Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01997/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 June 2014	**On 29 July 2014**

Before

THE HONOURABLE MRS JUSTICE SIMLER
UPPER TRIBUNAL JUDGE CLIVE LANE

Between

BODIE SHABBA SMITH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Kay Mak
For the Respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the respondent Secretary of State against the decision of the First-tier Tribunal comprising Judge Williams and Mr Eames. The Tribunal allowed the appeal of the appellant, Mr Bodie Smith, on Article 8 Convention grounds. Permission to appeal was given by First-tier Tribunal

Judge Lloyd who said that the consideration of Article 8 outside the Immigration Rules was arguably an error of law as the Immigration Rules have been found to be a complete code for deportation by the Court of Appeal in **MF (Nigeria)** and who therefore gave permission for the Secretary of State to raise the three grounds identified in the grounds of appeal as arguable. For convenience, the parties are referred to in this decision as the respondent and the appellant as they were before the First-tier Tribunal.

2. The background can be summarised shortly. The appellant claimed to have entered the UK in April 2000, but on 21 June 2007 was, having pleaded guilty of an offence of possessing a false identity document, sentenced to a term of imprisonment of fourteen months.

3. On 16 January 2008 he was notified by the respondent of a decision to make a deportation order against him. His custodial sentence ended on 20 January 2008 and he was thereafter detained under immigration powers.

4. On 23 January 2008 he claimed asylum but his asylum application was refused by a decision dated 19 April 2008 and his appeal against that decision was dismissed on 14 June 2008.

5. On 8 July 2008 he was released from immigration detention and required to report on a weekly basis to Beckett House and he duly did so.

6. On 13 February 2009 the deportation order against him was signed, but no steps were taken to remove him thereafter. It is significant that he did not, as many do, go underground at that stage but continued to report on a weekly basis.

7. He married a British citizen in the United Kingdom on 5 June 2010 and they had children thereafter of that marriage on 21 August 2010 and a second child in 2012.

8. In January 2011 further representations were submitted to the Home Office raising Article 8 and the appellant's relationship with his wife and at that stage their first child, and an application for further leave to remain on Article 8 grounds was refused on 21 February 2011 due to the fact that a deportation order had already been made.

9. Further representations were made, ultimately resulting in a refusal decision dated 19 September 2013 whereby the respondent refused to revoke the deportation order that had previously been made and it was against that decision to refuse to revoke the deportation order that the appeal to the First-tier Tribunal was made.

10. By its decision the First-tier Tribunal set out the relevant law at paragraphs 45 through to and including paragraph 54. The appeal was based on Article 3 and Article 8 grounds. The Tribunal dealt with the fact that the new Rules encompass the Article 8 and Article 3 considerations and are

now to be seen as the starting point, and the fact that it is only in a case where there is an arguable basis outside the Rules for relying on Article 8 grounds that Article 8 can be considered outside the Rules.

11. The First-tier Tribunal rejected the Article 3 ground of appeal, concluded that the appellant could not succeed under the Rules, but at paragraph 60, having set out the Rules as a starting point made clear that the new approach following the cases of **Nagre** and **Gulshan** in particular was that it would only be if there are arguably good grounds for granting leave to remain outside the new Rules that it would be necessary to consider Article 8 and concluded that in this particular case it was appropriate to do so. Having done that, the Tribunal ultimately concluded that the appeal should be allowed under Article 8 grounds. It did so having weighed a number of factors for and against and having it said expressly reached the conclusion in effect that this was a finely balanced case, but that the balance came down just in favour of the appellant here.

12. There is no challenge to the Tribunal's decision in relation to Article 3 in this case by way of Rule 24 notice, although the prospect of a late application to rely on a Rule 24 notice was raised by Mr Mak on behalf of the appellant. Having further reflected on this argument and the points that he wished to make, Mr Mak withdrew that application. We consider he was right to do is in the circumstances. The appeal by the respondent is therefore based solely on the conclusion in relation to Article 8 reached by the First-tier Tribunal.

