Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17533/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 February 2014	**On 12 February 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KWAKU AMPONSAH
(No Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr P Deller a Senior Home Office Presenting Officer
For the Respondent: Mr T Bobb a solicitor from Aylish Alexander

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department. I will refer to her as the Secretary of State. The respondent is a citizen of Ghana who was born on 3 August 1994. I will refer to him as the claimant. The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge Gurung-Thapa ("the FTTJ") who allowed, on Article 8 human rights grounds, the claimant's appealed against the Secretary of State's decision of 4 June 2013 to remove him from the United Kingdom following the

failure of his application to remain on Article 8 human rights grounds. Whilst there is a removal decision there are no removal directions.

2. The claimant came to the UK on 22 October 2000 with a valid visit visa which expired on 26 March 2001. He has committed a number of criminal offences which are set out in the refusal letter of 4 June 2013 addressed to the claimant's solicitors in the following terms; "On 12 October 2007 your client was reprimanded for common assault he committed on 6 September 2007. On 13 January 2009 your client was given a warning for theft he committed on 23 September 2008. On 2 September 2009 your client was convicted for making false representations to make gain for self or another or cause loss to another/expose other to risk he committed on 23 July 2009 till 22 August 2009. On the same day your client was also convicted of possessing knife blade/sharp pointed article in a public place. On 31 March 2010 your client was convicted for attempted theft, shoplifting on 18 March 2010. On 16 July 2010 your client was convicted for theft from person on 14 May 2010. On 16 July 2010 your client was convicted of robbery he committed on 14 October 2009 and was sentenced on 6 August 2010. On 12 March 2012 your client was convicted of theft of a cycle on 24 May 2012 and for going equipped for theft on 7 October 2011. On 3 May 2012 your client was convicted of conspiring/supplying Class A controlled drugs, Heroin on 17 September 2010 till 8 November 2011. On 13 March 2013 your client was arrested by officers from Croydon police station the theft (sic) of motor vehicle, no insurance. He was served with IS151A as an overstayer and detained at Brook House IRC. On 1 April 2013 your client was remanded on unconditional bail for driving otherwise than in accordance with a licence, using a vehicle whilst uninsured and taking motor vehicle without consent on 13 March 2013".

3. This is not a conducive deportation case. The Secretary of State has not treated the claimant as a "foreign criminal" and there has been no decision to deport him. However, the Secretary of State did conclude that the claimant's presence in the UK was not conducive to the public good because in her view his offending had caused serious harm and he was a persistent offender who had shown a particular disregard for the law. She considered the application on Article 8 human rights grounds as these are now contained in the Immigration Rules which came into effect on 9 July 2012. He did not meet the family life requirements of Appendix FM as a partner or parent and had not developed a family life here, although he did have some family ties. He could go back to Ghana and his father could accompany him.

4. It was accepted that the claimant had established a private life in the UK and that removal would interfere with this but his criminal convictions weighed heavily against him and he could pursue a private life in Ghana. He had not resided in the UK for a continuous period of at least 20 years. He was not under 18 but was between 18 and 25. He had spent at least half of his life residing continuously in the UK but because of his criminal history did not satisfy the requirements of paragraph 276ADE. The Secretary of State also concluded that the claimant had not established that there were exceptional

circumstances under paragraph 353B of the Immigration Rules. His removal would not breach his Article 8 human rights either under the Immigration Rules or under the jurisprudence outside those rules, although the Secretary of State maintained her position that the Immigration Rules contained a complete code for Article 8. She also concluded that the appellant was not entitled to succeed on Article 3 human rights grounds.

5. The claimant appealed relying on broadly based and formulaic grounds. Both parties were represented at the hearing before the FTTJ, the claimant by Mr Bobb who appears before me. The FTTJ heard evidence from the claimant and his father. The FTTJ found that the claimant did not meet the Article 8 requirements in Appendix FM of the Immigration Rules. She went on to apply Article 8 jurisprudence outside the Immigration Rules by reference to Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC) and the five-step principles set out in Razgar [2004] UKHL 27.

