Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/02296/2013

THE IMMIGRATION ACTS

Heard at Newport	**Promulgated on**
3 October 2014	**19 November 2014**

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AM
(Anonymity direction made)

Respondent

Representation:
For the Appellant: Ms C Grubb, instructed by Hoole & Co. Solicitors
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the determination of the First-tier Tribunal, Judge Britton and MJ Griffiths JP DL sitting as a panel, made following a hearing on 7 March 2014, and promulgated on 21 March 2014, in which they allowed the appellant's appeal against deportation on the basis that he established that he fell within an exception to the automatic deportation provisions set out at s.32(5) of the UK Borders Act

2007. The basis of the decision is that the appellant is essential to the care of the British children that he has fathered with a British partner.

2. The grounds of appeal assert that in reaching that conclusion the tribunal has failed to take into account the Immigration Rules and the requirement for exceptional circumstances to be identified. The grounds also take issue with the conclusion on the basis that the evidence before the tribunal did not sustain the conclusion because it was stale. The grounds refer to the evidence of the appellant originating in 2012 i.e. some two years prior to the hearing.

3. The difficulty with the grounds is that, first of all, they fail to recognise that the relevant test was that set out in The Immigration Rules Statement of Changes in HC 395. HC395 as amended, at 398B as opposed to 398A. It is 398A which requires exceptional circumstances, and that rule applies following a period of imprisonment of more than four years. This was a case where the appellant had been convicted and sentenced to a lesser term of imprisonment, so that the appellant was within 398B; the circumstances then fall to be assessed in the context of 399A and 399D. The tribunal were required, and did make findings in respect of available care in the United Kingdom for the British children, and their finding, that there was a lack of alternative available care, resulted in a positive outcome. In those circumstances, there is no requirement for "exceptional circumstances" to be identified beyond those matters set out at para 399A, and these grounds are simply wrong in asserting that there is an error in the decision making framework.

4. The remainder of the grounds at para 4 amount to a dispute as to facts; the assertion that there was no evidence later than 2012 before the First-tier Tribunal so as to be able to properly sustain the findings made in respect of 399A is simply not born out when we looked at the evidence before the tribunal. In the appellant's bundle there was evidence from the children's school, as well as from the family's medical practitioner, and from probation. It all speaks to the benefit that the appellant's presence in the United Kingdom provides to the children, and it is evidence of specific improvement in their position since his relatively recent release from custody, i.e. it covers the up to date position.

5. The grounds which at 5 through to 12 refer to errors in an article 8 balancing exercise. Whilst the tribunal has set out the matters that had persuaded them that the best interests of the children require the appellant's continued presence in the United Kingdom, and set out their reasons for concluding that in any event the circumstances were exceptional so that an article 8 consideration would have brought the balance down in his favour. In light of the clear findings under 399A the point is however otiose and incapable of founding an error of law.

6. Mr Richards submitted before us that the panel had failed to appreciate that the appellant's deportation is conducive, in terms of the public

interest with regard to s.32(4) of the 2007 Act. In that regard, we note the tribunal's considerations at para 36, 38 and 40, in which they plainly set out both the seriousness of the appellant's offending in the context of his last conviction, as well as his history of offending, and we find it is plain that they balance the significant weight they attached to the public interest with the position of the children. In doing so, the panel recognised that the respondent had accepted that the British children could not be reasonably required to leave the Untied Kingdom. Under paragraph 40, the tribunal conclude, taking into the account of all the evidence, that the way the appellant looks after the children and the genuine remorse he has shown, outweighs the public interest in his deportation.

7. We conclude by saying that the tribunal plainly found the case to be an exceptional one. The conclusion is sustainable on the evidence and so not perverse. We conclude that the decision of the First-tier Tribunal reveals no material error of law requiring it to be set aside, so that the decision allowing the appellant's appeal against deportation stands.

Deputy Upper Tribunal Judge Davidge

IMMIGRATION AND ASYLUM CHAMBER
Date: 11 November 2014