Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02236/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 July 2014	**On 24th July 2014**

Before

The Hon Mr Justice Lewis
Upper Tribunal Judge Southern

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MC

Respondent

Representation:

For the Appellant: Mr T. Wilding, Senior Home Office Presenting Officer instructed
For the Respondent: Ms S. Lloyd, counsel instructed by Debridge solicitors

DETERMINATION AND REASONS

1. The Secretary of State, who was the respondent before the First-tier Tribunal, has been granted permission to appeal against the decision of First-tier Tribunal Judge Colvin, sitting with a non-legal member of that tribunal. The panel, by a determination promulgated on 12 May 2014, allowed the respondent's appeal against a deportation order made by the

Secretary of State ("SSHD") pursuant to s32 of the UK Borders Act 2007 as a consequence of the respondent's conviction before the Guildford Crown Court on 15 February 2013 of two offences of possessing a controlled drug of Class A with intent to supply. For those offences he was sentenced to 30 months imprisonment for each, to be served concurrently. He has now served that sentence and was released from immigration detention, on bail, on 13 March 2014, having been held continuously in detention since his arrest on 1 November 2012.

2. An anonymity order has been made by the First-tier Tribunal and, there having been no application by either party to vary that order, it remains in place. Therefore, we shall refer to the respondent as MC.

3. MC, who was born on 12 December 1970, is a citizen of Jamaica. He arrived in the United Kingdom on 7 September 2000 and was admitted as a visitor for just 6 months. He overstayed that leave and has remained here ever since without any further leave to remain having been granted.

4. On 30 October 2001 he made an asylum claim which was refused. MC appealed against the removal decision that was made subsequently as a consequence but that appeal was dismissed on 12 August 2002, MC not being found to be credible in his account of being at risk on return to Jamaica as a result of having witnessed a gang related murder.

5. He renewed that application for international protection in 2010, submitting an application under the Legacy arrangements but that claim was rejected also in December 2010.

6. MC's case before the First-tier Tribunal was founded upon a claim advanced under article 8 of the ECHR on the basis that as he had established family life with his partner, Ms H, and her son who was 4 years old at the date of the decision to make a deportation order, his removal would bring about an interference with rights protected by article 8 and that, as it was in the best interests of the child that he remained in the United Kingdom as part of the family unit, that interference would be disproportionate to the lawful and legitimate aims being pursued in seeking his removal, notwithstanding the serious nature of the offences committed.

7. The First-tier Tribunal allowed the appeal on the basis that, although MC could not meet the requirements of the applicable immigration rules, the SSHD was wrong to find that there were not exceptional circumstances such that the public interest in deportation was outweighed.

8. As the challenge to the determination of the Fist-tier Tribunal now pursued by the SSHD is on the basis that the judge erred in her approach to the assessment of the article 8 claim, it is helpful to set out the legal framework in some detail and to examine how it should be applied.

9. Sections 32 and 33 of the UK Borders Act 2007 provide, so far as material:

> "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 12 months.
>
> ...
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), 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). ...'
>
> 33. *Exceptions*
>
> (1) Section 32(4) and (5)—
>
> (a) do not apply where an exception in this section applies (subject to subsection (7) below), and
>
> ...
>
> (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—
>
> (a) a person's Convention rights, or
>
> (b) the United Kingdom's obligations under the Refugee Convention."

10. The relevant Immigration Rules are, so far as relevant, as follows:

> 362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 9 July 2012 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.
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> ...
>
> 396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

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 applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would not be reasonable to expect the child to leave the UK; and

(b) there is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

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; or

(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK 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.

399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted."

11. Article 8 of the ECHR provides:

"**Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

12. Thus, as MC is a foreign criminal, as defined by s 32(1) of the UK Borders Act 2007, his deportation is, by virtue of s 32(4) of the Act, conducive to the public good and the SSHD must make a deportation order because of the mandatory requirement of s 32(5) unless one of the exceptions set out in s.33 apply. The exception relied upon by MC is his claim that deportation would result in an infringement of rights protected by Article 8 of the ECHR, because it would involve him being separated from his partner and her son, as they would remain in the United Kingdom and not accompany him to Jamaica to carry on family life together there.