13. The new Immigration Rules introduced on 9 July 2012 had the effect of bringing the consideration of Article 8 within the Rules so as to ensure a consistent, fair and transparent approach to the decision making process. The approach to and effect of the new Rules has been considered in a number of cases, including most relevantly for our purposes **Gulshan [2013] UKUT 640**. The new Rules provide better coverage of the factors identified as relevant to the analysis of Article 8 claims than previously so that in many cases the factors relevant to an Article 8 consideration will be addressed by the decision maker. Accordingly, after applying the requirements of the Rules it is only if there may be good arguable grounds for granting leave to remain outside the new Rules that it is necessary to consider the application of Article 8 and whether there are compelling circumstances not sufficiently recognised under the Rules that require consideration outside the Rules.

14. The proper approach for the decision maker is therefore to consider whether an applicant in the circumstances of this particular appellant meets the requirements in the new Rules, in particular Appendix FM and EX.1. addressing family life and related factors, and paragraph 276ADE in relation to private life aspects as a starting point.

15. Where an applicant does not meet the requirements of the Rules it is only as we have indicated where there are exceptional circumstances that mean that refusal of the application would result in unjustifiably harsh

consequences for the individual or their family, such that refusal would not be proportionate under Article 8, that leave outside the Rules can be considered or granted. Exceptional in this context does not mean unusual or unique, but rather that the circumstances in which such a refusal would result in unjustifiably harsh consequences are likely to be very rare.

16. So far as EX.1. is concerned it applies if an applicant has a genuine and subsisting relationship with a partner in the UK who is a British citizen settled in the UK or in the UK with refugee status or humanitarian protection, and that there are, and we quote, "insurmountable obstacles to family life with that partner continuing outside the UK".

17. Following the Court of Appeal's decision in **MF (Nigeria)** it is clear that insurmountable obstacles does not mean obstacles which are literally impossible to surmount, but concerns whether there are practical possibilities of relocation. If there are no insurmountable obstacles to relocation within the meaning of the Rules, then removal will be disproportionate under Article 8 outside the Rules only if there are other non-standard or particular features demonstrating that removal will be unjustifiably harsh for an applicant and his or her family.

18. On this appeal the respondent contends that the First-tier Tribunal's decision was in error of law principally by reference to three particular matters. Firstly, the public interest in favour of deportation in a case of this kind was inadequately recognised and insufficient weight was given to it. Secondly, so far as the question of delay was concerned, this was given too much weight in favour of the appellant whose status was always precarious, who lost his appeal in 2008 and could have left thereafter voluntarily at any time and this was inadequately, it is said, recognised by the First-tier Tribunal with the consequence that the delay was treated as a factor that weighed too significantly in the appellant's favour. Thirdly, the respondent contends that under the heading "Exceptional Circumstances" the Tribunal should have decided whether there were arguably good grounds for considering Article 8 as a preliminary matter, and only if it concluded that there were, gone on to consider Article 8. Mr Avery, on behalf of the respondent, argues that that was not this Tribunal's approach which dealt with it in a one stage way and simply considered Article 8 without having dealt with that threshold consideration. Moreover, having done so, Mr Avery argues on behalf of the respondent that the appellant never had lawful status in this country and that there was a failure properly to consider that, or to address that feature which vitiates the Article 8 evaluation. Although not raised in his oral argument, in writing Mr Avery also contended that there was a failure adequately to address the double aim that is relevant in a deportation case, namely the need to deport foreign criminals to prevent disorder and crime, as well as the maintenance of effective immigration control, and in writing it was submitted that there was a material misdirection in failing to consider the double aim that the appellant's deportation would realise.

19. For the reasons that we will give shortly in a moment, we cannot accept Mr Avery's arguments that there was an error of law in this case. In our judgment this Tribunal directed itself properly in accordance with the new approach to the new Immigration Rules identified in **Nagre** and **Gulshan** and adopted the two stage approach that is required. In particular, at paragraph 52 the Tribunal expressly set out the fact that the starting point was the Rules and that it was only if the Tribunal came to the conclusion that the appellant did not satisfy the Immigration Rules that there would be any scope to consider Article 8. The Tribunal referred to the two stage process in **MF** and to the relevant Immigration Rules which were described in **MF** as a complete code.

