraph 44 the Master of the Rolls says:

> "44. We would therefore hold that the new Rules are a complete code and that the exceptional circumstanced 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.
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> 45. 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 result 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."

14. The Tribunal purported to deal with the issue of proportionality in paragraph 22. The Tribunal said this:

> "In summary thee is the seriousness of the offences, the risk of re-offending, the time that has passed since the original decision was taken and the delay on the part of the Home Office and the lack of any explanation for that delay since the decision was taken. There is also the question of the appellant's relatively good immigration history which the first Tribunal relied on. Although this is not an automatic deportation we consider that the public interest in removing foreign criminals in the non-technical sense is significant, in that the question of deterrence is always important. In the final reckoning however we conclude that the presumption that we referred to in paragraph 18 above is rebutted, and in the light of all the matters that can be said on both sides of the argument, removal of the appellant would not be proportionate. The decision would therefore not be in accordance with the law."

15. Mr Bandegani submitted today that in paragraph 22 the Tribunal did consider all relevant factors and did not exclude any factors that were

relevant and that the Tribunal came to a decision that was reasonably open to them. Again, we do not accept that submission.

16. Firstly, although the Tribunal does refer to the seriousness of the offences, for the reasons that we have already given we have concluded that the Tribunal in this case simply misinterpreted the seriousness of the offences or perhaps, to put it more appropriately, misappreciated how serious the offence of supply was. That failure to understand the seriousness of the offence vitiated the further analysis that it has undertaken.

17. As to the risk of re-offending, in our judgment that was a matter that could carry very little weight in this context. The appellant had committed a serious offence and, as is clear both from the Rules and on authority, deportation is almost inevitable unless there are compelling factors to the contrary. The risk of re-offending cannot be regarded as compelling.

18. Similarly, the Tribunal refer to delay, but there is no indication in this case that the appellant materially changed his circumstances as a result of the delay that occurred, and we do not accept that any delay in this case could affect the public policy in deporting those who have committed a serious offence. The Tribunal also referred to the relatively good immigration history. However, as Mr Parkinson pointed out, on behalf of the Secretary of State, a relatively good immigration history should be the norm and cannot properly be counted as a factor giving rise to compelling grounds for a decision that would otherwise be taken in the public interest. Furthermore, we do not believe that paragraph 22 gives sufficient weight to the need for deterrence in this area. This is a case in which in our judgment deportation was justified not only by reason of the appellant's own conduct but also by reason of the need to demonstrate that offending of this nature is regarded with revulsion by the public and to indicate to others in a similar position that unless there are compelling reasons deportation will almost inevitably follow where an offence of this gravity has been committed.

19. For those reasons therefore we do not accept that in paragraph 22 the Tribunal has properly examined all the matters that bear upon the issue of proportionality and has not properly weighed a number of the factors to which it has referred. In our judgment, looking objectively at the circumstances of this case, the Tribunal could as a matter of law only have been driven to the conclusion that there were no such compelling reasons. For completeness we refer also to the relationship that, as we have observed, was of a relatively short duration and not such as to give rise to any compelling aspect in this case.

20. Our decision therefore is, for the reasons given, that the First-tier Tribunal did commit an error of law in its misappreciation of the serious harm caused by drug offences of this nature, and that the Tribunal also erred in concluding that there were here exceptional circumstances, namely compelling circumstances that justified the setting aside of the

deportation order. For those reasons the decision of the First-tier Tribunal's determination is set aside and we reinstate and affirm the deportation order that was made in this case by the Secretary of State.

Signed Date

Mr Justice Parker
Sitting as a Deputy Judge of the Upper Tribunal