13. In those circumstances the focus is upon the immigration rules that set out how such claims are to be assessed. Those rules provide a structured approach to assessment of the claim. First, the presumption is that deportation is in the public interest unless one of the exceptions applies, including in particular that removal would be contrary to obligations in the Refugee Convention or the European Convention on Human Rights. Secondly, where the claim is that removal would be contrary to Article 8 ECHR, and if the circumstances fall within para. 398, the SSHD considers whether paras 399 or 399A apply. Thirdly, if those paras. do not apply, the SSHD will go on to examine what has been advanced on behalf of the claimant to see if, notwithstanding that the claim does not fall within paragraphs 399 or 399A, there are compelling circumstances such that the pressing public interest in ensuring that

foreign criminals are deported should yield to those particular circumstances of the case. The compelling circumstances constitute the exceptional circumstances that may outweigh the public interest in deportation. This is approach is confirmed by the decision of the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192 at paras. 42 to 44. This is also consistent with the approach repeatedly confirmed by Strasbourg jurisprudence.

14. Although the SSHD accepted that MC had a genuine and subsisting parental relationship with the child of his partner, and that the child was a British citizen, the claim did not fall within para 399 because there was, of course, another family member – his mother - who was able to care for him in the United Kingdom, as she had done during his period of imprisonment. Thus, the issue at the heart of this appeal was whether MC's claim disclosed the exceptional circumstances demanded by para 398 as well as domestic and European law such as to outweigh the public interest in deporting foreign criminals. In the decision letter, the SSHD carried out a meticulous examination of everything advanced on MC's behalf and explained why it was not accepted that any such exceptional circumstances had been established.

15. It is important that the vocabulary used in the rules of "exceptional circumstances" is understood correctly, as was explained by the Court of Appeal in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192:

> "43. The word "exceptional is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".
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> "44..... the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence..."

In reaching that conclusion, and in expressing agreement with the approach identified by Sales J in *R* (*Nagre) v SSHD* [2013] EWHC 720 (Admin), the Court of Appeal made clear that, particularly in respect of "precarious" family life cases, those being where the family life was established where there was no leave to remain as is the case with MC, although not just in those circumstances:

> "...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."

16. It follows from this that the assessment of the article 8 claim, when carried out correctly under the rules, is a complete assessment of the

claim. Where the particular circumstances relied upon by the applicant are not accommodated within the provisions of paragraphs 399 or 399A of the rules, the search required to be carried out by para 398 for compelling circumstances such as to render the proposed deportation disproportionate and so contrary to rights protected by article 8 should be sufficient.

17. In approaching the article 8 claim in that way, it can be seen that the starting point is a statutory presumption that the public interest requires the deportation of a foreign criminal and that the assessment of the claim is to be informed by the SSHD's view of where the public interest lies, as set out in the immigration rules and the requirement of primary legislation that the SSHD *must* make a deportation order in respect of a foreign criminal unless a statutory exception applies.

18. The task of a judge determining an appeal against the making of a deportation order is not to substitute his or her own view of where the public interests lies or of what is capable of amounting to an exception to the mandatory obligation upon the SSHD to make a deportation order. The role of the judge is to ensure that the decision is one that is lawful and made in accordance with the immigration rules. That means that all material considerations have properly been taken into account and, if the particular claim discloses circumstances of a compelling nature that are not accommodated for by consideration within the rules and have not been taken into account by the SSHD, to strike a balance between the competing interests in play. In striking that balance, the judge must bear in mind that the scales do not begin set at a level. The starting point is that the public interest requires the deportation of a foreign criminal. That is why something very compelling is required.

19. In her determination, Judge Colvin set out the immigration history and summarised the case advanced before her by MC. He said that at the time of committing the offences of possession Class A drugs with intent to supply, actions for which he was now "incredibly ashamed", he was living with his partner and her son. He became involved in the supplying of controlled drugs because he needed to raise money to fund legal services in relation to regularising his immigration status. He was determined not to reoffend in the future. He accepted his punishment and was a model prisoner. He was a practicing Christian and hoped to be able to marry his partner. He had lost contact with his relatives in Jamaica.

20. The judge set out a summary of the oral evidence concerning MC's relationships with his partner and her son. They had been in a relationship since 2010. He had developed a close relationship with the child who treated him as if he were his father. He played a full parental role in respect of the child. Both the child and his partner would "face a lot of turmoil and upheaval" if he were deported to Jamaica. MC's partner said that her son would be devastated. Financial constraints would mean

that visits to Jamaica could probably only take place every two years or so. Another witness, who is the partner's sister, gave oral evidence to the effect that MC was not the type of person to involve himself in drugs offences and his removal to Jamaica would be a big set back for the child.

21. The judge then considered the case of the SSHD. She noted that the sentencing remarks of the Crown Court Judge illustrated that the offences committed by MC were serious ones, as is reflected in the sentence of 30 months. The SSHD accepted that MC was in a genuine and subsisting relationship with his partner's son, to whom the judge incorrectly referred as MC's "step-son", and that there were insurmountable obstacles preventing family life being maintained in Jamaica with both MC's partner and her child, but noted that contact could be maintained by occasional visits and other means of communications. As for MC's private life, the SSHD noted that MC had not lived in the United Kingdom for 20 years and that for most of the time spent in this country he was unlawfully present. Nor, in the context of his relationship with his partner, had be been present for 15 years. He had family members in Jamaica and so there were no exceptional circumstances such as to outweigh the public interest in deportation.

