Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00784/2014

THE IMMIGRATION ACTS

Heard at Manchester **Determination Promulgated**

On 19 September 2014 **On 12 January 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A S
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Johnstone, Senior Home Office Presenting Officer
For the Respondent: Mr D Ouattara, Cohesion Legal Services Centre

DETERMINATION AND REASONS

1. The respondent, AS, was born on 2 January 1979 and is a citizen of Eritrea. I shall hereafter refer to the respondent as the appellant and the appellant as the respondent (as they appeared respectively before the First-tier Tribunal).

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2. The appellant had appealed against the decision of the respondent to refuse to revoke a deportation order which had been signed against the appellant on 3 February 2010. The First-tier Tribunal, in a determination promulgated on 27 June 2014, dismissed the appeal on Article 3 ECHR and asylum grounds but allowed it on Article 8 ECHR grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. There are two grounds of appeal. First, the Secretary of State asserts that the Tribunal failed to follow the guidance of *MF (Nigeria) [2013] EWCA Civ 1192* by failing to identify any exceptional circumstances in the appellant's case which would justify a determination of the appeal on Article 8 ECHR grounds outside the Immigration Rules. Secondly, the Secretary of State asserts that the Tribunal failed to give proper weight to the public interest concerned with the appellant's deportation. Instead, the Tribunal found [71] that there was "no compelling evidence that the public interest would be served by the appellant's removal [from the United Kingdom]". The Tribunal had found that it would not be in the best interests of the appellant's child for the appellant to be deported and that the "problems" which the Tribunal considered "could" be caused in respect of the child's welfare were not certain or the finding was not supported by adequate evidence.

4. As noted above, the deportation order against the appellant had been signed as long ago as 2010. The appellant had been convicted on 1 September 2008 of seeking/obtaining leave by deception and had been sentenced to twelve months' imprisonment. The sentencing judge had concluded that the appellant had, notwithstanding his offence, remained of "good character".

5. At [44], the Tribunal directed itself to consider *MF* noting that they should "consider the position outside the Immigration Rules to determine whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in removal". The Tribunal went on to set out extensive quotations from Article 8 jurisprudence. At [68], the Tribunal concluded that;

> There would be no immediate impact [on the appellant's child – aged about 2 months old at the date of the hearing] caused by the appellant relocating to Eritrea. However in the longer term, the child's interest would best be served by the presence of both parents. The absence of the appellant could cause problems in respect of the child's welfare development and wellbeing. In these circumstances we find that there are material issues which would adversely affect the child if the appellant were to relocate.

6. I consider that statement by the Tribunal to be entirely speculative. As the Tribunal recorded, the child is at present a very young infant. The observation that a child is best raised by both parents is axiomatic; it is difficult to see how such a consideration might be regarded as exceptional when the child is so young that the impact of the removal of its father cannot possibly be assessed. Likewise, whilst "the absence of the appellant could cause problems in respect of the child's welfare" it might,

on the other hand, cause no problems whatsoever; it is impossible to reach any sensible conclusion when a child is as yet still so young. The Secretary of State does not challenge the Tribunal's observation that it would not be reasonable for the entire family to relocate to Eritrea (the appellant's partner is a refugee). The Tribunal has taken no consideration of the fact that, if the appellant were removed to Eritrea, the partner would remain in the United Kingdom and be able to care for the child. In my opinion, the Tribunal has given weight to matters rendered irrelevant in the analysis by virtue of being entirely speculative.

7. That error has been compounded by the lack of weight accorded by the Tribunal to the public interest concerned with the appellant's removal. At [71], the Tribunal observed that there was "no compelling evidence that the public interest will be served by the appellant's removal". I do not consider that to be a proper assessment of the role of the public interest in an Article 8 ECHR analysis of this kind. In the absence of "compelling evidence" to show that the public interest will be served by foreign criminals' removal is not a test recognised by law. Whilst I am aware of the generally quite favourable comments of the sentencing judge (see above), the Tribunal should weigh the public interest properly against any possible interference to the Article 8 rights of the appellant and his family. To dismiss the public interest as a factor because there was "no compelling evidence" to indicate that it would be served by the appellant's deportation was not appropriate. This further error on the part of the Tribunal has, in the light of its inappropriate assessment of the best interests of the child, led me to conclude that the determination should be set aside.

8. I have proceeded to remake the decision. As I have noted above, it would, in an ideal world, be desirable for the appellant's child to be brought up by both of its parents. Set against that observation, I cannot ignore the fact that this very young child's primary carer (its mother) remain in the United Kingdom to care for it. The appellant's crime was, as the sentencing judge acknowledged, serious and his deportation would serve the public interest by preventing his reoffending within this jurisdiction discouraging similar offending by others. It is no fault of the appellant that his child is at present so young but the fact remains that the child is probably at an age where it is best able to cope with separation from its father. These considerations have led me to conclude that there is nothing whatever in the appellant's circumstances which could be properly described as exceptional. The operation of the Immigration Rules (paragraphs 398 and 399) contemplate the deportation of individuals in circumstances where family members will remain in the United Kingdom to care for children of the family. That is exactly what will occur in the appellant's case. The sentencing judge's acknowledgment of the appellant's good character and the nature of the appellant's offending do not, in my opinion, render this an exceptional case falling outside the operation of the Immigration Rules. In the circumstances, I find that the appellant's appeal against the refusal of the Secretary of State to revoke the deportation order should be dismissed.

DECISION

9. The determination of the First-tier Tribunal which was promulgated on 27 June 2014 is set aside. I have remade the decision. The appellant's appeal against the refusal of the Secretary of State to revoke the deportation order dated 3 February 2010 is dismissed on asylum grounds, under the Immigration Rules and on human rights grounds (Articles 3 and 8).

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their 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 19 November 2014

Upper Tribunal Judge Clive Lane