20. The Tribunal referred to the fact that paragraph 398 of the Immigration Rules provides that if the specific conditions of paragraph 399 or 399A do not apply in relation to a foreign criminal, in exceptional circumstances the public interest in deportation may be outweighed by other factors, and to the fact that the use of the term "exceptional" in this context was a recognition that very compelling reasons would be needed to outweigh the public interest in deportation.

21. We are accordingly satisfied that the First-tier Tribunal had very much in mind the two stage approach and the need for there to be very compelling circumstances where an individual does not satisfy the requirements in the Immigration Rules for the public interest in deportation to be outweighed by factors relevant to any Article 8 consideration.

22. Having given themselves that direction in law, at paragraph 60 we are satisfied that the Tribunal followed that approach. In fact, the Tribunal made clear that this was one of those rare cases where there were arguably good grounds for a consideration of Article 8 outside the Rules and for a consideration of whether there were compelling circumstances not sufficiently recognised under the Rules that could outweigh the public interest in deportation here. We therefore reject Mr Avery's argument that the Tribunal's approach at paragraph 60 discloses an error of law.

23. Having identified and followed the two stage approach, the Tribunal then made an assessment of the relevant factors by reference to the evidence and the findings of fact in this case.

24. At paragraph 67 the Tribunal found that the only conviction recorded against the appellant was the conviction in June 2007. They accepted that identity offences are serious and did not in any way underestimate the seriousness of the sort of passport offence that the appellant was convicted of here. With those sentiments we agree. Nevertheless, the Tribunal went on to record the fact that this was the only offence this appellant had committed and, whilst it attracted a fourteen month sentence, it was not the most serious offending that one comes across on a daily basis in the Crown Court.

25. Moreover, the appellant was released from immigration detention in July 2008. He had maintained contact with the Home Office, faithfully reporting on a weekly basis to Beckett House ever since July 2008. That was important. It meant that he was in touch with the Home Office and there was no difficulty of his making in relation to deporting him. Moreover, the Tribunal found that the risk of reoffending by this appellant was low to say the least.

26. So far as other factors are concerned, the Tribunal accepted that he had married a British citizen on 5 June 2010, recorded the respondent's concession that this was a genuine and subsisting marriage (that was dealt with at paragraph 64 of the decision), and quite apart from that concession, from the evidence the Tribunal heard they found that this was a strong relationship between the appellant and his wife and a strong family relationship between the parents and their children.

27. The Tribunal had identified at the outset of the decision the fact that the appellant came to the UK in 2000. There is no suggestion that he came here lawfully and it is in our judgment implicitly recognised by this Tribunal that he had no status in this country from the outset. His status was expressly recognised as precarious by the Tribunal at paragraph 72 where the Tribunal said, "We accept that the appellant chose to have children in the United Kingdom when his status was not only uncertain but where he could have been deported at any time." Mr Avery argues that that was not a recognition of his precarious status from the start, but rather a statement in favour of the appellant and a criticism of the respondent Secretary of State. We cannot accept that that is the case. We consider that that sentence, viewed in light of the evidence in the findings that this Tribunal had made, is a recognition that this was an appellant who had no legal status in the UK and who could have been deported at any time following his criminal activity, but whose status was uncertain from the start.

28. The Tribunal having dealt with that point at paragraph 70 also referred expressly to the words of Lord Justice Judge (as he then was) who said that people from foreign countries must realise that one of the consequences of serious crime for foreign nationals is a return to their country of origin. They also accepted that deportation of foreign criminals can express society's condemnation of serious criminal activity and promote public confidence in the treatment of foreign citizens who have committed crimes. In light of their direction in law at paragraph 52 in relation to the double aim of dealing with foreign criminals and the public interest in good immigration control, we consider that this Tribunal did not forget the double aim that is necessary and was, albeit perhaps obliquely referring to that at paragraph 72.