22. At paragraph 30 of her determination the judge said this:

> "It is accepted on the evidence that the appellant has difficulties in meeting all the requirements under the immigration rules even though it is accepted by all parties that he has a genuine and sustainable relationship both with his partner and G, his step-son. It means that essentially we must determine the appeal under Article 8 more generally when applying the test of exceptional circumstances."

That is a wholly incorrect approach which in itself discloses legal error such as to render the judge's decision unsustainable. It is not the case that MC had difficulty in meeting the rules. The position was that he did not do so. The judge appears to be applying a "near miss" principle that is legally incorrect. MC did not fall within paragraph 399. That was because there was another family member able to continue to care for the child – the child's mother. He had not lived in the United Kingdom with valid leave for 15 years preceding the decision. His relationship with the partner and her child had been taken fully into account by the SSHD, both in considering whether MC fell within 399 or 399A and in looking to see if his claim disclosed any exceptional circumstances. The fact that MC failed to succeed under the rules was not, as the judge thought, a reason to carry out her own assessment of the very same circumstances, unfettered by the considerations of the SSHD's view of the public interests arguments set out within the rules.

23. The judge went on to identify the following factors that she considered to speak in MC's favour:

    a. His length or residence in the United Kingdom;

b. The fact that he has a genuine and subsisting relationship with his partner and her son that could not be continued after deportation as they would remain in this country;
c. That MC had no "pattern or history of offending" and the commission of these offences was "an aberration probably caused by the family's lack of finances" and that the offending was "out of character";
d. He represented a low risk of reoffending;
e. The judge considered that there was "little doubt" that the best interests of the child is to maintain a close relationship with MC, again incorrectly referred to as the child's step-father.

24. That led the judge to conclude as follows:

> "The question therefore is whether there are countervailing matters that outweigh these best interests of the child... Clearly, the serious nature of the drug offences in which the appellant was involved and for which the statutory presumption means that he should be deported in the wider public interest especially as a deterrent factor – factors that are to be given significant weight. We have set out our views on this above. The assessment of proportionality does not condone or lessen the seriousness of these offences and the need to show deterrence. We have, however, come to the view that the offences were uncharacteristic for the appellant and there is a low risk that anything like this will happen again. We also find that he is truly remorseful.
>
> We have reached the conclusion after careful deliberation that it would be disproportionate to deport the appellant in this case. We would not wish to repeat all the matters set out above that have informed this decision but, suffice to say, that it is the appellant's length of time in the UK, his overall behaviour of being a committed family man and the long-term welfare interests of his step-son that tip the balance in his favour of being allowed to remain in the UK..."

25. There are a number of difficulties with that conclusion and the route taken to arrive at it.

26. First, the reasoning at the heart of the decision is, with respect, simply misconceived. Each factor identified above by the judge had been specifically and carefully taken into account by the SSHD in the refusal letter, clear cogent and frankly unassailable reasons given to demonstrate that, even taken together they could not outweigh the public interest in the deportation of this particular foreign criminal. Therefore, what the judge has done is to simply disregard the structured approach of the rules and to repeat the exercise of balancing the public interest arguments with MC's article 8 claim but without having regard to the SSHD's views upon where the public interest lie, as set out clearly in the requirements of paragraphs 399 and 399A.

27. In particular, the reliance placed by the judge upon the fact that MC had no prior history of offending and that he represented a low risk of reoffending discloses a significant misunderstanding of the legal framework. MC is someone whose deportation is conducive to the public good because he is a foreign criminal in respect of whom the SSHD must

make a deportation order unless an exception applies, which the SSHD found it did not. The fact that he had not offended before then or that he is said to represent a low risk of further offending does not in any way at all reduce the importance or cogency of the public interest in his deportation. He faced deportation because of the offences that he committed and not because those offences were part of a series of offences previously committed or possibly to be committed in the future. He does not cease to be a foreign criminal because there is no reason to believe that he will reoffend in future.

28. Similarly, full account had been taken by the SSHD upon the effects upon both the partner and the child of being separated from MC, as is illustrated by the focus in the rules upon whether there was a family member available to care for a child with whom the applicant as a genuine and subsisting relationship. It is implicit in the rules themselves that the consequence of severing such relationships is factored into the assessment.

