Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00359/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 December 2014	**On 6 January 2015**

Before

THE HONOURABLE MRS JUSTICE CARR DBE
UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KAG
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr J A D Dinh of Duncan Lewis & Co Solicitors
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal, Judge Canavan, promulgated on 22 September 2014 whereby she allowed the appellant's appeal against the Secretary of State's decision to make a deportation order against him under Section 32 of the UK Borders Act 2007 ("the 2007 Act") following his conviction for robbery

in 2010. In respect of that conviction he was sentenced to three years' custody.

2. The First-tier Tribunal Judge allowed the appeal under the Immigration Rules and under Article 8 of the European Convention on Human Rights. On this appeal the Secretary of State asserts that the judge did not properly balance the public interest against the appellant's circumstances and so fell into material error of law. Reliance is placed on **SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550**, in particular at paragraph 41.

3. The facts can be shortly summarised. The appellant is a citizen of Trinidad and Tobago whose date of birth is 25 August 1983. He first entered the United Kingdom in 2008 with entry clearance as a visitor. He returned to Trinidad and Tobago in February 2009 before his visa expired. He then came back in April 2009 and stayed here with clearance as a visitor. He went on to knowingly overstay his visitor visa. He met his wife S in Trinidad in 2004. They had a relationship on and off between 2006 and 2009. Around this time he also had a relationship with another woman in the United Kingdom with whom he had a child in April 2010 (J). The appellant is no longer in a relationship with this woman but he does have regular contact with J. The appellant has lived with S and her two children in this country since December 2009. S had a 15 year old daughter and a ten year old son, M. She is a British-born citizen as are the three children to whom we have just referred. The appellant himself also has a 10 year old son, N, who lives with his mother in Trinidad. The appellant and S married in June 2013. As at August 2014 S was pregnant with his child.

4. In 2010, as we have recorded, the appellant was convicted of robbery. On 6 January 2011 he was sentenced to three years' custody. The offence had the aggravating feature of being a group attack on a single lone man leading to relatively serious injuries on the victim. The sentencing judge when passing sentence commented that he did not think that his continued presence in this country was to the public good. The appellant was released on immigration bail and licence on 21 March 2012 since which time he has not reoffended. He has also since then been living with S and her children as well as seeing J on a regular basis.

5. In the meantime on 4 February 2011 the Secretary of State notified the appellant of his liability to deportation and asked him to complete a questionnaire. There were various communications between the Secretary of State and the appellant's lawyers in 2011. It was not until 30 January 2014 that the Secretary of State signed a deportation order. The reasons given were that the appellant's removal would amount to interference with family life and it might not be in the best interests of the children but it was deportation to be ordered in accordance with the legitimate aim of the prevention of disorder and crime. Neither Immigration Rules 399 or 399A applied. No exceptional circumstances existed. The appellant had had children and married in full knowledge that he had no leave at the time to

remain. Although he had committed only one offence, it was a serious offence.

6. In her judgment the judge set out the relevant legal framework, see in particular at paragraphs 14 to 18 of the judgment.

7. Section 32(5) of the Borders Act 2007 states that the Secretary of State must make a deportation order in relation to a foreign criminal who has been sentenced to a period of imprisonment of at least twelve months subject to any of the exceptions set out in Section 33 of the Act. Section 33(2) provides an exception to deportation where removal of the foreign criminal in pursuance of a deportation order would breach the United Kingdom's obligations under the Refugee Convention or would be incompatible with his rights under the Human Rights Convention. Section 32(4) of the Act demonstrates that Parliament has placed special weight on the deportation of foreign criminals as a matter that is conducive to the public good. Even if an exception applies the general principle is still deemed to apply, see (Section 33(7)). Paragraph 397 of the Immigration Rules states that 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. If an appellant was convicted of an offence for which he was sentenced to a period of less than four years but at least twelve months he may be eligible for consideration under of the Article 8 exceptions contained in the Immigration Rules in paragraph 399(a), (parental relationship), and 399(b), (partner) or paragraph 399A, (private life).

