Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02127/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 April 2014	**On 28 May 2014**
Oral determination given following the hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

KUGANATHAN BALASUBRAMANIAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Halligan, Counsel instructed by Bloomsbury Law Solicitors
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant in this case is a national of Sri Lanka who was born on 25 November 1969. I will briefly summarise his immigration history. He

came to this country on 25 March 2002 using a false passport provided by an agent. He claimed asylum and this claim was refused. He appealed against the refusal of his asylum claim and was issued with temporary release on 23 June 2002 but failed to comply with the reporting conditions. Subsequently on 12 November 2002 his appeal to the Adjudicator was dismissed. His subsequent application for permission to appeal to the Tribunal was rejected and he became appeal rights exhausted on 14 December 2002. Thereafter the appellant did not return home as he ought but remained in this country without leave. Subsequently, on 18 January 2010 (by which time the appellant had apparently managed to remain in this country without leave) his representatives submitted further representation for his asylum claim to be re-assessed in light of objective evidence of changes in the country situation and subsequent case law but also under Article 8 of the ECHR. His representatives also requested that he be granted indefinite leave to remain under the legacy casework programme. On 13 August 2010 the appellant's application was considered under the legacy project and he was granted indefinite leave to remain outside the Immigration Rules. He was granted a no time limit stamp although it is common ground (as set out in the skeleton argument produced before the panel of the First-tier Tribunal to which reference will be made below) that it was stated in the letter granting him indefinite leave to remain that any criminal activity would be a ground for withdrawal of this leave.

2. On 19 November 2013 at Peterborough Crown Court the appellant was convicted of dishonestly conspiring to make false representations in order to make gain for himself or another or cause loss or expose others to risk. Although I have not seen the sentencing remarks it appears that the criminal activity of which he was convicted involved a scheme whereby others would take driving tests for people who would then obtain driving licences to which they were not entitled. The circumstances of the offending are set out in the decision letter sent by the respondent to the appellant on 16 October 2013 in which the respondent stated that as a result of the appellant's conviction at Peterborough Crown Court for which he had been sentenced to fourteen months' imprisonment, he was subject to automatic deportation pursuant to Section 32(5) of the UK Borders Act 2007. In this decision letter it is stated that the offence of which the appellant had been convicted was that "between 17 December 2008 and 26 March 2010, you were involved in a conspiracy to take driving tests in the United Kingdom in the identities of others so that those others (your co-defendants) were able, or would have been able, to obtain UK driving licences without passing the UK driving test."

3. The appellant appealed against this decision and his appeal was heard before a panel of the First-tier Tribunal consisting of First-tier Tribunal Judge P J M Hollingworth and Mr G H Getlevog, lay member, sitting at Nottingham Magistrates' Court on 3 February 2014. In a determination promulgated on 14 February 2014 the panel dismissed the appellant's appeal. It is fair to record that, in the words of Mr Deller who appeared before me "the First-tier Tribunal determination did not deal with the

merits in any great degree and did not mention by name the post 9 July 2012 Immigration Rules and only has the barest regard to the case law which has ensured". It is a feature of this determination that it does not even mention that the appellant's presence in this country between 2002 and 2010 was entirely unlawful.

4. The appellant has appealed against this decision on the basis that the decision to remove him was "disproportionate". It is argued in the grounds that the First-tier Tribunal had failed to give proper reasons as to "why/whether it had been demonstrated that it was necessary in the interests of a democratic society to deport the appellant (i.e. the proportionality question)". It is said further that the First-tier Tribunal panel failed to attach appropriate weight to its finding that there was a low risk of re-offending.

5. Permission to appeal was, perhaps surprisingly given the circumstances of this case, granted by First-tier Tribunal Judge Warren L Grant on 14 March 2014. Judge Grant, when setting out his reasons for granting permission, stating that "the grounds of application assert correctly that in deciding that deportation was proportionate the panel failed to consider the issue in respect of which they considered deportation to be proportionate".