29. In any event, the summary provided by the judge, which must be taken to be her understanding of the position, of the respondent's reasons for rejecting MC's claim that there were exceptional circumstances such as to found an exception to the mandatory making of a deportation order is wholly inadequate. In considering the claim under paragraphs 399 and 399A the SSHD took into account her duty under s. 55 of the Borders, Citizenship and Immigration Act 2009, noted that the child's mother cared for the child while MC was in prison, that the child would find separation emotionally difficult; and that the relationship with both the partner and her child was commenced at a time when MC had no leave to remain.

30. The SSHD considered at length in the decision letter whether there were any exceptional circumstances such as to outweigh the public interest in deportation. That detailed analysis of all that MC had to say included this, having made clear that the legitimate aims being pursued were not just the prevention of crime but also the maintenance of effective immigration control:

> "It is acknowledged that [the child] may find the separation from you difficult, but at 4 years of age and having already been separated from you while your were incarcerated, it is asserted that the emotional impact, particularly with the support of his mother, would be minimal; this is not considered to outweigh the public interest in seeing you deported…
>
> It is also acknowledged that your partner… may find separation from you difficult, but it is considered that she has coped while you are serving your custodial sentence and she will continue to cope if you are deported…"

31. The SSHD also considered the other material now relied upon, including letters of support by others known to MC.

32. Ms Lloyd, who appeared for MC, was invited more than once during the course of her submissions to identify anything that the judge relied upon in reaching a different conclusion in her assessment outside the rules that had not already been fully considered by the SSHD in carrying out the assessment within the rules but she was unable to do so. It was an error of law for the judge to set aside the assessment of the SSHD under the rules and to determine the appeal upon the basis of her own assessment based upon precisely the same considerations but not informed by the requirements of the immigration rules when all of those considerations were matters fully accommodated by the provisions of the rules. The judge erred also in considering to be exceptional circumstances which were not in any way at all exceptional and all of which had already been taken into account by the SSHD. It is impossible to identify any aspect of MC's relationship with his partner and her son which would not be expected to be present in any such "family group".

33. For those reasons we set aside the decision to allow the appeal and will remake the decision.

34. Ms Lloyd advanced submissions on MC's behalf, effectively repeating the case put before the First-tier Tribunal. There is no need for us to repeat those submissions because they are all considered in detail above. We have looked also at the statements and other documentary material put before the First-tier Tribunal, including the OASys report that indicates a very low risk of reoffending and the witness statements an letters of support.

35. However, nothing advanced on MC's behalf comes anywhere close to outweighing the public interest in his deportation as a foreign criminal. The offences committed by him were very serious indeed. Although he had no previous convictions and pleaded guilty, receiving full credit for that in the sentencing exercise, he was still sentenced to a substantial term of imprisonment, That is, though, entirely unsurprising as he was found in possessing of 100 wraps of crack cocaine. That the weight of the public interest considerations was very substantial indeed is reflected in the decision letter in which the SSHD said this:

> "In September 2007 at the Bournemouth Labour Party Conference the Prime Minister made a commitment that those foreign nationals involved in gun crime or the production, importation and supply of drugs would not be allowed to remain in the United Kingdom…By the very nature of your offence you preyed on the vulnerability of those who have an addiction to these drugs and had no regard for the impact these drugs have on the fundamental interests in society. The Prime Minister and the Secretary of State remain committed to reducing the levels of crime related to the use and sale of drugs which by their very nature have a disproportionate effect on society as a whole…"

36. Drawing all of this together we reach the following conclusions. Not only is MC a foreign criminal in respect of whom there is a strong public interest in his deportation, but the offences he committed were particularly serious ones, both in terms of the nature and the scale of the

offending. He has only ever been given a short period of leave to be present in the United Kingdom. He overstayed that leave so that for most of the time he has been here he has been either unlawfully present or detained in prison. He formed the relationships upon which he now seeks to rely while present without leave. He does not fall within paragraphs 399 or 399A of the immigration rules, for the reasons given above and his claim discloses nothing at all that can properly be regarded as amounting to a compelling or exceptional reason for concluding that his wish, and that of his partner and her son, to remain together in the United Kingdom should outweigh the public interest in his removal. Even accepting that the best interest of the child would be served by him continuing to have MC present as part of the family group and recognising that is a paramount consideration, it is not the paramount consideration and does not prevail in this case.

37. For these reasons MC's appeal against the deportation order will be dismissed.

Conclusions:

The First-tier Tribunal made an error of law and the determination is set aside.

We re-make the decision in the appeal by substituting a fresh decision to dismiss the appeal.

Signed

Date: 22 July 2014

Upper Tribunal Judge Southern