8. As the judge recorded at paragraph 16 of her judgment, if the appellant does not satisfy the requirements of those exceptions it would only be in "exceptional circumstances" that the public interest in deportation would be outweighed by other factors. The judge went on to refer to the decision of the Court of Appeal in **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192** where it was found that the Rules provided a complete code to the assessment of Article 8 in deportation cases, and a reference to exceptional circumstances was made. Nevertheless it should still be a proportionality exercise in accordance with Strasbourg principles. All factors relevant to the assessment of proportionality are to be taken into account and weighed in the balance although there would still need to be very compelling reasons to outweigh the public interest in deportation.

9. In paragraph 37 of her judgment the judge expanded her consideration of the relevant tests to include consideration of "unduly harsh" as well as "exceptional circumstances" or "very compelling circumstances".

10. At the hearing below the appellant and his wife attended and both gave evidence in English. At the conclusion of the hearing and the evidence in giving her ruling, having set out the relevant law, the judge identified the best interests of the children as a primary consideration. Although

considerations relating to the best interests of the child form part of the overall balancing exercise the decision in **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4** makes it clear that there is a distinct assessment to be made in this regard without reference to public policy considerations such as immigration control. That is an exercise which the judge carried out. Taking into account relevant statutory guidance and after careful consideration of the facts and the evidence she concluded that it was in J's best interests to remain in the United Kingdom and for the appellant to remain here with him in order to provide him with ongoing practical and emotional support. She rejected the submission that modern channels of communication from abroad would be adequate. She found that whilst not caring for J on a day-to-day basis the appellant was present in J's life and an important influence as a father. He spent time with J at weekends and on the holidays and his mother wished for the appellant to be there for J whilst he grows up.

12. The judge also found that, whilst the case for A and M was not so strong, the appellant was now an integral part of the family and it would be in their best interests too for him to remain in the United Kingdom to provide them with de facto parental support. There was of course also the unborn child to consider in whose interests it would normally be for both parents to be involved.

13. The judge then went on to consider whether the necessary circumstances existed that would show that the public interest in deportation was outweighed under paragraph 398 of the Immigration Rules. Again, in a full and careful reasoned judgment, she concluded that they did.

14. An appeal to this Tribunal only relies on the basis of a material error of law. It was common ground below and remains common ground here that paragraphs 399 and 399A of the Immigration Rules did not apply. It would therefore only be in exceptional circumstances as considered and explained by the judge in paragraphs 35 and 37 in particular that the public interest in deportation would be outweighed by other factors.

15. Despite the careful submissions of Mr Kandola for the respondent we are not persuaded that any material error of law exists. The judge identified the correct legal principles. She paid due regard to the public interest in maintaining an effective system of immigration control and to the public interest in deporting foreign criminal for the prevention of disorder and crime. She did acknowledge the significant weight given by Parliament to this public interest : we refer in particular to paragraphs 30 to 35 of her judgment. At paragraph 35 she went out of her way to consider in some detail the nature of the appellant's offending and the risk of his reoffending. Against this background she was in our judgment entitled to take into account the fact that the appellant speaks English and is capable of finding work and earning a legitimate income to support his family and the fact that he had known his future wife for some time before his immigration status became precarious. Her finding that, whilst

serious, the robbery offence was not at the most serious end of the scale of offence was in our judgment one open to her. The appellant was otherwise of good character. He had been released on bail for over two years and not reoffended. He had settled into family life with his wife and children and presented a low risk of reoffending. Finally, she was entitled to take into account her findings that it was in the best interests of the children, a primary though not paramount consideration, for the appellant to remain in the United Kingdom to continue to be involved closely in their upbringing.

16. We are not persuaded that her decision, having considered all the circumstances of the case, that it would be unduly harsh on the appellant's partner and children to be separated on a long-term basis can be impugned. This was a difficult balancing exercise which the judge carried out by reference to the correct principles and on the basis of findings of fact that she was entitled to make.

17. We do not find any error of law in her conclusion that deportation would amount to a disproportionate interference into his family life under Article 8 of the European Convention. In short, this was in our judgment an adequate ruling.

Decision

The Decision of the First Tier Tribunal shows no material error of law and that decision allowing the appeal shall stand.

Direction Regarding Anonymity – Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Mrs Justice Carr