29. Having identified all the factors that were relevant to the balancing exercise that the Tribunal was conducting the Tribunal concluded in this way, we find, having given anxious scrutiny to all the evidence, that there are the compelling circumstances in this case that can just outweigh the

public interest in deportation. In our view that was a decision that was open to this Tribunal on the findings it made and in light of the material considerations and the careful balancing exercise it undertook. In the vast majority of cases where children are left with a carer in the UK, the proportionality assessment is unlikely to outweigh the public interest and the dual aim in deportation of a foreign national person convicted of a criminal offence. Compelling circumstances would indeed be necessary to give rise to disproportionately. Here the Tribunal identified unjustifiably harsh circumstances where this was not the most serious of offending, were there had been delay, certainly since July 2008 coupled with regular weekly reporting, and where there was evidence of a particularly strong relationship between the appellant and his wife and the parents and their children in this case. The Tribunal recognised the public interest and we reject Mr Avery's argument that there was insufficient weight given to that. Mr Avery concedes that the public interest was referred to but argues that it was not engaged with or given real meaning. We cannot accept that in light of the Tribunal's obvious engagement with those issues.

30. So far as delay is concerned, again we cannot accept that this Tribunal gave undue weight to the question of delay. It was a factor, but only a factor in the Tribunal's consideration. Nor in our judgment is there any evidence of delay by the appellant. Delay by the appellant is not referred to in the respondent's refusal letter, nor as Mr Avery frankly accepted, was there evidence regarding a delay by the appellant before the First-tier Tribunal, nor was there any argument or discussion about this. Again, as Mr Avery frankly accepted, in those circumstances we cannot accept his argument that there was undue weight given to delay here or inadequate recognition of delay caused by this appellant, and finally, so far as exceptional circumstances are concerned, we have already indicated that we are satisfied that there was no error of law at paragraph 60, and nor do we accept that there was insufficient weight given to the double aim of controlling the ability of foreign criminals to live here and the prevention of disorder as well as maintaining effective immigration control.

31. As we identified in the course of argument, the respondent relied in writing on the case of **JO (Uganda) v Secretary of State for the Home Department [2010] EWCA Civ 10** where the Court of Appeal said this:-

> "Where the person to be removed is a person unlawfully present in this country who has also committed criminal offences, the decision to remove him may pursue a double aim, namely the prevention of disorder or crime as well as the maintenance of effective immigration control. If that is the case, it should be made clear in the reasons for the decision, since it affects the way in which the criminal offending is factored into the analysis. Where the prevention of disorder or crime is an aim, the person's criminal offending can weigh positively in favour of removal, in the same way as in a deportation case. But if reliance is placed only on effective immigration control, it is difficult to see how the person's criminal offending would relate to that aim or, therefore, count as a factor positively favouring removal. On the other hand, it might still have a significant effect on the proportionality

> balance by reducing the weight to be placed on the person's family or private life: to take an obvious example, where a person has spent long periods in detention, his family ties and social ties are likely to be fewer or weaker than if he has been in the community throughout. Criminal offending can therefore remain relevant even if the maintenance of effective immigration control is the only aim of the removal decision; but careful account must be taken of how it bears on that decision."

32. Despite being pressed on a number of occasions, Mr Avery was unable to identify how the dual aim bore on the decision in this particular case, save to say that the appeal was allowed by a narrow margin so that any slight error in the Tribunal's approach would be material. Given that the appellant's sentence was completed before his marriage and the birth of his children in this case, we cannot see how the maintenance of effective immigration control and the aim of preventing disorder or crime has particular relevance in this case. This is not a case where family and private life ties are likely to be fewer or weaker as a result of the offending and any sentence, and nor is this a case where the appellant is a repeat offender or is a high risk of future offending. Indeed, the Tribunal expressly found that he is at a low risk of offending.

33. In our judgment these were matters that this Tribunal weighed in the balance and recognised, having regard to all the factors in this case, that this was a finely balanced case, but a case in which exceptionally, after anxious scrutiny, this Tribunal found that the compelling circumstances did outweigh the public interest in deportation. In our judgment this Tribunal adopted a correct approach to the law and a correct approach to the balancing exercise it was required to undertake, and we are fully satisfied that there was no error of law such as would entitle us to interfere with it in the circumstances. The appeal is accordingly dismissed.

Signed Date 11 June 2014

Mrs Justice Simler