6. The FTTJ concluded that the claimant had established a family life with his father in this country and that he had a private life here. The first four of the Razgar tests were answered in the affirmative leaving the appeal turning on the last, whether the interference with his Article 8 human rights would be proportionate to the legitimate public end sought to be achieved. After making findings of fact and reviewing the evidence she concluded that his removal would be a disproportionate interference with his right to respect for his private and family life. The appeal was dismissed under the Immigration Rules but allowed on wider Article 8 human rights grounds.

7. The Secretary of State applied for and was granted permission to appeal to the Upper Tribunal. She submits that the FTTJ erred in law in a number of ways. Firstly, she failed to take into account a number of factors relevant to the proportionality assessment including the lack of a legitimate expectation to remain in the UK, the availability of other family members in Ghana, the possibility of the claimant either receiving financial support from his father in the UK or his father returning to Ghana to help him settle there or that his medication was available in Ghana. Secondly, by failing to make adequate findings as to why the claimant failed on Article 8 grounds as these are contained in the Immigration Rules. Thirdly, by failing to give proper consideration to "exceptional circumstances" as these have been clarified as "an unjustifiably harsh outcome.

8. The claimant has submitted a Rule 24 reply to the grounds of appeal.

9. Mr Deller said that he did not criticise the way in which the FTTJ set out or dealt with the evidence before her. However, she gave no or no clear reasons for deciding that the claimant failed under the Immigration Rules. It was important for her to do so not only to show why she agreed with the Secretary of State, if such was the case, but to set out the framework for considering the Article 8 grounds outside the Immigration Rules. The Immigration Rules set out Parliament's view of what needed to be considered. The FTTJ had not

given balanced consideration to the competing factors. The emphasis was on those factors which assisted the claimant and little was said about the public interest. The FTTJ should follow the dicta of the Supreme Court in HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25 (20 June 2012). I was asked to find that the FTTJ had erred in law and to set aside her decision.

10. Mr Bobb relied on the Rule 24 reply. He submitted that Mr Deller had strayed outside the ambit of the grounds of appeal. There was no test of exceptionality under the Article 8 jurisprudence outside the Immigration Rules. He accepted that there was a public interest to be taken into account but argued that the FTTJ had done this adequately. The statements of principle were set out in paragraphs 31 (4) and 33. It was important to emphasise that this was not a deportation case and the claimant was not a "foreign criminal". He argued that the FTTJ had properly balanced the factors in favour of the appellant and in relation to the public interest. The claimant had been here illegally for a number of years but that was not his fault; his father had not told him. He was only six years old when he arrived. I was asked to find that there was no error of law and to uphold the decision.

11. I reserved my determination.

12. In the refusal letter the Secretary of State dealt with the claimant's grounds under Appendix FM of the Immigration Rules at length and in detail. It is clear from paragraph 30 of the determination that the FTTJ agreed with both the reasoning and the conclusions. I find that this was sufficient. I can find no indication that it was ever seriously contended on behalf of the claimant that he could succeed under Appendix FM. As the FTTJ agreed with both the reasoning and conclusions of the Secretary of State I am not persuaded that any more detailed reference to them was necessary or that it should have informed the FTTJ's reasoning in relation to the Article 8 jurisprudence outside the Immigration Rules.

13. Mr Deller stated that he did not criticise the way in which the FTTJ set out or dealt with the evidence. I agree. Whilst not every possible permutation of circumstances was set out I find that the FTTJ made proper findings of fact and set out a sufficient outline of the factors taken into account which persuades me that no important factor was left out of account.

14. I can find no indication that in relation to the Article 8 grounds outside the Immigration Rules the FTTJ applied any test of exceptionality or whether there would be an unjustifiably harsh outcome. The grounds assert that one formulation of the proper proportionality test is that set out by Lady Hale in HH v Deputy Prosecutor of the Italian Republic. Again I can find no indication that the FTTJ departed from these principles.

15. The FTTJ took into account the extent and duration of the claimant's criminality, his age at the time the offences were committed, the fact that none

of them attracted custodial sentences and the risk assessment made in April 2013. I find that the reference to the fourth of the Razgar tests in paragraph 31, where the elements of the public interest are set out, and what is said in paragraph 34 provides a sufficient indication that the FTTJ had in mind and took into account all aspects of the public interest.

16. I find that the FTTJ did not err in law and I uphold her determination.

17. I have not been asked to make an anonymity direction and see no good reason to do so.

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Signed Date 8 February 2014

Upper Tribunal Judge Moulden