The Hearing

6. For reasons which have not been explained the appellant did not attend the hearing before this Tribunal although he was represented by Counsel, Mr Halligan. I heard submissions on his behalf and I also heard submissions on behalf of the respondent. I recorded these submissions contemporaneously and as they are contained within my Record of Proceedings I do not intend to set out below, word for word, what was said before me, but shall set out only such of the submissions as are necessary for the purposes of this determination. I have, however, had regard to everything which was said to me in the course of the hearing as well as to all the documents contained within the file before reaching my decision.

7. I was provided with statements from the appellant's wife and children and also a letter from the appellant himself. These statements are in a case of this nature unusual because the appellant's wife (described in her statement as "legal wife") and his children are all living in Sri Lanka and so rather than saying that they want their husband and father to continue living with them in order for family life to be continued (as is normally the case where removal is being resisted) they say the opposite which is that they want their husband and father to continue living apart from them. I will set out their reasons briefly in a moment. The letter from the appellant himself states that he has "a family which includes a wife, two children and a mother who depends on me with everything" and that they were suffering from a fault he committed before in his country but that he

has “learnt from his mistake.” He says that “if you decide to send me back to my country then my life and my family will be shattered both mentally and physically”. Again, it is unusual in a case where an applicant is seeking to resist removal for an argument to be made that the life of that applicant’s family will be “shattered” in circumstances where he will be reunited with them. The reason apparently is contained in the next sentence when he says that “I won’t be able to face society in my country if I [am] labelled as a criminal”. He then goes on to add that “more than me, my children’s life will be questionable. This is because, they will be named as criminal’s children and the society will be against them and will bully them to the extreme they will eventually stop continuing their education”. He invites this Tribunal to “consider my children’s future and my future and make a very generous decision”.

8. The letter from the appellant’s wife just refers to their children’s education and says that if the appellant has to come back to Sri Lanka “I will have to suffer a lot” and also that “my husband’s coming to Sri Lanka my children will spoil all their life in future”.

9. The letters from the appellant’s two daughters are almost identical and are written it would appear in identical handwriting even to the extent of having a similar gap in the word “faithfully” between “faith” and “fully”. Essentially they are both saying that they would be embarrassed by their father’s return to the extent that people would ask questions about him at their school and they would find it hard to face their friends. It is not suggested in the grounds that the appellant has any family life in this country and nor has any argument been advanced on the basis of any private life he might have. The highest that his case can or has been put is that in Sri Lanka people tend to disapprove of criminals and perhaps the family can benefit from the money that the appellant would be able to go on sending were he to be allowed to remain.

Discussion

10. As I observed during the course of the hearing when expressing my provisional views this appeal would seem to have absolutely no merit whatsoever. This is an automatic deportation case and I should for the sake of completeness set out the relevant provisions of the UK Borders Act 2007 as follows:

> “*Deportation of Criminals*
>
> **32. Automatic Deportation**
>
> (1) In this section “foreign criminal” means a person –
>
> (a) who is not a British citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom condition (1) or (2) applies.

(2) Condition (1) is that the person is sentenced to a period of imprisonment of at least twelve months.

(3) Condition (2) is that –

(a) the offence is specified by order of the Secretary of State under Section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (serious criminal), and

(b) a person is sentenced to a period of imprisonment.

(4) For the purpose of Section 3(5)(a) of the Immigration Act 2971, the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to Section 33).

(6) The Secretary of State may not revoke a deportation order made in accordance with sub-Section (5) unless.... [this is not relevant for the purposes of this determination]...

33. Exceptions

(1) Section 32(4) and (5) –

(a) do not apply where an exception in this section applies (subject to sub-Section (7) below)...

(2) Exception (1) is where removal of the foreign criminal in pursuance of the deportation order will breach:

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention.

(3) Exception (2) is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction...

(7) The application of an exception –

(a) does not prevent the making of a deportation order;

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good; but Section 32(4) applies despite the application of exception (1) or (4).”

11. There is no question and it is not and cannot be suggested but that this appellant falls within the definition of a “foreign criminal” as set out within Section 32(1) of the 2007 Act. Accordingly, subject to the exceptions set out within Section 33 by Section 32(5) the Secretary of State **must** [my emphasis] make a deportation order in respect of him. It is also the case that by virtue of Section 32(4) his deportation is conducive to the public good. That as will be discussed briefly below is a relevant factor when considering whether or not his deportation is proportionate.

12. It is submitted on behalf of the appellant that because his deportation would be in breach of his article 8 rights, the exception set out at section 33(2)(a) of the 2007 Act applies. The position as regards the circumstances in which this exception will apply in deportation cases has been considered by the respondent and amendments were made to the Immigration Rules in an attempt to set out the circumstances in which a deportation order might properly not be made because of Article 8 considerations. The relevant paragraphs of the Rules which came into force on 9 July 2012 (which as noted by Mr Deller were regrettably not referred to within the panel’s determination) are paragraphs 398, 399 and 399A, which provide as follows:

“398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) 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 at least 4 years;

(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; or

(c) the deportation of the person from the UK is conducive to the public 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 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.

399. [This paragraph is not applicable in the circumstances of this appellant]...

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK....".

13. It was made clear by the Court of Appeal in *MF (Nigeria)* [2013] EWCA Civ 1192 that a Tribunal must first consider whether or not in the case of a deportation order an applicant is entitled to claim that his removal would be disproportionate under Article 8 by reason of the matters set out within these paragraphs, but that where it would not be, further consideration can be given to whether removal could be said still to be disproportionate outside these specific provisions. In this case the appellant has not lived continuously in the UK for twenty years immediately preceding the date of the decision and nor can it be said that he has no ties with Sri Lanka; indeed the evidence is that he has substantial ties in that country because that is where his wife and daughters live, albeit they would prefer that he did not return to them. So following the decision in *MF (Nigeria)* the Tribunal should consider whether or not even outside the provisions contained within these specific paragraphs it could still be said that removal was disproportionate. To this extent the current jurisprudence remains valid and the use of the words "exceptional circumstances" within paragraph 398(c) is not meant to impose any test of exceptionality but rather to be predictive such that those occasions where a person who does not come within any of the exceptions set out within paragraph 399 or 399A will nonetheless be able to argue successfully that his removal would still be disproportionate would be the exception. It is in light of this guidance that this appeal has to be considered.

14. I also have in mind the observations of the Court of Appeal in *MF (Nigeria)* (at paragraph 43) that in order for an argument under Article 8 to succeed in these circumstances, an applicant would need to show "very compelling" reasons. What the court in that case had in mind was very strong family ties within this country.

15. The circumstances in this case cannot be said in any way to be compelling nor could they by any stretch of the imagination be said to be exceptional. This appellant had no right to be in this country at all after his appeal against the refusal of asylum was dismissed. That he remained for a number of years does not reflect any credit on him. He was very fortunate indeed to be granted leave to remain under the legacy policy because this leave was given not because individually he had any proper basis for being here but because the backlog of claims was so enormous

that the respondent considered that for administrative reasons it was more efficacious to grant some applicants leave generally rather than give further individual consideration to their specific claims. It was however made clear to this appellant when he was granted indefinite leave to remain that this leave could be revoked in the event of a criminal conviction. No evidence regarding private life was put before the Tribunal and it has not been suggested that his deportation would be disproportionate because of any particular ties he has in this country; nor can it be credibly suggested that he has any family life in this country. Indeed the evidence is that all of his close family (that is his wife and children) are in Sri Lanka. I do not consider it even remotely arguable that to return this appellant to the country where his wife and children live would engage his Article 8 rights because it would stop him sending money back to them or because his family would be better off without him, as they appear to be arguing.

16. In these circumstances, even though it is regrettable that the First-tier Tribunal did not make its decision in a more structured manner and it would have been preferable as Mr Deller accepted if the relevant law had been at least referred to, nonetheless the decision which it made cannot be impeached. This appeal could not possibly have succeeded before any Tribunal and although the structure of the determination might be open to challenge, nonetheless the panel did have in mind the merits of the appellant's claim or rather in the circumstances of this case its lack of merits. In these circumstances I find that there was no material error of law in the determination of the First-tier Tribunal such that this decision needs to be re-made and I will so find. For the sake of completeness I will just add that had I felt the need to set aside the determination I would have had no hesitation at all in re-making the decision by again dismissing the appellant's appeal.

Decision

There being no material error of law in the determination of the First-tier Tribunal this appeal is dismissed.

Signed: Date: 27 May 2014

Upper Tribunal Judge Craig